

No. 1-11-2549

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 10 CR 9139
	)	
MARCUS RIVERS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justice McBride concurred in the judgment.  
Presiding Justice Gordon specially concurred in the judgment.

ORDER

*HELD:* Defendant appealed his conviction for burglary and attempted robbery. We affirmed his conviction, holding that: (1) the State laid an adequate foundation for introduction of palmprint evidence where latent print examiner gave a detailed description of the process involved in print comparison; (2) latent print examination was not “new” or “novel” for purposes of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); and (3) evidence was sufficient to convict defendant of attempted robbery, even though the only force he used was during the escape, since the attempted taking of property and the use of force were part of a series of events constituting a single incident.

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¶ 1 Defendant Marcus Rivers was charged with burglary and attempted robbery based upon allegations that he stole bicycles from the garage of Stanton Avedon, a semi-professional cyclist. Following a jury trial, he was found guilty of both offenses and sentenced to 12 years for burglary and 5 years for attempted robbery, the sentences to run concurrently. Defendant now appeals. For the reasons that follow, we affirm.

## ¶ 2 I. BACKGROUND

¶ 3 At defendant's jury trial, Avedon testified for the State that he was a semi-professional cyclist. On May 8, 2010, at around 6:10 a.m., he looked out of his window to check the weather before getting dressed for a bicycle ride with his team. He observed that his overhead garage door was open, even though he had shut it the night before. He rushed to the garage and discovered that the service door was also open and two of his five bicycles were missing. The remaining bicycles were hanging by hooks from the ceiling of the garage.

¶ 4 Avedon stated that he closed the garage doors and then went back upstairs to call 911 and report the theft. When he came back downstairs approximately five minutes later, he saw that his overhead garage door was again open, and he observed defendant entering his garage. Avedon yelled, "Hey, mother----er," and he followed defendant into the garage. There, he saw defendant walk straight to one of his remaining bicycles, reach toward it, and place one hand on the seat and his other hand on the handlebars.

¶ 5 Upon seeing this, Avedon moved toward the defendant, saying, "What are you ----ing doing? Where are my bikes?" He grabbed the defendant by the lapel and started shaking him. When the defendant tried to leave the garage, Avedon, still holding him by the lapel, slammed

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him against the side of a car. Defendant punched Avedon and ran outside. Avedon chased after the defendant and put him in a headlock, yelling profanities at him. The two men rolled around on the ground, fighting. Defendant bit Avedon's hand and then started to run away. Avedon, still on the ground, grabbed a cinch cord around the waist of defendant's windbreaker jacket. As defendant ran, Avedon ended up with the cinch cord in his hand and a rope burn. He had also injured his hip and his knee in the struggle.

¶ 6 Avedon got up and continued to chase the defendant, yelling, "You're not going to get away." As he ran, he made a cell phone call to the police. When they were about five blocks away from Avedon's garage, a police car pulled in front of the defendant, and the defendant was apprehended.

¶ 7 Avedon further testified that he never gave defendant permission to enter his garage or to remove anything from his garage, that nobody was with the defendant when Avedon saw him in his garage, and that he never got his bicycles back.

¶ 8 Officer Rafael Lopez, a patrol officer with the Chicago Police Department, testified that on May 8, 2010, at around 6:15 a.m., he responded to a call regarding two people fighting in an alley. He proceeded to that location and observed the defendant running down Milwaukee Avenue, with Avedon around 20 yards behind him. Lopez stopped his car in front of the defendant and took the defendant into custody.

¶ 9 After speaking with Avedon, Lopez went to look at Avedon's garage. He stated that it was a two-car garage with a black Lexus parked in one of the spaces and three bikes hanging on a hook from the rafter. There was a service door in the garage right next to the Lexus, but there

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was no space between the Lexus and the wall, such that “[y]ou had to go over the car to get in.”

Lopez testified that he saw a handprint on the hood of the Lexus and what he believed was a shoe print on the bumper. He took a photograph of the shoe print, which was admitted into evidence.

¶ 10 Officer David Herrera of the Chicago Police Department testified that he transported defendant to the police station and processed him. Defendant was fingerprinted at that time. Herrera stated that after speaking with Lopez, he took defendant’s sneakers from him and inventoried them. Both the sneakers and the photographed shoe print were given to the jury to examine during their deliberations.

¶ 11 Officer Willard Streff, an evidence technician for the Chicago Police Department, testified that he was called to process the crime scene. Streff examined the black Lexus in Avedon’s garage for fingerprints and lifted four prints from the hood using special tape that is used for that purpose. The lifts he obtained were sent to the crime lab.

