2015 IL App (4th) 130622-U

NO. 4-13-0622

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 23, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
and	)	Vermilion County
JOHN E. EDWARDS,	)	No. 12CF123
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion by refusing defendant's proposed instruction on a lesser included offense, considering that no rational jury could have acquitted defendant of the greater offense while finding him guilty of the lesser offense.

(2) A fingerprint examiner's hearsay testimony that two other fingerprint examiners had verified his identification of defendant's fingerprints did not qualify as plain error.

¶ 2 Defendant, John E. Edwards, appeals from his conviction of residential burglary (720 ILCS 5/19-3(a) (West 2010)), for which he is serving a prison sentence of 18 years. He makes two arguments.

¶ 3 First, defendant argues the trial court abused its discretion by refusing his proposed jury instructions on the lesser included offense of criminal trespass to a residence (720 ILCS 5/19-4(a)(1) (West 2010)). We find no abuse of discretion in the refusal, considering that

no rational jury would have acquitted him of residential burglary while finding him guilty of criminal trespass to a residence.

¶ 4 Second, defendant argues it was plain error for a fingerprint examiner to testify that two other fingerprint examiners had verified his identification of defendant's fingerprint, lifted off a television. We disagree that this hearsay testimony qualifies as plain error.

¶ 5 Therefore, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 A. The Information

¶ 8 On March 7, 2012, the State filed an information, which charged defendant with two offenses.

¶ 9 Count I alleged that, on December 31, 2011, he committed the Class 1 felony of residential burglary (720 ILCS 5/19-3(a), (b) (West 2010)) in that he "knowingly and without authority[] entered *** the dwelling place of Curtis R. Noggle, located at 1311 Oak Street, Danville, *** with the intent to commit therein a theft."

¶ 10 Count II alleged that, on the same date, he committed the Class A misdemeanor of criminal trespass to a residence (720 ILCS 5/19-4(a)(1), (b)(1) (West 2010)) in that he "knowingly and without legal authority entered the dwelling place of Curtis R. Noggle, located at 1311 Oak Street."

¶ 11 B. *Nolle Prosequi* of Count II

¶ 12 On May 28, 2013, after jury selection but before opening statements, an assistant State's Attorney, Charles D. Mockbee IV, moved to nol-pros count II (which charged defendant with criminal trespass to a residence). An assistant public defender, Lindsay VanFleet, objected. Over her objection, the trial court granted the State's motion to nol-pros count II.

¶ 13 C. Evidence in the Jury Trial

¶ 14 The jury trial occurred on May 28 and 29, 2013. The witnesses testified substantially as follows.

¶ 15 1. *Curtis Noggle*

¶ 16 Curtis Noggle resided at 1311 Oak Street, Danville, in a one-story house, which was equipped with a burglar alarm system. When triggered, the system sounded an audible alarm and sent a signal to the burglar alarm company, which then called the police.

¶ 17 The evening of December 31, 2011, Noggle was away from home, at his cousin's house. Around midnight, he received word that the burglar alarm in his house had been triggered. Initially, his father went to the house to investigate. Noggle returned home the next day.

¶ 18 It appeared to Noggle that someone had entered the house through a window to the left of the front door. "The screen [of the window] was a little messed up." When he went to his cousin's house the night before, the window had been closed, though unlocked. The window was large enough that Noggle, who was 6 feet 4 inches tall, could have fit through it. He had given no one permission to enter his house.

¶ 19 In the living room, he kept a television "[a]lmost right up against the window." A chair next to the television had been shifted slightly out of its usual position, it seemed. Muddy shoe prints were on the floor, in the living room and near the bedroom. There was no damage to the house. Nothing was missing.

¶ 20 2. *Phil Bernardi*

¶ 21 Around 11:30 p.m. on December 31, 2011, a Danville police officer, Phil Bernardi, was dispatched to 1311 Oak Street in response to a burglar alarm. Another police

officer, Ralph Dunham, went there as well. Bernardi parked about two houses south of the house and approached on foot. He saw someone, barely visible in the darkness, standing in front of the house. This person "then walked to the north side of the residence and then back behind it[,] to the alley." Bernardi radioed Dunham that the suspect was going south, down the alley.

