

2014 IL App (1st) 120074-U
No. 1-12-0074
Order Filed August 29, 2014

SIXTH DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 09 CR 14024
v.)	
)	
LAZERRICK MOSLEY,)	
)	Honorable
Defendant-Appellant.)	John Joseph Hynes,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's convictions and sentences for first degree murder, armed robbery and home invasion were affirmed; his conviction and sentence for possession of a stolen motor

vehicle were vacated. Defense counsel's performance in contesting the State's DNA evidence did not constitute ineffective assistance of counsel, and the admission of expert testimony in the field of historical cell phone analysis was not plain error. The State acknowledged that the possession of a stolen motor vehicle charge had been dismissed prior to trial.

¶ 2 Following a bench trial, the defendant, Lazerrick Mosley, was found guilty of first degree murder, armed robbery, home invasion and possession of a stolen motor vehicle. The trial court sentenced the defendant to natural life imprisonment for first degree murder and imposed consecutive 30-year sentences for home invasion and armed robbery, and a 7-year sentence for possession of a stolen motor vehicle. The 30-year and 7-year sentences were to be served concurrent to the defendant's natural life sentence. The defendant appeals.

¶ 3 On appeal, the defendant contends that: (1) defense counsel's failure to adequately challenge the deoxyribonucleic acid (DNA) evidence denied him the effective assistance of counsel; (2) there was no foundation for the admission of expert testimony in the field of historical cell phone analysis; and (3) his conviction for possession of a stolen motor vehicle violated his right to due process.

¶ 4 The relevant testimony and evidence presented at the defendant's bench trial are summarized below.

¶ 5 **BACKGROUND**

¶ 6 The victim, William Schmidt, resided at 15927 Westway Walk, apartment B-106, in Tinley Park, Illinois. He worked the 11 p.m. to 7 a.m. shift at a truck stop in Monee, Illinois. On May 2, 2009, the victim was working at the truck stop when Bradley Mancha, a fellow employee, arrived at 6:45 a.m. By the morning of May 4, 2009, the victim had failed to report to work for two shifts in a row. Michael Joseph Lanigan, the victim's manager, drove to the victim's apartment complex and looked for the victim's car, a blue Honda Fit. Mr. Lanigan did not locate the Honda in the parking lot and could not gain access to the victim's

apartment. He called the victim's listed contacts, hospitals and the police. In the evening of May 4, 2009, in response to a request for a wellness check by the victim's brother, William Schmidt, the Tinley Park police entered the victim's apartment where they discovered the victim's body on the living room floor. An autopsy revealed that the victim died of multiple stab wounds and incised wounds to his neck area, causing a significant loss of blood and resulting in the victim's death.

¶ 7 I. Police Investigation and Discovery of Evidence

¶ 8 According to the testimony of the Tinley Park police officers, the apartment showed no signs of forced entry. The police found a wallet containing the victim's identification. The police did not find any keys to the apartment or keys to the Honda, which was missing from the apartment complex parking lot. On May 5, 2009, Sergeant Robert Deel of the Illinois State police arrived at the victim's apartment to assist in the investigation. Sergeant Deel described the apartment as dirty and cluttered with personal items and debris all over the floor. He observed a large blood stain on the carpet. In moving items around in the area of the blood stain, he located a blood-stained knife, within two to three feet of the blood stain. Sergeant Deel identified State's exhibit 5 as the knife he found in the victim's apartment.

¶ 9 On May 5, 2009, the Tinley Park police entered the victim's car in the LEADS system as stolen. On May 25, 2009, the police learned that the victim's car had been towed from the Countryside Manor Homes (the nursing home) in Dolton to George's Towing in Dolton. The Tinley Park police had the Honda towed to the Tinley Park police department where it was placed in a secured area. On May 29, 2009, Sergeant Deel processed the Honda for DNA. He swabbed various areas of the Honda including the steering wheel and the driver's interior door pull.

¶ 10 II. Non-Expert Witness Testimony

¶ 11 Curtis Terry, Sr. testified for the State on direct examination as follows. Mr. Terry was the father of the defendant and six other children. Mr. Terry was self-employed as a roofer. In May 2009, he lived with his wife and their three daughters on Harper Avenue in Dolton. The defendant was staying at the Harper Avenue residence. The defendant worked on roofing projects with Mr. Terry.

¶ 12 On Friday, May 1, 2009, Mr. Terry and the defendant returned to the Harper Avenue residence after work. Between 8 p.m. and 8:30 p.m., the defendant told Mr. Terry that he was going to meet his mother in Tinley Park. Mr. Terry did not see the defendant again until 11a.m. or 11:30 a.m. the next morning. Mr. Terry was angry with the defendant because the defendant was supposed to be at work with him at 7 a.m. The defendant explained that a friend refused to give him a ride. The witness told the defendant that he was disappointed in him for not appearing for work and that he wanted the defendant to leave. Mr. Terry gave the defendant permission to take a shower; later, he heard the sound of the clothes dryer.

¶ 13 On Monday, May 4, 2009, Mr. Terry was working on a project in Markham when he received a cell phone call from his youngest son, Curtis Terry, Jr. (Curtis). Mr. Terry instructed Curtis to come to the job site. Curtis arrived with his cousin, Rontrell Skinner (Rontrell) and the defendant. After speaking with Curtis, Mr. Terry instructed him to get lunch for the workers while he spoke to the defendant.

¶ 14 Mr. Terry confronted the defendant asking him why he would try to involve his youngest brother in "something that [the defendant] did." The defendant responded that it was Mr. Terry's "m---- f----- fault." If Mr. Terry had given him a gun, "[the defendant] wouldn't have

left a knife." When Curtis and Rontrell returned with lunch, the defendant left the job site. Mr. Terry acknowledged that he did not call the police, explaining "[h]e's my son."

¶ 15 Sometime after May 4, 2009, Mr. Terry was cooking dinner for one of his daughter's graduation party when he noticed two black-handled stainless steel steak knives missing from his Chicago Cutlery knife set. The knife set was in the kitchen and accessible to anyone in the residence. The witness identified the State's exhibit 4 as his knife set. There were three unfilled places for knives: one knife was broken and had been discarded, but two knives were missing. The witness identified State's exhibit 5 as one of the knives from his set; it had a black handle and was stamped "Chicago Cutlery."