¶ 12 The final witness for the State was Joseph Calvo, who was offered as an expert in the field of latent print examination and identification. Since, in this appeal, defendant challenges the admissibility of Calvo’s testimony, we shall consider his testimony in some detail. Calvo testified that he had been employed as a latent fingerprint examiner for the Chicago Police Department for eight years. He explained that a latent print is a chance impression left behind when friction ridge skin comes in contact with a surface, while an inked print is a deliberate recording of friction ridge skin where black ink is applied to the hand, foot, or fingertips and then placed onto a contrasting surface. He stated that when comparing a latent print with an inked print, he would examine them side by side under 6x magnification, so as to determine whether

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the same characteristics were in the same relative position in both the latent and the inked print. He listed seven types of characteristics that he would look for and pointed them out on a diagram displayed before the jury.

¶ 13 With regard to the present case, Calvo testified that he examined four latent prints. The first three were not suitable for comparison, but the fourth had a higher quality of detail and sufficient characteristics to make an identification. Calvo determined that it was a palm print. He then compared it with inked prints from the defendant. After looking at “the hypothenar underneath the interdigital area of [defendant’s] left palm,” Calvo determined within a reasonable degree of scientific certainty that the ridges in the latent print were the same as defendant’s.

¶ 14 During cross-examination, counsel for the defendant asked Calvo how many matching characteristics Calvo found between defendant’s palm and the latent print, and the following colloquy occurred:

“CALVO: This was a palm, it was in excess of 15 characteristics.

COUNSEL FOR DEFENDANT: What were those characteristics?

A. I don’t remember.

Q. Did you write those characteristics down anywhere?

A. I did not.”

On redirect examination, Calvo testified that he remembered that there were in excess of 15 matching characteristics because he did a follow-up examination, looking at the print again prior to his court appearance.

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¶ 15 Defendant did not call any witnesses on his behalf. During closing argument, counsel for the defendant vigorously challenged the palmprint identification:

“You heard the officer that testified about the fingerprints today. He said there were 15 points that compared to Mr. Rivers’ prints and to the prints that was [*sic*] lifted. He doesn’t know what those 15 points were. He doesn’t know, he didn’t write them down. That’s important to know that.”

¶ 16 The jury found defendant guilty of burglary and attempted robbery. He was sentenced to 12 years for burglary and 5 years for attempted robbery, the sentences to run concurrently. Defendant now appeals.

## ¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant raises two contentions of error: first, that the palmprint evidence introduced against defendant was inadmissible, and second, that the State did not prove defendant guilty of attempted robbery beyond a reasonable doubt, where the only force involved in this case occurred during the escape and not during the attempted taking of property.

### ¶ 19 A. Admissibility of Palmprint Evidence

¶ 20 With regard to the palmprint evidence introduced at trial, defendant argues that (1) the State failed to lay an adequate foundation for the palmprint evidence, since the latent print examiner did not sufficiently explain the basis for his opinion, and (2) no valid scientific basis for latent palmprint identification has ever been demonstrated, and no *Frye* hearing on the matter has been held in this or any other case.

¶ 21 Defendant acknowledges that he has forfeited these issues by failing to make a

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contemporaneous objection at trial or raise these issues in a posttrial motion. See *People v. Allen*, 222 Ill. 2d 340, 350 (2006) (in order to properly preserve an issue for review, defendant is required to raise an objection at trial and in a written posttrial motion, and failure to do so will result in forfeiture of that issue on appeal) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). This rule of forfeiture is “particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant’s lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level.” *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Defendant nevertheless argues that we should consider his contentions of error under the plain error doctrine. This doctrine “allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.” *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Before a reviewing court may invoke the plain error doctrine, it must first determine whether any error occurred. *People v. Chapman*, 194 Ill. 2d 186, 225-26 (2000); see *Herron*, 215 Ill. 2d at 187 (“only if there was error can the defendant plausibly argue that the error prejudiced him in a close case”). Thus, we turn to the merits of defendant’s contentions of error, beginning with his contention that the State failed to lay an adequate foundation for the testimony of its latent print examiner.

¶ 22 Before expert testimony can be admitted, the proponent must lay an adequate foundation establishing that the information upon which the expert bases his opinion is reliable. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2000). In the case of fingerprint evidence, expert testimony

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based on scientific knowledge is necessary. *People v. Hunley*, 313 Ill. App. 3d 16, 29 (2000).