¶ 22 Upon reaching the house, Bernardi saw that a window was half open, "just north of the front door." The person Bernardi had seen, whose features he had been unable to make out in the darkness, had been standing by that window.

¶ 23 After "stopp[ing] a subject on Voorhees Street," the other police officer, Dunham, came to the house. Bernardi watched him lift a fingerprint off a television, which was by the window.

¶ 24 3. *Ralph Dunham*

¶ 25 Ralph Dunham was a Danville detective, a member of the crime scene investigation unit. He was "coming down Voorhees Street[,] from the west," when Bernardi told him "he had just seen a subject disappear around the back of the house and go south[] in the alley, toward[] Voorhees [Street]." Dunham saw "the subject on a bicycle[,] coming out of the alley[,] onto Voorhees Street." This person was "wearing all dark clothing." Dunham stopped him and was "able to identify [him]" as defendant.

¶ 26 After stopping defendant on his bicycle, Dunham asked him "where he was coming from." Defendant answered he was coming from his mother's residence. Dunham asked him where his mother's residence was. Defendant answered "it was on Center Street[,] near the YMCA." This explanation made no sense to Dunham, considering that defendant had been riding south on his bicycle and his mother's residence was, by his own account, to the south.

When Dunham pointed out to defendant this paradox, defendant said he "was just out riding around."

¶ 27 After obtaining defendant's date of birth and address, Dunham proceeded to 1311 Oak Street. On the outside ledge of the half-open window was a muddy shoe print. Dunham took a photograph of the shoe print; the photograph was People's exhibit No. 5. People's exhibit No. 8 was a photograph of the bottom of defendant's shoe, "to show that there was a similarity between the treads on the bottom of his shoe and the muddy shoe print shown on the window ledge." Just inside the window was a flat-screen television—"a television you could pick up and carry"—and when Dunham shone his flashlight obliquely on the television, he saw a "latent fingerprint" on the smooth frame surrounding the screen. He "applied fingerprint powder to [the fingerprint] and lifted it with clear tape." He then stuck the tape to a note card, People's exhibit No. 2, which he gave to the evidence technician, Randy Osgood.

¶ 28 4. *Gary Havey*

¶ 29 Gary Havey worked for the forensic science laboratory of the Illinois State Police. He was a forensic scientist specializing in latent fingerprints, palm prints, and footprints. He was a member of the International Association for Identification. He had done tens of thousands of print comparisons and had testified in Illinois 176 times.

¶ 30 Havey first received People's exhibit No. 2 from Osgood on February 22, 2012. He "did a comparison and evaluation at that time," and on May 23, 2012, he "issue[d] an initial report" to Osgood.

¶ 31 People's exhibit No. 2 returned to the laboratory on December 20, 2012, and Havey "did a recomparison of the suitable latent print to some new standards that had been submitted." The new inked fingerprint standards were People's exhibit No. 3, consisting of three

"fingerprint cards marked [']John E. Edwards.['] " After comparing these three standards to one another to make sure they were the fingerprints of the same person, Havey chose the clearest of the three standards and compared it to People's exhibit No. 2. His comparison, which was "verified by a separate forensic scientist," "revealed that the latent print [had been] made by the person whose fingerprints appeared on the card marked [']John E. Edwards.['] "

¶ 32 Harvey testified: "If you make an identification[,] that identification is not only identified by myself[,] but it also has to be verified by another forensic scientist." The prosecutor asked Havey:

> "Q. Okay. And you said that also the—the procedure you use someone else would have verified your identification as well?
>
> A. That is correct.
>
> Q. Okay. And who is that?
>
> A. Actually this case ended up—there are actually two forensic scientists actually made the verification, Karen Horath and Stephanie Bolin.
>
> Q. Are they forensic scientists at the lab as well?
>
> A. Yes, they are.
>
> Q. And you said that procedure is done in every case.
>
> A. Yes. This is an in-house insurance [*sic*] quality program that we use.
>
> Q. So based on your analysis, training and experience did you reach an opinion with a reasonable degree of scientific

certainty as to whether or not People's 2 and 3—what was the comparison there?