¶ 16 On cross-examination, Mr. Terry stated that when Curtis and Rontrell returned with the food, Mr. Terry told Curtis about his conversation with the defendant and told Curtis "to drop [the defendant] off and don't go any further with him."

¶ 17 On June 6, 2009, three detectives from Tinley Park came to the Harper Avenue residence and requested that Mr. Terry go the Tinley Park police department with them. At the police department, Mr. Terry was told he was a suspect in a murder, and he signed a paper agreeing to talk to them. Mr. Terry did not consume alcohol prior to his interview with the police. Mr. Terry did not inform the police about his May 4, 2009 conversation with the defendant. When defense counsel confronted Mr. Terry with the fact that he had not told anyone in authority that the defendant blamed him for not having a gun, Mr. Terry responded, "I didn't come all the way down here to lie against my son."

¶ 18 Mr. Terry explained that the Chicago Cutlery knife set was his and it had been purchased at Walmart. Walmart had similar ones for sale. Mr. Terry did not know who took the missing steak knives or what happened to the second missing steak knife.

¶ 19 On redirect examination, Mr. Terry stated that he did not want to testify in this case. A subpoena had to be issued for his court appearance.

¶ 20 Rontrell Skinner testified for the State on direct examination as follows. Rontrell was 28 years old and was employed as a church organist and music teacher. On May 4, 2009, Rontrell followed Curtis, his cousin, and the defendant to a car dealership where Curtis left his car. The defendant asked Rontrell if he would take him to a nursing home in Dolton to pick up some keys he had thrown away there. When Rontrell asked why he had thrown the keys away, the defendant stated that he had murdered someone in Tinley Park, and he threw the keys away because the police were coming. When they arrived at the nursing home, the defendant got out and looked around a wooded area across from the nursing home, but he did not find the keys. After returning to Rontrell's car, the defendant pointed to a blue Honda in the parking lot of the nursing home and stated that it was the car he drove from Tinley Park. The defendant explained that he needed the keys to get back in the victim's house to retrieve the murder weapon.

¶ 21 Rontrell then drove Curtis and the defendant to Markham where Mr. Terry was working. Rontrell recalled that he went by himself to pick up lunch for the workers.

¶ 22 On cross-examination, Rontrell acknowledged that he did not contact the police after hearing the defendant admit to murdering someone in Tinley Park. Around June 6, 2009, the witness was questioned by the police and told them what the defendant had said about the murder. The witness acknowledged that he signed a paper waiving his *Miranda* rights. Rontrell was never charged with an offense in this case.

¶ 23 On redirect examination, Rontrell stated that after telling the witness about the murder he had committed, the defendant then stated he was just "playing." The witness thought it was

"weird to admit such a crime in front of someone you don't know." On re-cross examination, Rontrell stated that he believed the defendant was joking, but he was not sure.

¶ 24 Curtis Terry, Jr. testified for the State on direct examination as follows. Curtis was the youngest of Mr. Terry's sons and the defendant's half-brother. At the time of the trial, Curtis was a senior in college. On the morning of May 4, 2009, Curtis was staying at his mother's residence with his cousin, Rontrell. Rontrell was going to follow him to a car lot where Curtis planned to drop off his car. The defendant arrived unexpectedly and asked to be driven to Dolton to retrieve his house keys. After dropping off his car, Curtis rode with Rontrell and the defendant in Rontrell's car to Dolton, where they stopped across the street from a nursing home. Initially, Curtis remained in the car with Rontrell while the defendant searched for the keys in a wooded area. Eventually, Curtis left the car to help the defendant search for the keys. It was a very hot day, and Curtis tried to convince the defendant that the keys could not be found and suggested that he just get another copy made. Finally, the defendant gave up his search and returned to the car. The defendant had a strange look on his face. When Curtis asked him what was wrong, the defendant blurted out that he had killed someone and needed the keys to get back into the house to retrieve the knife he used to kill the person. The defendant believed that his fingerprints were on the knife. When Curtis asked him if it was the truth, the defendant said he was just "playing." Once the defendant said that, Curtis believed what he said about the murder.

¶ 25 The defendant described to Curtis how the murder took place. The defendant had been watching the victim for three months. The defendant approached the victim from behind and forced him into the apartment. The victim complied with the defendant's demand that he "give him everything." When Curtis asked why then did he kill the victim, the defendant

explained that the victim had seen his face, so he stabbed the victim in the neck. The defendant dropped the knife but could not locate it due to all the newspapers and other clutter in the apartment. The defendant watched the victim until he was dead. The defendant pointed to a blue Honda in the nursing home parking lot and told Curtis it was the victim's car. As he was driving the Honda, he spotted a police car. So he parked the Honda at the nursing home and threw the keys away. The defendant told Curtis that he thought of setting the victim's apartment on fire. Curtis told the defendant that he could not understand why the defendant would do what he just described to the witness and that he was going to take him to Mr. Terry.

¶ 26 Curtis and the defendant drove to Markham where Mr. Terry was working that day. After speaking to his father, Curtis went to get lunch for the workers, while Mr. Terry talked to the defendant. After Mr. Terry and the defendant finished talking, Curtis, Rontrell and the defendant returned to Curtis's mother's residence. Curtis did not go to the police because he was not sure what the defendant told him was the truth. It was important enough, though, for Curtis to tell Mr. Terry.

¶ 27 On cross-examination, Curtis clarified his direct examination testimony. Prior to driving to Markham, the defendant had stated only that he had killed someone and pointed out the victim's Honda in the nursing home parking lot. It was after they returned to Curtis's mother's residence and were drinking beer that the defendant told Curtis the details of the victim's murder. Curtis did not go to the police because at first he did not believe the defendant. When eventually he did believe him, Curtis became nervous around the defendant realizing that the defendant was capable of murdering Curtis's mother or Curtis

himself. Even after Curtis heard the details of the murder, he did not contact the police; the defendant was his "brother," and he was not thinking clearly.

