

No. 1-12-0935

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 of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 2736
)	
EMMITT HENDERSON,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction is reversed where the trial court in a bench trial improperly admitted and relied on hearsay evidence that a non-testifying fingerprint examiner verified Seavers' fingerprint identification results.

¶ 2 Defendant, Emmitt Henderson, appeals his conviction after a bench trial of residential burglary and his sentence of seven years' imprisonment. On appeal, Henderson contends (1) he was denied a fair trial when the trial court improperly admitted and relied on hearsay evidence that a non-testifying fingerprint examiner verified the results of Cynthia Seavers, the testifying

expert on fingerprint analysis; (2) the State failed to prove him guilty beyond a reasonable doubt where his conviction rested solely upon two latent fingerprints, and no proof was presented that the print cards used to match the prints to Henderson contained prints actually belonging to him; (3) his right to confrontation was violated where he did not have an opportunity to cross-examine the second fingerprint examiner who verified Seavers' results; (4) the trial court erroneously allowed Seavers to testify regarding her findings that the latent fingerprints analyzed belonged to Henderson where there was no foundation as to how the prints matched; and (5) trial counsel was ineffective for failing to request a *Frye* hearing to determine the general acceptance of latent print identification. For the following reasons, we reverse the judgment of the trial court and remand for a new trial.

¶ 3

JURISDICTION

¶ 4 The trial court sentenced Henderson on February 23, 2012. He filed a notice of appeal on March 6, 2012. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5

BACKGROUND

¶ 6 Henderson was charged with one count of residential burglary. The following evidence was presented at his bench trial.

¶ 7 Silvery Mitchell testified that she lived at 8616 Drexel in Chicago.¹ Her brother, Robert Carter, stayed with her in the apartment and her daughter lived in a separate apartment

¹ The State's brief at one point lists the address as 8615 Drexel, but our examination of the record

upstairs. On June 10, 2010, she returned to her residence after being out of town for several days and discovered that two television sets, an iPod, and a camera were missing. Mitchell saw that a window in her niece's bedroom had been damaged and was lying in the middle of the floor. Mitchell testified that she did not give Henderson permission to enter her apartment on June 10, 2010.

¶ 8 The parties stipulated that if called to testify, Robert Carter would state that on June 10, 2010, around 9:30 a.m., he was in the basement of the apartment building when he heard footsteps upstairs. He went upstairs and saw that a bedroom window had been removed and several items in the room were missing. Carter notified police and when they arrived, he told them that he saw an unknown offender run from the scene, jump over the fence, and escape down the alley. Carter was not able to give police a description of the offender. However, he did see the same offender walking northbound on Cottage Grove pushing a garbage can. Carter could not identify Henderson as the offender he saw on June 10, 2010.

¶ 9 Detective Joseph Bowes testified that he investigated the burglary and as part of his investigation, he investigated Henderson and Marcus Williams. The police arrested Williams on the day of the burglary and at the time of his arrest, Williams was carrying the iPod taken from Mitchell's apartment. Williams led Detective Bowes to an apartment on East 84th Street where police recovered the two missing television sets. They recovered no proceeds from Henderson, nor did they find his personal effects in Mitchell's apartment. Detective Bowes testified that the apartment from which they recovered the stolen television sets was vacant.

¶ 10 Officer Harold Fiene, an evidence technician, testified that on July 10, 2010, he processed a burglary crime scene at 8616 Drexel in Chicago. Officer Fiene noticed that a

confirms that the correct address of the apartment building is 8616 Drexel.

bedroom window pane was removed and lying six to eight feet from the opening in the wall. He photographed the scene and dusted objects for fingerprints. Specifically, Officer Fiene dusted the window and found fingerprints. He used sticky tape to retrieve the print. Officer Fiene also processed a second crime scene at the apartment on East 84th Street. He photographed the two stolen television sets and dusted them for fingerprints. He recovered one suitable print from one of the television sets. Officer Fiene lifted a total of 12 prints from both crime scenes.