Illinois courts disagree on what it takes to establish a proper foundation for latent print comparison testimony. In *People v. Safford*, 392 Ill. App. 3d 212 (2009), which defendant relies upon as his sole support, the court found a latent print examiner's testimony to be inadmissible where he described the latent print comparison process in a general fashion but did not explicate the similarities between the defendant's prints and the latent prints at issue. However, several cases following *Safford* have either rejected *Safford* or distinguished it so as to find latent print evidence admissible even where the State's expert failed to identify some or all of the alleged points of similarity before the jury. See *People v. Negron*, 2012 IL App (1st) 101194; *People v. Harmon*, 2013 IL App (2nd) 5783384; *People v. Mitchell*, 2011 IL App (1st) 083143; *People v. McNeal*, 405 Ill. App. 3d 647 (2010).

¶ 23 In *Safford*, the State's latent print examiner testified in detail about the general procedure he follows in fingerprint investigation. *Safford*, 392 Ill. App. 3d at 220. He stated that he uses the "analysis, comparison, evaluation, and verification method," and he looks at three levels of detail, explaining what he looks for at each level. *Id.* at 220, 231. He then opined that, based upon his examination, the defendant's inked print matched a latent print found at the crime scene. *Id.* at 220. He stated that he confirmed this conclusion with a different inked card of the defendant's prints, and each of his print identifications was confirmed by another examiner. *Id.* However, he gave no explanation of *how* he reached the conclusion that the latent print in question belonged to the defendant. *Id.* at 221. He did not note the number of points of comparison, nor did his notes explain how he reached his opinion. *Id.*

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¶ 24 Under these facts, the *Safford* court held that the latent print examiner's testimony should not have been admitted, because he failed to provide an evidentiary foundation for his testimony.

*Id.* at 219. In support of its decision, the court stated:

“In order to ensure that the expert engaged in a trustworthy and reliable comparison process, ‘how’ the expert arrived at his conclusion must be subject to cross-examination.

\*\*\* The defense must be allowed to challenge the analytical process Examiner Cutro undertook in the case at hand to arrive at his expert opinion.” *Id.* at 224.

According to the *Safford* court, the defense was deprived of this opportunity by the examiner's failure to detail the points of comparison that he found. *Id.*

¶ 25 The *Safford* court acknowledged that its decision was seemingly at odds with *People v. Campbell*, 146 Ill. 2d 363, 384 (1992), in which our supreme court stated that no Illinois case expressly sets out a minimum number of points of similarity between a latent print and an inked print that must be present for an identification. *Safford*, 392 Ill. App. 3d at 222-25. Indeed, the *Campbell* court stated:

“We note further that fingerprint evidence of identity has been held admissible in some cases where the expert found five points of similarity, and in another in which the expert found only four. The courts, in those cases, took the position that *the paucity of points of similarity went to the weight accorded to the evidence.*” (Emphasis added.) *Campbell*, 146 Ill. 2d at 384.

The *Campbell* court therefore held that “whether there is a sufficient number to make a positive identification is a question for the jury.” *Id.* at 385. The *Safford* court attempted to distinguish

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this holding by arguing that “as the paucity [of points of similarity] approaches zero, our concern is no longer with weight but with admissibility.” *Safford*, 392 Ill. App. 3d at 225. Thus, notwithstanding *Campbell*, the *Safford* court held that the examiner’s failure to describe any points of similarity rendered his testimony inadmissible. *Id.*

¶ 26 However, the parties have not cited, nor has our research disclosed, any post-*Safford* case that cites *Safford* in support of a finding that the State lacked a sufficient foundation for the introduction of fingerprint evidence. On the contrary, the cases citing *Safford* on this issue have largely rejected or sought to distinguish it. A prime example of this is *Negron*, 2012 IL App (1st) 101194, where the court reached an opposite conclusion from materially indistinguishable facts. In *Negron*, the State’s latent print examiner explained that he uses the analysis, comparison, evaluation, and verification method and described the various minutia he looked for in the comparison process. *Id.* ¶ 20, 37. He stated that he compared the defendant’s prints to latent prints found at the crime scene and found “unique areas that matched.” *Id.* ¶ 21. His opinion was reviewed and verified by another examiner. *Id.* However, he admitted that he did not count the areas of similarity, nor did he take any notes describing his observations when he compared the prints. *Id.* ¶ 23. Thus, just like in *Safford*, although the examiner gave a detailed description of the general process of fingerprint comparison, he did not describe the actual points of similarity that led him to his decision, beyond a bald assertion that such points existed.

¶ 27 Nevertheless, the *Negron* court held that the examiner’s testimony was properly admitted, finding that the deficiencies in his testimony went to its weight rather than its admissibility. *Id.* ¶ 40 (citing *People v. Ford*, 239 Ill. App. 3d 314, 319 (1992) (expert’s failure to describe points of

similarity between comparison prints went to the weight of the evidence, not its admissibility)).