¶ 28 In June 2009, Curtis was contacted by the Tinley Park police and went to the police station. The witness was placed in a room and signed a waiver of his *Miranda* rights. He had a discussion with two detectives and made a statement. Prior to the interview with the police, Curtis discussed what the defendant told him only with Mr. Terry. He did not discuss it with Rontrell or any of his friends.

¶ 29 III. Expert Testimony

¶ 30 A. DNA

¶ 31 1. *State's Expert Witness*

¶ 32 Christopher Webb, a forensic scientist with the Illinois State Police, was accepted by both parties as an expert in the field of forensic DNA analysis. Mr. Webb testified on direct examination as follows.

¶ 33 Mr. Webb was assigned to obtain a DNA profile of the victim in this case. The witness was able to create a DNA profile of the victim using a sample of his blood that was suitable for comparison purposes. He also took a sample of blood from a handle and blade from the knife found near the victim's body. Mr. Webb identified the DNA profile of the victim on the knife blade. From the knife handle, he identified human DNA which he interpreted as a mixture of two individuals.

¶ 34 From the blood stain on the knife handle, Mr. Webb identified a major male DNA profile and a minor DNA profile. The major profile matched the victim's DNA profile. The minor profile was incomplete, meaning that it was less than the 13 locations (loci) plus the gender marker used for analysis. However, an incomplete profile could still be used for comparison

purposes. An individual could be included as a possible DNA contributor if he or she had all of the parts of the partial profile. Lacking a sample to compare to the partial profile, Mr. Webb searched the State's convicted felon DNA data basis known as CODIS (Combined DNA Index System). Of the two candidates from the index, Mr. Webb was able to exclude one because it did not have the same profile as the minor profile. The other candidate could be a contributor. Mr. Webb requested a confirmatory sample from the defendant. The result of the comparison between the minor DNA profile from the knife handle and the defendant's DNA profile was that the defendant could not be excluded as a contributor to the minor DNA profile on the knife handle.

¶ 35 Mr. Webb explained that "approximately 1 in 2.1 million Black, 1 in 10 million Hispanic, or 1 in 40 million White unrelated individuals" could not be excluded as having contributed to the minor DNA profile at 9 loci. Mr. Webb explained further as follows:

"[W]hat the statistics mean is it's a numerical description of how common or rare the evidence profile is. In other words, how common or rare that minor DNA profile I observed from the stain on the knife handle, how common or rare that profile is in three different populations, the Black population, the Hispanic population, and the White population."

* * *

What this is describing [is] the probability of coming up with that DNA minor profile again in a population of Black, in this example, Black unrelated individuals."

¶ 36 Mr. Webb also conducted a DNA analysis on the swab from the driver's interior door pull of the Honda. He identified a mixture of human DNA profiles and interpreted them to be a mixture of two individuals. After identifying a major DNA profile and a partial minor DNA

profile, Mr. Webb could not exclude the victim from the major profile. While the defendant could be excluded from the major profile, he could not be excluded from the partial minor DNA profile. Approximately 1 in 35 Black, 1 in 190 Hispanic or 1 in 220 White unrelated individuals could not be excluded as a DNA contributor at 2 loci. Mr. Webb explained that the partial minor DNA profile was very limited; as a result, the statistics were very common.

¶ 37 Mr. Webb also conducted a DNA analysis on the DNA sample from the steering wheel of the Honda. He identified a mixture of human DNA which he interpreted as a mixture of two individuals. The contributions from the two individuals were too similar to separate out a major and minor DNA profile, but the mixture was still suitable for comparison purposes. Neither the victim nor the defendant could be excluded as having contributed to the DNA mixture. Approximately 1 in 83,000 Black, 1 in 250,000 Hispanic or 1 in 250,000 White unrelated individuals could not be excluded from having contributed to the DNA mixture taken from the steering wheel of the Honda.

¶ 38 Mr. Webb explained the chain of custody of the DNA evidence. His opinions that the defendant could not be excluded as a DNA contributor to the DNA evidence on the knife handle, the driver's interior door pull and the steering wheel in the Honda were within a reasonable degree of scientific certainty.

¶ 39 On cross-examination, Mr. Webb acknowledged that he authored both a July 6, 2010, and an August 26, 2011, report on the swab taken from the blood stain on the knife handle. According to the July 6, 2010, report, he would have expected to find 1 in 35,000 Black unrelated individuals who could not be excluded from contributing DNA to the knife handle. After the issuance of Mr. Webb's July 6, 2010, report, the Illinois State Police forensics lab system changed the way statistical analysis was conducted to allow inconclusive profiles to

be used in the statistical analysis. Revisiting the statistical probabilities was appropriate both for scientific purposes and policy-wise.

¶ 40 Mr. Webb explained that on a DNA strand there are areas referred to as "loci." The loci he looks at are called short tandem repeats or "STR's." "Alleles" are different variations of the sequences at these loci. As the basis for comparison, he used 14 loci – 13 STR's and a gender marker – which was the standard procedure. The comparison showed less than the amount of alleles necessary for a match because it was a partial profile, and some of the information was missing. In such a case, Mr. Webb explained as follows:

"What I needed to do in this case in order to come up with my - - in order to determine this case, could one of the offenders be excluded or both of the offenders be excluded or could both not be excluded, as I took my data, and I lowered the threshold.

And the purpose of that is it gives me more information. We have a threshold in our data in order to set a level at which anything above there we're positive is an allele, we're positive that it's a known - - part of the DNA profile or part of a DNA profile.

When I lower my threshold I can still use that data, but I can only use it for exclusionary purposes only."

¶ 41 Mr. Webb was able to exclude the other candidate from the CODIS list, a female offender, by comparing her DNA profile to the evidence profile. Mr. Webb never found the data from the CODIS list flawed or less than perfect. The defendant could not be excluded from contributing his DNA to the knife handle even though his complete DNA profile did not appear at 3 out of the 13 loci on the knife handle.