¶ 11 Cynthia Seavers, a latent fingerprint examiner with the Chicago Police Department, testified that she performed a print analysis to identify the source of the recovered fingerprints. Seavers explained the scientific basis for fingerprints as a means of identification, stating that no two individuals have an identical friction ridge design. Seavers testified that she used the ACE-V method, which is analysis, comparison, evaluation, and verification. In her examination, Seavers used the proper tools, including proper lighting, a light box, two 5x magnifying glasses, and pointers. To make a print identification, Seavers examines the ridge detail of each print to see whether they have "the same unit relationship and occupy the same space in each [print]."

¶ 12 Seavers testified that when she put Lift C, a palm impression, into the Automated Fingerprint Identification System (AFIS), a match was found to a print card belonging to Henderson. Seavers compared the latent palm print to the print card and concluded that the print belonged to Henderson. She also compared the latent print taken from one of the television sets at East 84th Street and concluded that it belonged to Henderson. An investigative alert was issued as a result and approximately seven months later, Henderson was arrested.

¶ 13 Seavers stated that the final step of the ACE-V methodology is verification, meaning that an identification is not effected until verified by a second examiner. Seavers testified that an unidentified second examiner conducted an independent analysis and arrived at the same conclusion regarding the identity of the latent fingerprints found on the window and on the television set. Defense counsel objected on the basis that Seavers' statement was hearsay since the second examiner was not present to testify about the verification. The trial court overruled the objection, reasoning that Seavers was present and observed the verification by the second examiner.

¶ 14 After the State rested, defense counsel moved for a directed verdict which the trial court denied. Henderson did not testify and the defense rested. The trial court found Henderson guilty of residential burglary. It stated that "[t]he prints were lifted, the prints of the defendant from an AFIS hit, it matched to the defendant. The prints came from a window frame that was on the interior of the apartment *** 6 to 8 feet from the frame, from the outside frame of where that window should have been, and from one of the televisions, the proceeds of the crime. The Court finds that this scientific evidence is the equivalent of a video of what occurred and the defendant is placed squarely at the scene and handling the proceeds by this scientific evidence. It has not been refuted."

¶ 15 Henderson filed a motion for a new trial which the trial court denied. The trial court sentenced Henderson to 7 years' imprisonment. Henderson filed this timely appeal.

¶ 16 ANALYSIS

¶ 17 Since it is the dispositive issue on appeal, we address Henderson's contention that the trial court improperly admitted and relied on hearsay evidence that a non-testifying fingerprint examiner verified Seavers' fingerprint identification results. Henderson acknowledges that he

failed to preserve this issue on appeal since defense counsel objected to the testimony at trial, but failed to include the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He asks, however, that this court review his contention as plain error. The admission of hearsay identification testimony constitutes plain error only if it substitutes for courtroom identification or is used to corroborate a weak identification. *People v. Hughes*, 259 Ill. App. 3d 172, 178-79 (1994).

¶ 18 Here, the alleged hearsay identification testimony provided the only identification of Henderson as a culprit in the burglary. No witness identified him as an offender seen committing the burglary, no witness identified Henderson in court as the person who committed the burglary, and no other testimony or evidence linked Henderson to the crime. As such, we review his contention as plain error.

¶ 19 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Such evidence is generally inadmissible because the opposing party has no opportunity to cross-examine the declarant. *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004). Testimony that a nontestifying party identified the accused as the perpetrator of a crime constitutes inadmissible hearsay. *People v. Lopez*, 152 Ill. App 3d 667, 672 (1987).

¶ 20 In the case at bar, Seavers testified that the results of her fingerprint analysis was verified, as required under the ACE-V methodology, by an unidentified second examiner who conducted an independent analysis and arrived at the same conclusion regarding the identity of the latent fingerprints found on the window and on the television set. In *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994), *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005), and *People v. Prince*, 362 Ill. App. 3d 762, 776 (2005), this court held that testimony by a fingerprint examiner that her

identification had been verified by a second, non-testifying examiner is inadmissible hearsay. Furthermore, the admission of this testimony was not harmless because the fingerprint evidence was the only evidence linking Henderson to the burglary. See *People v. Mitchell*, 200 Ill. App. 3d 969, 975 (1990) (admission of hearsay testimony is harmless error if it is merely cumulative or is supported by a positive identification and other corroborative circumstances).