It stated that any argument regarding the lack of specificity should be made to the jury, to be used in determining the weight to be accorded his testimony. *Id.* ¶ 41. In this regard, the court noted that the defense performed a vigorous cross-examination of the latent print expert regarding his lack of notes and the fact that he did not rest his conclusion on a specific number of comparison points. *Id.* ¶ 42.

¶ 28 Regarding defendant's argument that *Safford* required reversal, the *Negron* court had this to say:

“We underscore the fact that *Safford* is an outlier case and no reported case since then has held that there must be a minimum number of points of fingerprint comparison or a disclosure of a specific number of points of similarity found by the expert. The dissent in *Safford* noted that it could ‘find no authority that supports the proposition that the lack of detail we find here is devastating enough to bar a qualified and experienced fingerprint examiner’s opinions,’ and that ‘the lack of testimony concerning the number of points of comparison went to the weight of [the expert’s] opinions, not their admissibility.’” *Id.* ¶ 40 (quoting *Safford*, 392 Ill. App. 3d at 231 (Wolfson, J., dissenting)).<sup>1</sup>

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<sup>1</sup> The *Negron* court also made an attempt to distinguish *Safford* on grounds that the *Negron* expert “detail[ed] his analysis process and reanalysis for confirmation.” *Negron*, 2012 IL App (1st) 101194, ¶ 41. However, this distinction is unavailing, since, as noted, the *Safford* expert also testified in detail about the analysis process and stated that he confirmed his results and had them verified by another examiner. *Safford*, 392 Ill. App. 3d at 220.

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Thus, the *Negron* court, following the *Safford* dissent, held that the trial court did not err in admitting the expert's testimony and leaving the issue of his credibility for the jury to decide.

*Negron*, 2012 IL App (1st) 101194, ¶ 42.

¶ 29 A similar conclusion was reached in *Harmon*, 2013 IL App (2nd) 5783384. In that case, the State's latent print examiner explained that a latent fingerprint is compared to a known fingerprint with three levels of analysis, which he described in detail. *Id.* ¶ 11. He also described the magnification equipment and tools used in fingerprint comparison. *Id.* ¶ 12. He then opined that defendant's fingerprint matched a latent print in the victim's car, stating that he had found over 12 points of comparison, but he did not document any of those points. *Id.* Under these facts, the *Harmon* court held that there was a sufficient foundation for the examiner's testimony, citing *Negron* for the proposition that any deficiency in the evidence would go to its weight rather than its admissibility. *Id.* ¶ 41-42 (citing *Negron*, 2012 IL App (1st) 101194, ¶ 40). The examiner's description of the procedure he used, as well as his testimony that he found more than 12 specific points of comparison, "offered a sufficient scientific basis for trial counsel to engage in a meaningful cross-examination." *Harmon*, 2013 IL App (2nd) 5783384, ¶ 42. Thus, the *Harmon* court rejected defendant's argument that the examiner's failure to specifically describe the 12 points of comparison was fatal to his testimony. *Id.*; see also *Mitchell*, 2011 IL App (1st) 083143, ¶ 26 (fingerprint examiner's testimony was admissible where she explained the comparison procedure and stated that she "quickly" found 13 points of comparison, but she only showed five of those points to the jury); *McNeal*, 405 Ill. App. 3d at 672-73 (2010) (where fingerprint expert's testimony was "substantially similar" to that of the expert in *Safford*, but

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defendant failed to raise a timely objection to its foundation, admission of expert's testimony did not rise to the level of plain error).

¶ 30 Under the facts of the present case, we follow *Negron*, *Harmon*, and the great weight of Illinois precedent in holding that Calvo's testimony was admissible, and the deficiencies in his testimony, insofar as he testified to 15 points of comparison but did not identify them specifically, went to the weight of his testimony rather than its admissibility. See *Campbell*, 146 Ill. 2d at 384 (number of similarities goes to the weight of the evidence, not its admissibility, and it is for the jury to decide whether the number is sufficient); *Ford*, 239 Ill. App. 3d at 319 (expert's failure to describe points of similarity between comparison prints went to the weight of the evidence, not its admissibility); *Negron*, 2012 IL App (1st) 101194, ¶ 40; *Harmon*, 2013 IL App (2nd) 5783384, ¶ 42. We note that, just as in *Negron*, the defense in this case was given full opportunity to vigorously cross-examine Calvo, eliciting testimony that although he found more than 15 points of comparison, he did not remember those points and did not write them down in his notes. The defense also reminded the jury of these deficiencies in Calvo's testimony during closing statements. Thus, the defense was able to challenge, and did in fact challenge, the process that Calvo used to reach his conclusion. In response to this line of argument, the State elicited testimony that Calvo confirmed his findings in a follow-up examination that he conducted prior to trial. The jury weighed this evidence and apparently found Calvo's testimony to be credible in combination with the other evidence of defendant's guilt. Such a finding is within the province of the jury, pursuant to our supreme court's decision in *Campbell*. *Campbell*, 146 Ill. 2d at 384; see also *Ford*, 239 Ill. App. 3d at 319.