¶ 42 With regard to the DNA evidence found in the Honda, Mr. Webb acknowledged that the victim's DNA appeared on the gear selector handle, the driver's seat adjustment handle and the driver's interior door release handle. While the victim could not be excluded from being the source of the DNA on those areas, Mr. Webb agreed that the defendant was excluded. However, even though it was a very limited minor DNA profile, the defendant could not be excluded as the source of the DNA on the driver's interior door pull because his DNA profile matched what information Mr. Webb had on the minor DNA profile. A person would not be included or excluded based on the number of loci present or not present out of the possible 13. The determination is based on the data that is present. Where there was not enough DNA material to amplify the loci, no conclusions could be drawn.

¶ 43 On redirect examination, Mr. Webb explained that for his August 26, 2011, report he used the two-piece statistical calculation or the "two P" rule. The rule was referenced in a 1996 report by the National Research Council and was generally accepted by the scientific community in DNA analysis. The two P rule allowed him to include more information and accounted for the statistical differences between his July 6, 2010 and his August 26, 2011 reports. In his DNA analysis of the knife handle, of the 13 loci, there were 5 complete matches to the defendant and four incomplete matches to the defendant. According to Mr. Webb, the defendant could not be excluded from the minor DNA profile taken from the knife handle, the driver's interior door pull and the steering wheel of the victim's Honda. On re-cross examination, Mr. Webb acknowledged that he could not say that it was the defendant's blood on the knife handle rather than anyone else's blood.

¶ 44

2. Defendant's Expert Witness

¶ 45 Dr. Karl A. Reich, PhD. and M.D., was employed by Independent Forensics of Illinois as a scientist. The doctor was accepted by both parties as an expert in the fields of forensic biology and forensic DNA analysis. Dr. Reich testified on direct examination as follows.

¶ 46 Dr. Reich explained that the general methodology for performing forensic analysis were essentially identical worldwide. As the basis for his opinion in this case, he relied on Mr. Webb's data and conclusions as well as his own experience in the field and other cases he had reviewed.

¶ 47 Within a reasonable degree of scientific and biological certainty, Dr. Reich opined that the defendant could not have been a potential contributor to the DNA found on the knife handle. The doctor explained as follows:

"There are four missing alleles at three genetic systems which are missing. The mismatch of one genetic system is sufficient to exclude a contributor.

There is no almost. It's not hand grenades or horseshoes. A single mismatch at a single STR loci is sufficient to exclude a contributor from a DNA profile, and there are too many missing alleles in order to make an assignment to Mr. Mosley from [the knife handle]."

¶ 48 Dr. Reich found no explanation in Mr. Webb's documentation explaining why he ignored the missing alleles. The doctor's analysis reflected the current state of DNA analysis. He did not stretch or extrapolate the results he was provided with; he simply looked at the results and made the comparisons.

¶ 49 Regarding the DNA analysis of the driver's interior hand pull, Dr. Reich noted that of the 13 loci, there were 6 loci which did not identify the defendant's DNA. Therefore, the defendant could not have been a contributor to the DNA found on the driver's interior door

pull. With regard to the steering wheel, Dr. Reich found no explanation in the documentation for not excluding the defendant as a contributor of the DNA where the comparison between the defendant's DNA profile and the DNA profile from the steering wheel showed a missing allele.

¶ 50 Dr. Reich found the laboratory methods and procedures followed by Mr. Webb well within the norms and the standard for forensic analysis. Dr. Reich explained that when a DNA profile is included in a laboratory report, the accreditation standard required a statistical calculation to provide background on the profile. Mr. Webb completely fulfilled the accreditation standard in his report. However, based on the missing alleles, the doctor did not agree with Mr. Webb's conclusions. Within a reasonable degree of scientific and biological certainty, Dr. Reich opined that the defendant's complete DNA profile could not be identified on the knife handle or the Honda's driver's door interior pull or the steering wheel.

¶ 51 On cross-examination by the defendant, Dr. Reich described an "allelion dropout" as an excuse or explanation for not having a result. An allelion dropout could excuse or explain why the minor donor's profile on the knife handle was incomplete. The doctor agreed that an incomplete profile could be used for comparison purposes.

¶ 52 Dr. Reich relied on all the materials obtained from Mr. Webb in formulating his opinions in this case. Dr. Reich agreed with Mr. Webb's findings that Mr. Terry, Curtis, and Jason Catchings¹ could be excluded as contributors to the DNA evidence found on the knife handle and the Honda's driver's door interior pull and the steering wheel. Dr. Reich maintained that

¹Jason Catchings was Mr. Terry's nephew and worked at the nursing home. He was not called to testify in this case.

the four missing alleles at three genetic systems excluded the defendant as a DNA contributor in this case.

¶ 53

B. Historical Cell Phone Analysis

¶ 54

The State presented Joseph Raschke, a special agent with the Federal Bureau of Investigation (FBI) as an expert in the area of historical cell phone analysis. The trial court conducted a *voir dire* to qualify Agent Raschke as an expert in that field.

¶ 55

Agent Raschke had 250 hours of training in the field of historical cell phone analysis. The training was in the areas of cellular networks operations, radio frequency and cellular communication. The agent had performed historical cell phone analyses for about three years during which time he had analyzed thousands of phone records and had twice testified in Cook County circuit court as an expert witness in cell phone analysis. His analysis methodology was used in a number of situations including locating fugitives, recovering kidnap and other crime victims; he estimated that he had used it at least 150 times. Agent Raschke could not recall an investigation where his analysis failed to achieve results. He taught cell phone analysis to federal agents, FBI agents, prosecutors and local law enforcement officers. The agent did not know if it was a discipline accepted by the scientific community as an area of expertise.

¶ 56

Agent Raschke explained how he performed his analysis. The agent received raw data from the phone companies that included when the call from a particular cell phone was made, what cell phone towers were utilized and a list where those towers are located. The records also indicated which side of the cell tower was activated by the call and in which direction the tower pointed. From the list of towers and their location, Agent Raschke plotted that

information on a map based on the longitude and latitude of the cell tower, using a mapping software program.