¶ 21 However, admission of such evidence is also harmless where there is no reasonable possibility that the verdict would have been different if the hearsay had been excluded. *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992). The State argues that the verdict would not have been different if the hearsay evidence had been excluded because Henderson had a bench trial, and this court must presume that the trial court considered only competent evidence and disregarded the hearsay testimony. *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001). This presumption is rebutted where the record shows affirmative evidence to the contrary. *Id.*

¶ 22 In coming to a verdict, the trial court below stated that "[t]he prints were lifted, the prints of the defendant from an AFIS hit, it matched to the defendant. The prints came from a window frame that was on the interior of the apartment *** 6 to 8 feet from the frame, from the outside frame of where that window should have been, and from one of the televisions, the proceeds of the crime. The Court finds that this scientific evidence is the equivalent of a video of what occurred and the defendant is placed squarely at the scene and handling the proceeds by this scientific evidence. It has not been refuted." The trial court relied on the only evidence linking Henderson to the burglary: the latent fingerprints taken from the window and television set which Seavers subsequently identified as matching the print card of Henderson. Seavers testified that under the ACE-V methodology, her fingerprint identification had to be verified by a second examiner. Therefore, the trial court's finding of guilt could not have been made without

considering the inadmissible hearsay testimony that the second examiner verified the prints as belonging to Henderson. Accordingly, we find the admission of testimony that a second examiner verified Seavers' results is plain error and requires reversal. Due to our disposition of this issue, we need not address Henderson's remaining claims of error.

¶ 23 Before we remand this cause for a new trial, we must determine whether a retrial would raise double jeopardy concerns. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). Double jeopardy prohibits retrial when a conviction is reversed due to insufficient evidence to support the conviction, but does not prohibit retrial where a conviction is set aside due to the erroneous admission of hearsay evidence. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). For double jeopardy purposes we may take all evidence submitted at trial, including inadmissible hearsay evidence, into consideration when determining whether the evidence was sufficient to sustain Henderson's conviction. *Lopez*, 229 Ill. 2d at 367.

¶ 24 Henderson argues that the evidence supporting his conviction is insufficient because the latent fingerprints used to connect him to the burglary were found under unreliable circumstances. Fingerprint evidence is circumstantial evidence. *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991). When a conviction rests solely on circumstantial fingerprint evidence, the evidence must also satisfy physical and temporal proximity criteria. *People v. Rhodes*, 85 Ill. 2d 241, 249 (1981). In other words, the prints must have been found in the immediate vicinity of the crime under such circumstances as to establish that they were impressed at the time the crime was committed. *Id.*

¶ 25 Here, Henderson's prints were lifted from the window that was taken out of the wall by the offender and placed in the middle of the bedroom which was located in the back of the apartment. Police also found his prints on one of the television sets taken in the burglary and

later recovered in a vacant apartment on East 84th Street. A statement by Robert Carter, who lived in the apartment, indicated that a fence enclosed the back yard area. Mitchell stated that she did not give Henderson permission to be in her apartment. We find the evidence sufficient to sustain Henderson's conviction.

¶ 26 Henderson also contends that the State's evidence was insufficient because it failed to prove that the prints on the print card used to compare with the prints taken from the burglary actually belonged to him. We note that Henderson did not object at trial when the State presented testimony that the print card for E. Leroy Henderson was pulled after AFIS indicated a match with the prints retrieved at the crime scene. In fact, a forensic person for the defense had an opportunity to examine the print cards and prints used in the case. Nonetheless, even on the merits we are not persuaded by Henderson's argument. Henderson relies on *People v. Miller*, 20 Ill. App. 3d 1061 (1974) to support his contention that a mere name on a print card is not sufficient to establish that the prints on the card belong to defendant. However, in *Miller* no other evidence was presented connecting the defendant to the print card used in the case. *Id.* at 1063. Here, the print card used came from AFIS and contained not only the name, but also an identification number, date of birth, place of birth, date of arrest and date the prints were taken. We find that the State presented sufficient evidence linking the print card to Henderson.

¶ 27 For the foregoing reasons, we reverse Henderson's conviction and remand for a new trial.

¶ 28 Reversed and remanded.