A. My comparison of the suitable latent print revealed that that latent print was made by the person whose fingerprints appear on the card marked John E. Edwards."

¶ 33 5. *Joseph Walton*

¶ 34 Joseph Walton was a correctional officer for the Vermilion County sheriff's department. On November 29, 2012, he fingerprinted defendant, rolling defendant's inked fingertips on the three cards in People's exhibit No. 3.

¶ 35 D. The Jury Instruction Conference

¶ 36 On May 29, 2013, after the close of the evidence, the trial court held a jury instruction conference. The public defender, Jacqueline Lacy, tendered instructions that would have given the jury the option of finding defendant guilty of criminal trespass to a residence in lieu of finding him guilty of residential burglary, on the theory that residential burglary included the lesser offense of criminal trespass to a residence.

¶ 37 Mockbee objected to these proposed instructions, and he cited *People v. Austin*, 216 Ill. App. 3d 913 (1991), in support of his objection. He argued:

"MR. MOCKBEE: Judge, I think that case [(*Austin*)] does say that criminal trespass to a residence is a lesser included of residential burglary. So it's a possible crime that the Defendant could be charged with and found guilty of."

Even so, Mockbee explained, *Austin* held "the lesser included should not be allowed in," because no rational jury could have acquitted the defendant of the greater offense, residential burglary,

while finding him guilty of the lesser offense, criminal trespass to a residence. The same was true in the present case, Mockbee argued: given the evidence adduced in the trial, a rational jury could not acquit defendant of residential burglary while finding him guilty of criminal trespass to a residence, and therefore defendant was not entitled to an instruction on criminal trespass to a residence.

¶ 38 Lacy accused the State of flip-flopping. Initially, the State charged defendant with criminal trespass to a residence (before nol prossing that charge), and thus "the State *** itself must have believed there was evidence to prove up a trespass to the residence." Indeed, in Lacy's assessment of the evidence, criminal trespass to a residence was the only viable charge. Because nothing was missing from the house and because no stolen property was found on defendant, she argued that the element distinguishing residential burglary from criminal trespass to a residence—namely, the intent to commit a theft—was unproven.

¶ 39 After hearing these arguments, the trial court decided it was irrelevant that the State originally charged defendant with criminal trespass to a residence. The object of inquiry, the court reasoned, should be the evidence adduced in the trial. Given the evidence, the court regarded the case as "fall[ing] squarely within *Austin*[,] where the defendant [was] either guilty of the higher offense or not guilty, period." The court explained:

> "The evidence is a window is found open which causes an alarm to go off. A [footprint] is found on the [windowsill]. His fingerprint is found on a television set inside the residence. The alarm is an audible alarm. He's seen in the immediate vicinity and flees when he sees the police officer. I guess the Defendant's version is his intention was to open a window and touch a TV but

> not to commit a residential burglary. That both defies logic and is not really consistent with the evidence in the case. He's either guilty of residential burglary or he's not guilty. There's nothing here that would require the—the—tendering of a lesser-included offense, and this is clearly a case that falls within the meaning and intent of *** *Austin*."

Therefore, the court refused the proposed jury instructions on criminal trespass to a residence.

¶ 40 II. ANALYSIS

¶ 41 A. The Refusal of the Proposed Jury Instructions on Criminal Trespass to a Residence

¶ 42 Defendant argues that because nothing was missing from the house, he was not found at the house, he possessed no burglary tools, and "the State's sole evidence of intent to commit a theft was a singular, partial latent print found inside the house," the trial court abused its discretion by refusing his proposed jury instructions on criminal trespass to a residence. See *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 60.

¶ 43 When deciding whether to give a jury instruction on a lesser included offense, a court should ask: Is the lesser offense included in the greater offense, and if so, could the evidence adduced in the jury trial rationally support a conviction of the lesser offense? *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). "[T]he second step—examining the evidence adduced at trial—should not be undertaken unless and until it is first decided that the uncharged offense is a lesser-included offense of a charged crime." *Id.*

¶ 44 Using the charging instrument approach (see *id.*), the State disputes that criminal trespass to a residence is included in count I, residential burglary, because the State perceives a difference between a "residence" for purposes of criminal trespass to a residence and a "dwelling

place" for purposes of count I: the difference being that a "dwelling place," unlike a "residence," can temporarily lack a resident, provided that the "owners or occupants" "intend within a reasonable period of time to reside" in the "dwelling place." 720 ILCS 5/2-6(b) (West 2010).