¶ 57 Agent Raschke explained that the phone companies did not provide data stating the range of each cell tower; the range of each tower is different depending on the topography and the proximity of other towers. While the cell phone networks are designed to prevent dropped calls, not every tower has the same range. The analysis did not place the cell phone in a particular location; rather, it placed the cell phone within a range provided by a particular tower. Because the cell tower expended the radio frequency to reach the next tower to avoid dropped calls, the range depended on how close the next tower was. While acknowledging that he was giving an estimate of the range of the cell phone tower, the agent's estimate would be the least amount of area the tower would reach. Agent Raschke stated further as follows:

"So, it's to that range. Now, what that range is depends on what the next closest tower is, but I don't granulate this down to the street level or within a block, you know, this is going to be located within a range of several blocks, half a mile, you know; depending on how far away the next tower is."

¶ 58 The defendant objected to Agent Raschke's testimony as an expert on the basis that it was not a field of expertise recognized by the scientific community. After questioning Agent Raschke, the trial court determined that he possessed the type of expertise not normally available or known by a lay person. The court noted that there was no challenge to the accuracy of the phone records on which Agent Raschke relied and that he was twice qualified as an expert witness in this area by the circuit court and utilized his analysis approximately 150 times to locate individuals. Over the defendant's objection, the trial court found Agent

Raschke qualified as an expert in the field of historical cell site analysis. Agent Raschke testified on direct examination as follows.

¶ 59 Agent Raschke performed an historical cell phone site analysis using the defendant's cell phone number and the records provided by the telephone company. At 12:19 a.m. on May 2, 2009, a call from the defendant's cell phone was made. The tower for that call was located at 151th Street and 88th Avenue in Orland Park and covered an area that included 15927 Westway Walk, Tinley Park, the address of the victim's apartment complex, and 15932 Alcott Avenue, Tinley Park, where the defendant's mother lived and which was less than two blocks from the victim's apartment. While it was not the closest tower, it faced in that direction. The next activity on the defendant's cell phone occurred at 10:07 a.m. on May 2, 2009. The tower for that call was cell tower 411 in the Hickory Hills 2 switch and located near the I-94 expressway and 150th Street. The surrounding towns to that cell phone tower were Dolton, South Holland and Burnham. The tower covered 1633 East 154th Street in Dolton, the location of the nursing home. The rest of the activity on the defendant's cell phone on May 2, 2009, was covered by cell tower 411 in the Hickory Hills 2 switch.

¶ 60 On cross-examination, Agent Raschke acknowledged that his analysis did not place individuals in specific locations, only the cell phones. It was his opinion that the Orland Park cell phone tower could reach as far as 15927 Westway Walk; he did not have the engineering measurement data to confirm his opinion. A cell phone call would not necessarily go to the closest cell phone tower; it would go to the one with the strongest signal.

¶ 61 The State and the defendant stipulated that on June 15, 2009, three women who saw a black male inside the foyer of the victim's apartment building on May 1, 2009, viewed a lineup of the defendant and three other black males. The women did not identify any person

in the lineup as the man they saw. The parties further stipulated that the three women were shown photo arrays containing photographs of the defendant and five other black males and made no identification.

¶ 62 The defendant waived his right to testify on his own behalf. The parties presented their closing arguments. The trial court took the case under advisement prior to rendering its decision.

¶ 63 IV Finding and Sentencing

¶ 64 On December 8, 2011, the trial court found the defendant guilty of first degree murder, home invasion, armed robbery and possession of a stolen motor vehicle. The court detailed the trial evidence that led to its findings. The pertinent parts of the trial court's findings of fact and its conclusions from those facts are set forth below.

¶ 65 The trial court first considered the testimony of Mr. Terry, Curtis and Rontrell as to the defendant's admissions that he killed the victim and took his car. Curtis's testimony regarding the defendant's description of the murder of the victim was confirmed by the evidence of the stab wounds to the neck and head of the victim, and that a knife was found near the victim. Mr. Terry identified the knife found near the victim's body as one belonging to a knife set he owned. While many such knives were available, the court found the likelihood of the exact same knife being brought into the victim's apartment would be very rare.

¶ 66 From the testimony of the witnesses, including that of Agent Raschke, the trial court traced a timeline, placing the defendant in the area of the victim's apartment on the evening of May 1, 2009 and the early morning hours of May 2, 2009. The victim was last seen early in the morning of May 2, 2009. The defendant failed to appear at 7 a.m. that morning to

work on a roofing job with Mr. Terry. The defendant eventually appeared between 11 a.m. and 11:30 a.m. the same morning.

¶ 67 The trial court reviewed the DNA evidence presented by both parties. The court noted that Dr. Reich testified that the procedure used by Mr. Webb was proper and that the statistical analyses contained in the July 6, 2010, and August 26, 2011, reports were acceptable within the scientific community. Dr. Reich found no misconduct or malfeasance on the part of Illinois State police in conducting the testing. However, Dr. Reich disagreed with Mr. Webb's conclusions and found that the defendant could be excluded as a contributor to the DNA found on the knife handle, the Honda's driver's interior door pull and the steering wheel. The trial court noted that the State's witnesses testified that the defendant's DNA was found on the knife handle and in the Honda.

¶ 68 The trial court found Mr. Terry, Curtis and Rontrell to be credible witnesses and that they had no motive to lie. The court noted Mr. Terry's statement that he did not come to court to lie about the defendant. The court found no basis in the record for the defendant's attacks on the witnesses' credibility; there was no evidence the witnesses targeted the defendant because they were afraid of being charged with the victim's murder and that the witnesses were given *Miranda* warnings was appropriate based on the limited amount of facts known by the police at the time the witnesses were questioned. There was insufficient time for the witnesses to have communicated with each other to devise a plan to blame the defendant and to make their stories consistent. The court found the witnesses' explanations as to why they did not come forward after they heard the defendant admit to the murder were understandable and reasonable. The court observed that throughout the trial, the defendant gave these witnesses a fixed stare in an effort to intimidate them.