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¶ 31 We additionally reject defendant’s contention that he was entitled to a *Frye* hearing to challenge the methodology that Calvo used in his comparison of the latent and inked prints, because it is neither new nor novel.

¶ 32 In Illinois, the admission of scientific evidence is governed by the “general acceptance” test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004) (stating that Illinois follows *Frye*). Under this standard, scientific evidence is admissible if the underlying methodology is “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014. Our supreme court elaborated upon this standard as follows:

“In this context, ‘general acceptance’ does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. [Citation.] Instead, it is sufficient that the underlying method used to generate an expert’s opinion is reasonably relied upon by experts in the relevant field. [Citation.] Significantly, the *Frye* test applies only to ‘new’ or ‘novel’ scientific methodologies. [Citation.] Generally speaking, a scientific methodology is considered ‘new’ or ‘novel’ if it is ‘ “original or striking” ’ or ‘does “not resembl[e] something formerly known or used.” ’ ” *Simons*, 213 Ill. 2d at 529 (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 79 (2002) (quoting Webster’s Third New International Dictionary 1546 (1993))).

See also *People v. Prather*, 2012 IL App (2d) 111104, ¶ 17 (*Frye* general acceptance test did not need to be applied where the proposed evidence, a home pregnancy test, was “incontestably” not

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novel, since such tests had been “in wide use for over 30 years” and “the core scientific principles and methodologies even predate Illinois’s adoption of the *Frye* standard”).

¶ 33 With regard to latent print examination, our supreme court has explicitly held that “there is a scientific basis for the system of finger print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it.” *People v. Jennings*, 252 Ill. 534, 549 (1911). Following *Jennings*, other courts across the country have likewise held that the science underlying latent print analysis and identification is sufficiently reliable to be admitted at trial. See, e.g., *State v. Cerciello*, 90 A. 1112 (N.J. 1914); *People v. Roach*, 109 N.E. 618, 623 (N.Y. 1915); *McGarry v. State*, 200 S.W. 527, 528 (Tex. Crim. App. 1918); *State v. Kuhl*, 175 P. 190, 195 (Nev. 1918); *Moon v. State*, 22 Ariz. 418, 424 (Ariz. 1921); *Commonwealth v. Albright*, 101 Pa. Super. 317, 321-22 (1931) (accuracy and reliability of fingerprint identification “are too well established to require elaborate confirmation at this time by the courts of this State”); *Piquett v. United States*, 81 F.2d 75, 81 (7th Cir. 1936) (taking judicial notice of “the well recognized fact that identification by finger prints is about the surest method known, and that it is in universal use in the detection of criminals”); *Shelton v. Commonwealth*, 134 S.W.2d 653, 657 (1939); *State v. Lapan*, 141 A. 686, 690 (1928); *Davis v. State*, 29 So.2d 877, 878 (Ala. Ct. App. 1947); *Lester v. State*, 416 P.2d 52, 55 (Okla. Crim. App. 1966) (“accuracy and reliability [of latent print examination] are too well established to require any further confirmation by this Court”); *Reed v. State*, 391 A.2d 364, 386 (Md. 1978). Based upon this body of case law, it is apparent that latent print examination is not “original,” “striking” or something that “does not

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resemble something formerly known or used.” (Internal quotation marks omitted.) *Simons*, 213 Ill. 2d at 529. Indeed, this court recently held in *Mitchell*, 2011 IL App (1st) 083143, ¶ 31, that fingerprint analysis is neither novel nor new for purposes of *Frye* analysis, stating that “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.*

¶ 34 Accordingly, we find no error in the trial court’s decision to admit Calvo’s testimony that defendant’s palm matched the palmprint found on the car in Avedon’s garage.

¶ 35 B. Attempted Robbery

¶ 36 Defendant next contends that the State did not prove him guilty of attempted robbery beyond a reasonable doubt, since the only force involved in this case occurred during the escape, not during the attempted taking of property. The State argues that these facts do not undermine defendant’s conviction where the attempted taking of the bicycle and the use of force were part of a series of events constituting a single incident.