¶ 45 Defendant responds that because the State took the position, in the jury instruction conference, that criminal trespass to a residence was included in residential burglary as described in count I, the doctrine of forfeiture now precludes the State from disputing, on appeal, that criminal trespass to a residence is included in count I. "The general rule that a prevailing party may raise, in support of a judgment, any reason appearing in the record does not apply when the new theory is inconsistent with the position adopted below or the party has acquiesced in contrary findings." *People v. Franklin*, 115 Ill. 2d 328, 336 (1987).

¶ 46 In the jury instruction conference, the State did indeed take the position that residential burglary included criminal trespass to a residence. Mockbee likened this case to *Austin*, which held that "criminal trespass to [a] residence [was] a lesser-included offense of residential burglary" (*Austin*, 216 Ill. App. 3d at 916), and he argued that, as in *Austin*, the evidence could not persuade a rational jury to acquit defendant of residential burglary while finding him guilty of criminal trespass to a residence. This was the only argument Mockbee made against the proposed jury instructions on criminal trespass to a residence. He did not argue in the alternative. His discussion of the evidence adduced in the trial presupposed that count I included criminal trespass to a residence. See *Kolton*, 219 Ill. 2d at 361. On appeal, therefore, the State has forfeited its right to dispute that count I includes criminal trespass to a residence. See *Franklin*, 115 Ill. 2d at 336.

¶ 47 Having determined, for purposes of this appeal, that count I includes criminal trespass to a residence, we now proceed to the second part of the inquiry: we "examine the

evidence presented at trial to determine whether a jury could rationally find the defendant guilty of the lesser offense, but acquit on the greater offense." *People v. Landwer*, 166 Ill. 2d 475, 486 (1995).

¶ 48 On this question, defendant suggests that *In re Matthew M.*, 335 Ill. App. 3d 276 (2002), is "instructive." Let us, then, recount the facts and rationale of *Matthew M.* to ascertain what instruction that case might offer.

¶ 49 In *Matthew M.*, a townhouse in Warrenville was burglarized while the owner was away, registering her children for school. *Id.* at 279-80. The burglar tore a window screen, climbed through the window, and stole two rings, a watch, and $440 in cash. *Id.* Soon afterward, the police pulled over a "swerving" car and performed a consensual search. *Id.* at 280. Sam Smith and the respondent were two passengers in the car. *Id.* The police found the stolen watch under Smith's seat. *Id.*

¶ 50 At the police station, the respondent told a police officer, Patrick Treacy, that Smith actually had done the burglary while he, the respondent, merely stood outside and acted as a lookout. *Id.* at 280-81. The respondent wrote in his statement:

> " 'We walk [*sic*] around Winchester [Street] for about 20 minute[s] and [Smith] was like is that little Mike and his Mom leaving. When we saw them pull off in the car Sam said he was going to go see was the window open[.] I was like ok I'll be waiting for you out here. I guess you can say I was just like a little look out [*sic*].' " *Id.* at 281.

¶ 51 After the respondent wrote his statement, Treacy asked him if he would help the police find the stolen rings. *Id.* The respondent replied he did not know where they were. *Id.*

He agreed, however, to Treacy's suggestion that he and Smith sit down, alone together in a room, and that while no one was watching, one of them would write an X on the map, showing the police where they could find the rings. *Id.* This sequestered meeting took place. Two Xs were inscribed on the map, and the rings were found at the designated locations. *Id.*

¶ 52 In his subsequent trial for residential burglary, the respondent requested the trial court to instruct the jury on the lesser included offense of criminal trespass to a residence (there was no dispute that it was a lesser included offense). *Id.* The court refused to do so, finding the evidence insufficient to support such an instruction. *Id.*

¶ 53 On direct appeal from his conviction of residential burglary, the respondent argued the trial court had abused its discretion, and had committed reversible error, by refusing to instruct the jury on the lesser included offense of criminal trespass to a residence. *Id.* at 284. The appellate court agreed. *Id.* at 285.