¶ 69

As to the DNA evidence, the trial court found that the expert witnesses disagreed in their conclusions and the use of the allelio dropout theory. Dr. Reich referred to the allelio dropout theory used by Mr. Webb as an excuse for not obtaining results, but he admitted that the allelio dropout theory explained why the minor profile on the knife handle was incomplete and that an incomplete profile could be used for comparison purposes. In arriving at its conclusion that the defendant had committed the offenses in this case, the court explained that it viewed the expert witnesses' conclusions in light of the other evidence and the credibility of the other witnesses. The court then stated as follows:

"When I do that I find that the State's expert, Christopher Webb's testimony more credible and his conclusions more reliable. His testimony was reenforced [*sic*] by the defendant's statements made to his family members reenforced [*sic*] by the distinctive knife that was analyzed and briefed. *** that the defendant's father said came from his home. It's reenforced [*sic*] by the time line. Physical evidence and testimony of all the other witnesses.

These facts coupled with the inconsistencies in Dr. Wright's [*sic*] report lead me to the conclusion that Christopher Webb's conclusions are more reliable. In conclusion, when I take everything together here it is clear to me the State has proven their case beyond a reasonable doubt."

¶ 70

The trial court entered judgment on its findings of guilt as to first degree murder, home invasion, armed robbery and possession of a stolen motor vehicle. The court sentenced the defendant to natural life imprisonment for first degree murder. The court imposed sentences of 30 years' imprisonment for home invasion and 30 years' imprisonment for armed robbery and a 7-year sentence for possession of a stolen motor vehicle. The 30 years' sentences for

home invasion and armed robbery were to be served consecutively to each other and concurrent to the natural life sentence and the 7-year sentence for possession of a stolen motor vehicle. The defendant's motion for reconsideration of his natural life sentence was denied. This appeal followed.

¶ 71

ANALYSIS

¶ 72

I. Ineffective Assistance of Counsel

¶ 73

The defendant contends that the DNA evidence was the most significant factor connecting him to the victim's murder. He argues that defense counsel's failure to convey to the trial court the flaws in the DNA matches testified to by Mr. Webb denied him the effective assistance of counsel.

¶ 74

A. Standard of Review

¶ 75

The parties differ over the standard of review applicable to this issue. The defendant maintains that *de novo* review is the appropriate standard. The State asserts that the *Strickland* test is the standard for review. *Strickland v. Washington*, 466 U.S. 668 (1984). However, the *Strickland* test is not a standard of review. It is a test to determine the validity of the defendant's claim of ineffective assistance of counsel whereas a standard of review identifies the amount of deference the appellate court affords the trial court's decision on the defendant's claim.

¶ 76

"In reviewing claims of ineffective assistance of counsel, we use a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance of counsel claim." *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008). In this case, unless the trial court's findings of fact

pertaining to the defendant's claim are against the manifest weight of the evidence, we will defer to those factual findings in considering *de novo* whether the defendant has stated a claim for ineffective assistance of counsel.

¶ 77

B. Discussion

¶ 78

A defendant has a constitutional right to the effective assistance of counsel. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To determine the validity of a claim of ineffective assistance of counsel, the court applies the two-pronged *Strickland test*: was counsel's performance deficient, and if so, did it result in prejudice to the defendant. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11. "The performance prong is satisfied if 'counsel's performance was objectively unreasonable under prevailing professional norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotations omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010)). Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 79

The defendant relies on *People v. Watson*, 2012 IL App (2d) 091328. In *Watson*, the only evidence linking the defendant to the burglary was the DNA match. Defense counsel conducted limited cross-examination of the State's DNA expert and did not call a DNA expert witness for the defense. The reviewing court found that defense counsel's performance was objectively unreasonable where she refrained from "pursuing, *in any regard*, a challenge to the *significance*, if any, of the alleged seven-loci match presented." (Emphasis in original.) *Watson*, 2012 IL App (2d) 091328 ¶ 31. The court in *Watson* found defense counsel's challenge to the DNA evidence "virtually nonexistent" and therefore could

not be the result of sound trial strategy. *Watson*, 2012 IL App (2d) 091328 ¶ 32. Because the DNA evidence was the "only" evidence against the defendant, there was a reasonable probability that if counsel had raised an argument as to the potential weakness of that evidence, reasonable doubt as to the defendant's guilt might have been raised. *Watson*, 2012 IL App (2d) 091328 ¶ 33.

¶ 80 *Watson* is clearly distinguishable from the present case. Unlike *Watson*, defense counsel extensively cross-examined Mr. Webb and presented an expert witness who testified that the defendant should be excluded as a DNA contributor and explained why he should be excluded. Defense counsel's questioning of Mr. Webb and his own witness, Dr. Reich, demonstrated his understanding of the DNA evidence. The trial court's acceptance of the testimony of the State's DNA expert over that of the defendant's DNA expert was not based on any failure on the part of defense counsel to challenge the DNA evidence, but because it found Mr. Webb's conclusion that the defendant could not be excluded as a DNA contributor more credible in light of the other evidence presented at trial. Therefore, defense counsel's performance in challenging the DNA evidence was not objectively unreasonable.

¶ 81 Assuming, *arguendo*, that the defendant satisfied the first prong of the *Strickland* test, his claim fails the prejudice test. Contrary to the defendant's contention regarding its significance, had the DNA evidence excluded the defendant from being a contributor to the DNA found on the knife handle and in the Honda, based the evidence at trial, we cannot conclude that there was a reasonable probability that, but for defense counsel's errors, the result of the defendant's trial would have been different. *Strickland*, 466 U.S. at 694.

¶ 82 In the present case, there was a significant amount of evidence, other than the DNA evidence, that linked the defendant to the murder of the victim. The defendant's convictions

were based on the testimony of his family, to whom he confessed committing the murder of the victim. Curtis testified that the defendant described how he had watched the victim over a period of time, forced him into his apartment where he stabbed him, and then watched the victim until he was dead. The defendant's description of the circumstances of the murder was confirmed by the presence of a knife by the victim's body, the fact that the victim died from blood loss and that the knife found by the victim's body was from a set owned by Mr. Terry, the defendant's father, and kept at the Harper Avenue residence where the defendant had been living. In addition, Curtis and Rontrell testified to the defendant's search for keys across from the nursing home where the victim's blue Honda Fit was parked and that the defendant pointed out the Honda as the victim's car he had taken after the murder. The defendant's statement about the Honda was confirmed by the fact that the Honda was identified as the victim's car.