¶ 37 Where a defendant challenges the sufficiency of the evidence used to convict him, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). A reviewing court may not disturb the jury’s determination unless “ ‘the evidence is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt as to guilt.’ ” *People v. Sanchez*, 375 Ill. App. 3d 299, 301 (2007) (quoting *People v. Eiland*, 217 Ill. App. 3d 250, 260 (1991)). The reviewing court must make all reasonable inferences from the record in favor of the

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prosecution. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009).

¶ 38 A person commits attempted robbery when he, with the intent to commit robbery, takes a substantial step toward the commission of a robbery by taking property from the person or presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/8-4, 18-1(a) (West 2010). In this case, the evidence at trial showed that defendant had entered the garage and taken hold of one of Avedon's bicycles when Avedon grabbed him by the lapel and started shaking him. An altercation between the two men ensued in which defendant punched and bit Avedon before fleeing. Defendant argues that since his use of force was not contemporaneous with the attempted taking but only occurred during his attempt to escape, it does not constitute a taking "by the use of force" for purposes of the attempted robbery statute. We disagree.

¶ 39 Illinois law is clear that, for purposes of determining whether a robbery has occurred, the force at issue need not occur before or during the taking of property. *People v. Robinson*, 206 Ill. App. 3d 1046, 1053 (1991) (citing *People v. Brown*, 76 Ill. App. 2d 362 (1966)); *People v. Brooks*, 202 Ill. App. 3d 164, 170 (1990). Rather, it is sufficient that the force and the taking are part of a series of events constituting a single incident. *Robinson*, 206 Ill. App. 3d at 1053; *Brooks*, 202 Ill. App. 3d at 170. Thus, this court has sustained convictions for robbery where a struggle ensued following the taking, or where the defendant used force when escaping the scene. *People v. Merchant*, 361 Ill. App. 3d 69, 73 (2005) (citing *People v. Houston*, 151 Ill. App. 3d 718, 721 (1986) (holding that a theft may constitute robbery where "the perpetrator's departure is accomplished by the use of force")); *Brooks*, 202 Ill. App. 3d at 170. However, there must be

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some concurrence between the use or threat of force and the taking of the victim's property.

*People v. Lewis*, 165 Ill. 2d 305, 339 (1995); see *People v. Collins*, 366 Ill. App. 3d 885, 897 (2006) (sustaining defendant's conviction for attempted robbery where "there was no significant interval between the attempted taking and the use of force," even though the use of force occurred after the attempted taking).

¶ 40 In this regard, *Brooks*, 202 Ill. App. 3d 164, is instructive. The victim in *Brooks* was a passenger on a bus. *Id.* at 168. She felt someone opening her purse, and upon checking her purse, she discovered that her wallet was missing. *Id.* She then turned around and saw her wallet in the hands of defendant, who was seated directly behind her. *Id.* When she demanded that he return it, the defendant pushed her shoulder and ran from the bus. *Id.* Although this use of force did not occur until after defendant had taken the victim's wallet, the *Brooks* court held that it was sufficient to sustain defendant's conviction for robbery, explaining: "We believe this force, used in a series of events involving a single incident and in response to the victim's challenge immediately upon the taking and before defendant's departure, is sufficient to sustain the robbery conviction under Illinois case law." *Id.* at 170.

¶ 41 Similarly, in *Merchant*, 361 Ill. App. 3d 69, the victim approached the defendant on the street and asked for change for a \$20 bill. The defendant snatched the \$20 bill from him and told him to leave. *Id.* at 71. The victim looked at him in surprise for a moment, and then the two men tussled. *Id.* This use of force, like the force used by defendant in *Brooks* and in the current case, occurred "almost immediately after the taking, in the context of a struggle for possession of the victim's property." *Id.* at 73. Accordingly, the *Merchant* court upheld defendant's

conviction for robbery. *Id.* at 75.

¶ 42 The State argues that *Brooks* and *Merchant* are analogous to the instant case. Defendant, however, contends that the instant case is more similar to *People v. Runge*, 346 Ill. App. 3d 500 (2004), where the court reversed defendant's conviction for armed robbery because the State failed to prove any concurrence between the use of force and the taking at issue in that case.

¶ 43 The defendant in *Runge* was convicted of armed robbery, among other crimes, because of his escape from a Department of Human Services facility at a prison. *Id.* at 502-03. The evidence at trial showed that defendant was dressed in DHS-issued clothing for a court appearance when he boarded a van to take him to court. *Id.* at 503. During the ride, he and another prisoner attacked the driver with pepper spray and escaped. *Id.* Upon his recapture, the State charged him with armed robbery on the theory that he stole the DHS-issued clothing by the use of force, namely, the pepper spray. *Id.* The *Runge* court rejected this argument and reversed defendant's conviction. It explained its reasoning as follows:

“The evidence did not show that defendant used any force or threat of force at the time DHS transferred the clothing to him.