¶ 54 Noting that "[v]ery slight evidence supporting a defendant's theory of the case [would] justify the giving of an instruction" (*id.* at 284), the appellate court found some evidentiary support for the theory that the respondent had "intended only to act as a lookout so that Smith could determine whether the window to the victim's residence was open," unaware that Smith intended to commit a theft. *Id.* at 284-85. The appellate court said:

> "We agree with respondent that there was some foundation for this theory in the evidence. In his written statement, respondent wrote that Smith told him that he 'was going to go see [if] the window was open' and that respondent would wait for him outside while he checked. Additionally, the State failed to introduce any direct evidence that respondent and Smith discussed or planned to

> commit a theft of the victim's residence. Moreover, the police did not find any of the stolen items in respondent's immediate possession after the crime. Also, the police did not witness whether respondent or Smith placed the 'X's' on the map to indicate the location of the rings. Based on this evidence, it is possible that a jury could have concluded that respondent did not know that Smith intended to commit a theft when Smith went to check to see whether the victim's window was open." *Id.*at 285.

¶ 55 Like the respondent in *Matthew M.*, defendant had no stolen property on his person—but the resemblance between the two cases ends there. Defendant was not a lookout. Rather, he acted alone. Also, unlike the respondent in *Matthew M.*, defendant actually entered the residence. It is difficult to see the relevance of *Matthew M.*

¶ 56 Defendant argues that, "as in *Matthew M.*, the State did not present any direct evidence of [his] intent." But "circumstantial evidence is most often the *only* way to prove a defendant's intent to commit a theft or other crime." (Emphasis in original.) *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 14. "[I]ntent can rarely be proved by direct evidence because it is a state of mind." *Thomas v. Koe*, 395 Ill. App. 3d 570, 582 (2009).

¶ 57 In fact, precisely because intent is a state of mind, it is questionable whether intent could *ever* be proven by "direct evidence," defined as "facts perceived through a witness' senses" (*People v. Dukes*, 146 Ill. App. 3d 790, 795 (1986)). No one has direct, sensory access to another person's mind—even when that person purports to describe his or her intent. From "surrounding circumstances," a trier of fact can only infer what the defendant intended. *Thomas*, 395 Ill. App. 3d at 582. Even if the defendant stated outright what he or she intended, the trier of

fact would have the choice of inferring or not inferring that the defendant's words accurately expressed his or her intent. See *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009) ("Where, as here, defendant denies intent, the State may prove defendant's intent through circumstantial evidence."). "Circumstantial evidence consists of proof of facts and circumstances from which the trier of fact may infer other connected facts that reasonably and usually follow according to common experience." *People v. Kathan*, 2014 IL App (2d) 121335, ¶ 20. The defendant's words, in which he or she professed to have a certain intent, would be a fact from which the trier of fact might infer, but would not be required to infer, a corresponding intent. Other circumstantial facts could be more probative than the defendant's words. See *Phillips*, 392 Ill. App. 3d at 259. In sum, the lack of direct evidence of defendant's intent need not be cause for concern. Intent is proven circumstantially.

¶ 58 If someone surreptitiously enters a stranger's house in the dead of night, when no one is home, the natural inference is that the person intends to commit theft. Granted, intruders do not *always* have that intent. The intruder, for instance, could be an adolescent intent on committing vandalism, or the intruder could be fleeing the police. In the minds of most people, however, the natural inference would be that the intruder intends to commit theft, and some evidence of additional facts would be necessary to displace that inference.