¶ 83 In finding the defendant guilty of the charges in this case, the trial court emphasized the testimony of the defendant's family members, finding the witnesses' to be credible and their testimony supported by the physical evidence. Unlike *Watson*, where the only evidence against the defendant was the DNA evidence, the DNA evidence was not of particular significance to the finding of guilt in this case. See *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 34 (evidence that the defendant could not be excluded from the DNA profile could not have overpersuaded the jury in light of its clear and limited import).

¶ 84 We note that the trial in this case was a bench trial whereas in *Watson*, the jury was the trier of fact. As the court in *Watson* noted, "DNA evidence is often assumed to have a special aura of certainty and mystic infallibility ***." *Watson*, 2011 IL App (2d) 091328, ¶33 (quoting Joel D. Liberman *et al.*, *Gold Versus Platinum: Do Jurors Recognize the*

Superiority of DNA Evidence Compared to Other Types of Forensic Evidence?, 14 Psychol. Pub. Pol'y & L. 27, 52 (2008)). Unlike a jury, the experienced trial court in this case would not be prone to treat the DNA evidence as uncontestable evidence of guilt.

¶ 85 In light of the amount of other evidence, both testimonial and physical, of the defendant's guilt, the DNA evidence did not contribute in any significant way to the trial court's finding of guilt in this case. The defendant failed to establish the prejudice prong of the *Strickland* test that, but for counsel's alleged unprofessional performance, there was a reasonable probability that the result would have been different.

¶ 86 The defendant failed to satisfy the *Strickland* test. Therefore, he failed to establish that he was denied the effective assistance of counsel.

¶ 87 II. Historical Cell Phone Analysis Testimony

¶ 88 The defendant contends that the trial court erred when it admitted Agent Raschke's expert opinion on cell phone analysis. The defendant contends that the admission of Agent Raschke's expert testimony was error in that there was no foundation for the agent's testimony, and there was no scientific basis for the granulation theory used by the agent in determining where the defendant's cell phone was located.

¶ 89 The defendant concedes that he did not raise the error in his motion for a new trial and therefore, he did not preserve it for appeal. He requests that we consider it under the plain error doctrine (Ill. S. Ct. R. 615(a) (eff. August 27, 1999)). In conducting a plain-error analysis, the court first determines if error occurred. *People v. Span*, 2011 IL App (1st) 083037, ¶ 73.

¶ 90 To be admissible, expert testimony must have an adequate foundation establishing that the information the expert is using for his opinion is reliable. *People v. Negron*, 2012 IL App

(1st) 101194, ¶ 34. Whether the foundational requirements have been met is a question of law that we review *de novo*. *Negron*, 2012 IL App (1st) 101194, ¶ 34.

¶ 91 The defendant relies on this court's opinion in *People v. Safford*, 392 Ill. App. 3d 212 (2009). In *Safford*, the expert witness testified as to the general process he used in fingerprint identification; he conducted a latent print examination of the defendant's fingerprint sample and the fingerprints on a piece of evidence. Based on his 24 years' experience and training, the witness concluded that the fingerprints could only be those of the defendant. On cross-examination, the expert witness acknowledged that he did not document in his notes the points of comparison and that his notes did not explain how he reached his opinion. *Safford*, 392 Ill. App. 3d at 220.

¶ 92 On appeal, a majority of this court held the admission of the expert witness's opinion was reversible error. This court observed that fingerprint evidence was extremely persuasive and might sway a jury even where a strong alibi defense was presented. *Safford*, 392 Ill. App. 3d at 225. Where the expert witness did not testify to the specific scientific process the witness utilized to reach his conclusion, reliance on his training and expertise was insufficient as the basis for his expert opinion. "It is only after the expert is called to answer 'how' he reached his conclusion that the fact finder can properly weigh the scientific evidence in the context of the other evidence presented at trial to determine whether guilt is shown beyond a reasonable doubt." *Safford*, 392 Ill. App. 3d at 226. In his dissent, Justice Wolfson found no authority for barring an expert's testimony based on the lack of detail in his opinion. He concluded it was a matter for the jury to decide. See *Safford*, 392 Ill. App. 3d at 231-32 (Wolfson, J. dissenting).

¶ 93 Nonetheless, the majority opinion in *Safford* recognized that foundational objections go to the weight of the evidence not its admissibility. *Safford*, 392 Ill. App. 3d at 225 (in fingerprint identification the lack of points of similarity may go to the weight of the evidence rather than its admissibility). Where the majority disagreed with the dissent was, "as the paucity approaches zero, our concern is no longer with weight but with admissibility." *Safford*, 392 Ill. App. 3d at 225. Unlike the expert witness in *Safford*, Agent Raschke's testimony did provide a foundation for his opinion. In his analysis, Agent Raschke relied on information from the phone companies from which he created a map displaying the location of the cell tower used by the call and the direction of the cell tower's coverage. Based on the direction the cell tower was facing, he estimated the range of that tower and concluded that the relevant addresses were covered by the range of the cell phone towers that the defendant's cell phone utilized in making the two calls on May 2, 2009.

¶ 94 Agent Raschke acknowledged that he did not have engineering measurement data to support his opinion. He also acknowledged that he could not state the exact range of the tower. However, any insufficiencies go to the weight and credibility of the evidence not its admissibility. See *Negron*, 2012 IL App (1st) 101194, ¶ 41 (citing the dissent in *Safford*). There was sufficient testimony as to "how" Agent Raschke arrived at his opinion as to the location of the defendant's cell phone. In contrast to *Safford*, defense counsel conducted a detailed cross-examination of the agent, challenging both his opinion and the methodology he used in his analysis.