Nor can we say that the taking of the clothing and the force used to escape were committed in a single series of continuous acts. \*\*\* During the interval between the ‘taking’ and the use of force, defendant boarded the van and put into action a plan to commit an unrelated, separate offense of escape from DHS custody.” *Id.* at 505.

¶ 44 In support of its decision, the *Runge* court cited *People v. Johnson*, 314 Ill. App. 3d 444 (2000), in which the court also found that the evidence was insufficient to convict defendant of

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armed robbery of a car title. The *Johnson* defendant had expressed interest in purchasing the victim's car, and, during a test drive of that car, defendant asked if he could see the car's title. *Id.* at 445. The victim handed the title to defendant. Defendant subsequently exited the car, telling the victim that he needed to obtain the purchase money from a relative. He entered a house before returning to the car. The test drive continued. Later, defendant pointed a gun at the victim and told him to exit the car. *Id.* at 446. The *Johnson* court found that this use of force was too remote from defendant's act of taking the title to sustain a conviction for armed robbery. *Id.* at 449. The court explained, "The fact that defendant left the car after receiving the title separates the acquisition of the title from defendant's subsequent [use of force]." *Id.* at 450.

¶ 45 We find the instant case to be much closer to *Brooks* and *Merchant* than to *Runge* and *Johnson*. The defining feature of both *Runge* and *Johnson* is that there was a significant interval between the taking, which was achieved peaceably, and the use of force. In that interval, the defendant in *Runge* executed a plan to commit an "unrelated, separate offense" (*Runge*, 346 Ill. App. 3d at 505); the defendant in *Johnson* left the presence of the victim, entered a house, and later returned (*Johnson*, 314 Ill. App. 3d at 450). No such interval exists in the present case. On the contrary, upon seeing defendant reach for one of his bicycles, Avedon immediately grabbed him by the lapel, and the two men fought with each other. Thus, even though defendant's use of force in this case occurred after the attempted taking, both the force and the taking were part of a series of events constituting a single incident. *Brooks*, 202 Ill. App. 3d at 170; see *Houston*, 151 Ill. App. 3d at 721 (theft may constitute robbery where "the perpetrator's departure is accomplished by the use of force"); *Collins*, 366 Ill. App. 3d at 897 (upholding conviction for

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attempted robbery where “there was no significant interval between the attempted taking and the use of force”). Accordingly, we affirm defendant’s conviction for attempted robbery.

¶ 46 III. CONCLUSION

¶ 47 As a concluding matter, defendant contends that the \$200 DNA analysis fee imposed by the trial court in this case should be vacated, since defendant had previously been incarcerated and therefore already had a DNA sample in the Illinois state police DNA database. The State agrees that defendant is entitled to have this charge vacated. See *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011) (statute authorizing the taking, analysis, and indexing of DNA, as well as the payment of the analysis fee, applies only to offenders who are not currently in the DNA database). We therefore order that the charge be vacated.

¶ 48 Defendant additionally requests that this court correct the mittimus to properly reflect that attempted robbery is a Class 3 felony, not a Class 2 felony. 720 ILCS 5/18-1(c) (West 2012) (robbery is a Class 2 felony for sentencing purposes); 720 ILCS 5/8-4(4) (West 2012) (attempt to commit a Class 2 felony is sentenced as a Class 3 felony). The State agrees that the mittimus needs to be corrected. Pursuant to Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b)), this court may correct the mittimus without remanding the case to the trial court. See *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992). Therefore, we order that the mittimus be corrected to reflect defendant’s conviction for a Class 3 felony.

¶ 49 Based upon the foregoing, the judgment of the circuit court is affirmed in all other respects.

¶ 50 Affirmed; fines and fees order modified; mittimus corrected.