¶ 59 Climbing in through the windows of other people's houses is risky. Surely, defendant needed some incentive to run this risk. The only apparent incentive in this case was property. That he lacked "burglary tools" is insignificant. Not all burglars equip themselves with "burglary tools." That nothing actually was stolen from Noggle's house likewise is insignificant: the audible burglar alarm scared defendant away, but not before he left his fingerprint on the television set. He climbed in through a window about a half hour before

midnight on New Year's Eve, at a time when people tended to be away from home, partying. An intent to commit theft is the only intent that would explain defendant's actions under the circumstances. A rational jury might well have found him guilty of criminal trespass to a residence, but a rational jury would not have simultaneously acquitted him of residential burglary. See *Landwer*, 166 Ill. 2d at 486. Therefore, we find no abuse of discretion in the trial court's refusal of the proposed jury instructions on criminal trespass to a residence. See *Rebecca*, 2012 IL App (2d) 091259, ¶ 60.

¶ 60 B. Hearsay

¶ 61 Havey testified that two other forensic scientists, Horath and Bolin, had verified his conclusion that People's exhibit No. 2 matched the inked fingerprint on the card labeled "John E. Edwards." Defendant argues this testimony was inadmissible hearsay. He cites *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994), in which the appellate court held that a fingerprint examiner's testimony that another fingerprint examiner had verified her fingerprint identification was hearsay and that the trial court had abused its discretion by overruling the defendant's objection to it.

¶ 62 As the State observes, however, and as defendant admits, he never objected to this hearsay testimony by Havey, and his motion for a new trial contains no mention of the hearsay testimony. To preserve an issue for appeal, it is necessary to make a contemporaneous objection as well as raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Therefore, defendant has forfeited his objection to Havey's testimony that Horath and Bolin verified his fingerprint examination. See *People v. Young*, 341 Ill. App. 3d 379, 387-88 (2003).

¶ 63 Defendant attempts to avert the forfeiture by invoking the doctrine of plain error. The doctrine of plain error allows a reviewing court to consider a forfeited error in either of two

circumstances: (1) a clear or obvious error occurred, and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurred, and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant believes that both of those circumstances are present in this case.

¶ 64 First, he argues the evidence was closely balanced. We disagree. Defendant's fingerprint was found on Noggle's television, and this fingerprint, by itself, was compelling circumstantial evidence that defendant was the person who had climbed through the window and set off the burglar alarm.

¶ 65 Defendant seems to assume that the validity of Havey's fingerprint identification depended on the out-of-court opinions of Horath and Bolin. Admittedly, Havey testified that a fingerprint identification "ha[d] to be verified by another forensic scientist" and that this "[verification] procedure [was] done in every case." But what did Havey mean? Did he mean that, under the standards of the International Association for Identification, a fingerprint identification was scientifically invalid unless another fingerprint examiner verified the identification? He never said so in his testimony. Instead, he said this verification procedure was merely an "in-house" procedure, to assure quality. It does not follow that Havey's fingerprint identification, by itself, was unreliable under the standards of the discipline as a whole. (In a footnote of his brief, defendant refers to "the ACE-V process (analysis, comparison, evaluation and finally verification) for analyzing fingerprints," and he cites a web site. We will disregard this footnote because it cites a source on the Internet instead of the trial record. See

People v. Brown, 249 Ill. App. 3d 986, 994 (1993) ("It is an elementary principle that an appellate court cannot consider matters outside the record.").) Havey never testified that People's exhibit No. 2 was defendant's fingerprint *because* Horath and Bolin had said so. Rather, he testified that People's exhibit No. 2 was defendant's fingerprint because "[his] comparison of the suitable latent print revealed that the latent print was made by the person whose fingerprints appear[ed] on the card marked [']John E. Edwards.['] " Specifically, on the "right thumb," with its "right slope loop," "[t]here were around 20 individual characteristics present between the standards and the latent print." His hearsay testimony that Horath and Bolin had reached the same conclusion as he was merely cumulative and therefore not plain error.

¶ 66 The appellate court has said:

> "Admission of hearsay identification testimony constitutes plain error only where it serves as a substitute for courtroom identification or is used to strengthen and corroborate a weak identification. [Citation.] If the hearsay testimony is merely cumulative, or is supported by a positive identification and other corroborative circumstances, it constitutes harmless error. [Citation.]" *People v. Armstead*, 322 Ill. App. 3d 1, 12 (2001).