¶ 95 The defendant points out that in *United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012), the district court determined that Agent Raschke did not qualify as an expert witness in the field of historic cell phone analysis, finding that the agent's testimony failed to

establish the reliability of the granulation theory he used and that the theory was untested by the scientific community. *Evans*, 892 F. Supp. 2d at 955-56. However, Illinois courts are not bound by the decisions of lower federal courts. *American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 605-06 (2009).

¶ 96 We note that the parties addressed at length the reliability of the theory utilized by Agent Raschke and whether the trial court should have ordered a *Frye* hearing. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (a hearing to determine if the expert's methodology was sufficiently established and generally accepted in the scientific community). A discussion of the reliability of the agent's theory or the necessity of a *Frye* hearing is unnecessary in this case because even if the admission of Agent Raschke's expert testimony was error without a *Frye* hearing, absent reversible error, there can be no plain error. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). Under the plain-error doctrine, we may excuse a procedural fault and consider unpreserved errors where:

"(1) the evidence was so closely balanced so as to preclude argument that an innocent person was wrongfully convicted; or (2) the alleged error affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Naylor*, 229 Ill. 2d at 602-03.

¶ 97 The defendant argues that both prongs of the plain-error doctrine are satisfied in this case. He maintains that the evidence was closely balanced and that the error was serious. Under either prong of the plain-error doctrine, the burden of persuasion remains with the defendant. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 98 The evidence in this case was not closely balanced. The defendant's family members testified that the defendant admitted committing the murder of the victim. The defendant

provided the details of how he had watched the victim for a period of time, forced the victim into his apartment, stabbed him and watched him die. The witnesses also testified that the defendant told them he needed to locate the keys to re-enter the victim's apartment to retrieve the knife he had dropped. The witnesses' testimony was corroborated by the physical evidence: the murder weapon was found by the victim's body and the car the defendant pointed out to the witnesses in the nursing home parking lot was the victim's blue Honda Fit.

¶ 99 The trial court's summary of the evidence against the defendant did refer to Agent Raschke's expert testimony. However, it is clear from the trial court's summary that Agent Raschke's testimony did not play a significant role in the finding of guilt. The trial court noted that Agent Raschke's testimony provided corroboration for the witnesses' testimony. See *Mitchell*, 2011 IL App (1st) 083143, ¶ 28 (distinguishing *Safford* on the ground that in the case before it the fingerprint evidence did not provide direct evidence of the defendant's guilt). There is no evidentiary basis for an argument that the defendant was wrongfully convicted of the victim's murder. Therefore, the defendant has not carried his burden of persuasion under the first prong of plain-error analysis.

¶ 100 The defendant maintains that an error does not have to be "structural" to satisfy the second prong of the plain error analysis. We disagree. An error under the second prong of the plain error analysis "has been equated with structural error." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. "Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction." *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. In Illinois, the structural error list includes the infringement of the right to a

jury trial by the denial of a defendant's request for special verdict forms where the answers to those forms could affect the defendant's sentence. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 44 (citing *People v. Smith*, 233 Ill. 2d 1, 27-28 (2009)). Structural error undermines the fairness of a defendant's trial and requires automatic reversal, regardless of forfeiture or the lack of prejudice. *Brewer*, 2013 IL App (1st) 072821, ¶ 44

¶ 101 The defendant's claim of error is not a structural error requiring automatic reversal. The defendant's reliance on *People v. Shelton*, 303 Ill. App. 3d 915 (1999), is misplaced. That case did not involve a plain-error analysis. The lack of foundation for the police officer's opinion testimony did not automatically render the defendant's trial unfair. Rather, the lack of foundation for the officer's opinion testimony that the defendant was under the influence of drugs, *i.e.* the officer had limited training in the effects of drugs on people, there was no evidence as to the effects of any drugs, and the jury could be expected to give the officer's opinion undue weight, required a new trial "in light of the paucity of other evidence" against the defendant. *Shelton*, 303 Ill. App. 3d at 927.

¶ 102 We find *People v. McNeal*, 405 Ill. App. 3d 647 (2010), instructive on this issue. In *McNeal*, the defendant failed to preserve his claim that the trial court's admission of the testimony of the fingerprint expert was error for lack of foundation and requested that this court review his claim for plain error. *McNeal*, 405 Ill. App. 3d at 669. After finding the evidence was not closely balanced, this court turned to the second prong of plain-error analysis, stating as follows:

"As to the second prong, defendant contends that the admission of the fingerprint evidence was so serious as to have affected the fairness of his trial because he was unable to challenge [the expert witness's] testimony. The State responds that any

error was rendered meaningless as [the victim's] testimony and notably, defendant's confession to Detective Nieman placed him in the apartment. We agree. Any error in this case was harmless as the defendant admitted to being inside [the victim's] apartment. The admission of the fingerprint evidence did not impact the fairness of the defendant's trial and we reject defendant's claim of plain error." *McNeal*, 405 Ill. App. 3d at 673.

¶ 103 We conclude that the defendant has failed to carry his burden as to the second prong of plain-error analysis. The admission of Agent Raschke's expert testimony was not a structural error, and in light of the amount of other evidence, excluding as well the DNA evidence, the defendant suffered no prejudice from the admission of the agent's testimony. There is no basis to find that the exclusion of Agent Raschke's testimony would have changed the outcome of the trial.

¶ 104 In the absence of plain error, the defendant's claim of error as to the admission of Agent Raschke's expert testimony is forfeited.

¶ 105 III. Possession of a Stolen Motor Vehicle

¶ 106 The defendant contends that the trial court erred in entering a judgment of conviction and sentence for possession of a stolen motor vehicle where that charge had been dismissed prior to trial. The State acknowledges the error.

¶ 107 We order the defendant's conviction and seven-year sentence for possession of a stolen motor vehicle vacated and the mittimus corrected. Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999).

¶ 108 For the foregoing reasons, we vacate the defendant's conviction and sentence for possession of a stolen motor vehicle. We affirm the defendant's remaining convictions and sentences, and the mittimus is corrected as ordered.

No. 1-12-0074

¶ 109 Vacated in part, affirmed in part; mittimus corrected.