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¶ 51 Presiding Justice Gordon, specially concurring:

¶ 52 I write separately because I cannot concur with the majority's conclusions: (1) that the State established an adequate basis for admission of its expert's opinion that defendant's palmprint matched a palmprint found in the victim's garage; or (2) that *People v. Safford*, 392 Ill. App. 3d 212 (2009), is no longer good law. However, since the burglary victim caught defendant in the act of burglarizing his garage and since defendant waived any error by failing to object at trial, the error did not rise to the level of plain error, because the evidence was not closely balanced. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 53 I. Standard of Review

¶ 54 While the admission of expert testimony is generally left to the discretion of the trial court, proper admission requires the proponent to show an adequate basis for the opinion. *Safford*, 392 Ill. App. 3d at 221 (citing *Hiscott v. Peters*, 324 Ill. App. 3d 114, 122 (2001)). An adequate basis requires a showing that the expert based his or her opinion on reliable information. *Safford*, 392 Ill. App. 3d at 221 (citing *Peters*, 324 Ill. App. 3d at 122). Whether the basis is adequate is a question of law, which we review *de novo*. *Safford*, 392 Ill. App. 3d at 221 (determining whether an adequate basis was shown "presents a question of law" (citing *Peters*, 324 Ill. App. 3d at 123 (it is a "question of law \*\*\* whether there was a sufficient basis for the expert's opinion")))). Thus, we should apply a *de novo* standard of review. *De novo* consideration means that we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 55 In addition, there are no facts in dispute concerning this issue. The State concedes in its

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appellate brief that its fingerprint expert did not make any notes regarding the detail of the prints during his analysis. The State also concedes that, although its expert claimed to have based his opinion on 15 points of comparison, it did not have any documents to establish what these 15 points were. Where the facts are not in dispute, our review is *de novo*. *People v. Chapman*, 194 Ill. 2d 186, 217 (2000).

¶ 56 II. Inadequate Basis

¶ 57 Neither party disputes the legal proposition that a proponent of expert evidence must show an adequate basis for its admission, nor could this time-honored proposition be disputed. *People v. McKown*, 236 Ill. 2d 278 (2010) (finding that “the absence of a proper foundation” is “error”). “An expert’s opinion is only as valid as the basis and reasons for the opinion.” *Wilso v. Bell Fields, Inc.*, 214 Ill. App. 3d 868, 875 (1991) (citing *McCormick v. Maplehurst Winter Sports*, 166 Ill. App. 3d 93, 100 (1988)). “A party must lay a foundation sufficient to establish the reliability of the basis for the expert’s opinion.” *Petraski v. Thedos*, 382 Ill. App. 3d 22, 28 (2000) (citing *Turner v. Williams*, 326 Ill. App. 3d 541, 552-53 (2001)). Expert opinions based on guess, speculation or conjecture are inadmissible. *Modeski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 886 (1999).

¶ 58 It is particularly important for a trial court to determine whether the State has shown an adequate basis for fingerprint evidence because fingerprint evidence, like DNA evidence, is extremely persuasive. *People v. Wright*, 2012 IL App (1st) 073106, ¶ 96.

¶ 59 When a fingerprint examiner testifies, as he did in this case, that he found 15 matching characteristics but he does not remember what they were and he did not write them down, he is

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asking the fact finder to rely simply on his word, not on any form of science. The Illinois Rules of Evidence allow an expert to testify as an expert when “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence.” Ill. R. Evid. 702 (eff. Jan. 1, 2011). Testimony that there were 15 points but “I don’t remember” what they were does not aid in understanding or setting forth any basis. It is asking the jury to take a blind leap of faith based simply on the witness’ job description.

¶ 60 The majority reaches its decision based largely on its conclusion that *People v. Safford*, 392 Ill. App. 3d 212 (2009), has been distinguished by several appellate court cases. However, this overlooks the fact that *Safford* has also been relied on by the appellate court, most notably in *Wright*, 2012 IL App (1st) 073106, ¶ 96.

¶ 61 In addition, defendant claims on appeal that the trial court erred by failing to conduct a *Frye* hearing, arguing in his brief that “[p]almprint evidence is not generally accepted in the relevant scientific community.” The majority discusses the general acceptance of fingerprint evidence but does not address defendant’s argument that palmprint evidence is not generally accepted. However, any error with regard to the admission of the palmprint evidence does not rise to the level of plain error, for the reasons discussed in the section below.

### ¶ 62 III. Not Plain Error

¶ 63 Although the State failed to establish an adequate basis for its expert’s opinion, this error does not rise to the level of plain error.

¶ 64 Generally, a defendant forfeits appellate review of an error if he does not both object at trial and raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

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However, an appellate court will still consider an unpreserved error if the error is clear and obvious, and either (1) the evidence is so closely balanced that this error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id.* In the case at bar, defendant does not argue that this error qualified as plain error under the second prong of the *Piatkowski* test; and, as for the first prong, the evidence is not closely balanced where the burglary victim catches the perpetrator in the act.

¶ 65 Since I conclude that any error in this case did not rise to the level of plain error, I concur in the judgment but not in the reasoning in the majority opinion.