In this context, the appellate court was discussing eyewitness identification, but the discussion applies, by analogy, to fingerprint identification as well. Havey never presented the opinions of Horath and Bolin as substitutes for his own opinion, and there was no apparent weakness in his fingerprint identification. He was a member of the International Association for Identification. He had done tens of thousands of print comparisons and had testified in Illinois 176 times. He explained the basis for his conclusion that People's exhibit Nos. 2 and 3 were the fingerprints of

the same person, *i.e.*, the "20 individual characteristics." Havey's hearsay testimony that Horath and Bolin had arrived at the same conclusion as he was merely cumulative. Because Havey's fingerprint identification was valid in itself and because it was indisputable evidence that defendant was in Noggle's house, we are unconvinced that the evidence in this case was closely balanced.

¶ 67 Second, defendant argues that, regardless of the closeness of the evidence, the hearsay testimony was plain error in that it deprived him of a substantial right, the right to cross-examine Horath and Bolin. See *People v. Bean*, 137 Ill. 2d 65, 81 (1990) (stating that "the right to confront witnesses" is a "substantial right"). As the State notes, however, the supreme court has held that a violation of the right to confront witnesses can be harmless. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). It must follow, then, that such a violation is not, *per se*, plain error. Again, the test is whether the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 565. In other words, the error has to be structural. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant disputes that plain error within the meaning of the second prong of *Herron* is limited to structural error (see *People v. Clark*, 2014 IL App (1st) 123494, ¶ 38), but we are bound by the words of the supreme court in *Thompson*: "In [*People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)], this court equated the second prong of plain-error review with structural error, asserting that automatic reversal is only required where an error is deemed structural, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613-14. We are aware of no case holding that a violation of the sixth-amendment right to confront witnesses (U.S. Const., amend. VI) is a structural error or an error calling for automatic reversal. In fact,

the appellate court has noted: "In *People v. Patterson*, 217 Ill. 2d 407, 424-28 (2005), that court held that confrontation-clause violations are not structural errors." *People v. Czapla*, 2012 IL App (2d) 110082, ¶ 19.

¶ 68 The appellate court has said, however: "[I]f a defendant can successfully prove ineffective assistance of counsel, this is considered a substantial impairment of fundamental rights, thus satisfying the second prong of the *Herron* test and triggering the plain error rule." *People v. McCarter*, 385 Ill. App. 3d 919, 928 (2008). Defendant claims his trial counsel rendered ineffective assistance by failing to object to Havey's hearsay testimony.

¶ 69 Claims of ineffective assistance often are best reserved for postconviction proceedings, in which an adequate record can be developed. *People v. Coleman*, 391 Ill. App. 3d 963, 975 (2009). The supreme court has held, however, that if the record on direct appeal affords the means of raising a claim, the defendant must raise that claim on direct appeal, or else the claim will be forfeited, unless "the forfeiture stems from the ineffective assistance of appellate counsel." *People v. English*, 2013 IL 112890, ¶ 22; see also *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) ("Here, defendant's postconviction allegations of ineffectiveness of counsel are based on information outside the record, specifically, things his counsel told him or failed to tell him. Therefore, defendant could not have raised these allegations on direct appeal, and thus he has not forfeited them."). All the facts relevant to defendant's claim of ineffective assistance of trial counsel can be found in the record; therefore, we will consider the merits of the claim.

¶ 70 We may dispose of a claim of ineffective assistance by proceeding directly to the question of prejudice, without addressing defense counsel's performance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). If trial counsel had made a hearsay objection to Havey's testimony

that two other fingerprint examiners had verified his work, the trial court presumably would have sustained the objection. Then the jury would have been left with Havey's fingerprint identification. Because Havey was an experienced fingerprint examiner and the jury had no apparent reason to doubt his competence, we are unable to find a reasonable probability that a hearsay objection would have resulted in a verdict of not guilty. See *id.* at 525. Therefore, we find no plain error in the sense of ineffective assistance of counsel. See *McCarter*, 385 Ill. App. 3d at 928.

¶ 71 Finding no plain error, we are obliged to honor the forfeiture of the hearsay objection. See *Enoch*, 122 Ill. 2d at 186.

¶ 72 III. CONCLUSION

¶ 73 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 against defendant in costs.

¶ 74 Affirmed.