FIRST DIVISION
February 6, 2012

No. 1-10-2084

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	97 CR 15260
	)	
GARY WHITMORE,	)	Honorable
	)	Charles Burns,
Defendant-Appellant.	)	Judge Presiding.

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

Held: The circuit court did not err in denying defendant Gary Whitmore's amended *pro se* motion for postconviction DNA (deoxyribonucleic acid) testing of a black ski mask recovered at the crime scene.

ORDER

¶ 1 Defendant Gary Whitmore appeals from a circuit court order denying his amended *pro se* motion for postconviction DNA testing of a black ski mask recovered at the crime scene. On

April 12, 2010, Whitmore moved for postconviction DNA testing of the ski mask pursuant to the amended version of section 116–3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2007)), as amended by Public Act 95-688 (Pub. Act 95-688, eff. October 23, 2007). The amended version of section 116-3 allows a defendant to subject physical evidence to scientific testing where the evidence sought to be tested was not previously tested or where it was previously tested but may now be tested using a method unavailable at the time of trial. 725 ILCS 5/116-3(a) (West 2007); *People v. Boatman*, 386 Ill. App. 3d 469, 472 (2008).

¶ 2 To obtain such testing, a defendant must present a *prima facie* case that identity was at issue in his trial and that the evidence sought to be tested has been under a secure chain of custody. *People v. Savory*, 197 Ill. 2d 203, 208 (2001). "Testing is permitted if, among other requirements, the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." *Savory,* 197 Ill.2d at 208. A *de novo* standard of review is applied to a trial court's ruling on a motion for postconviction DNA testing under section 116-3. *People v. O'Connell*, 227 Ill. 2d 31, 35 (2007).

¶ 3 Whitmore maintains that DNA testing of the ski mask is relevant to advancing his claim that he was not present at the crime scene. He argues that his goal is to prove misidentification or false identification by showing that he is not the source of biological material inevitably left on the ski mask by its wearer.

¶ 4 Under the factual circumstances in this case we do not believe that an absence of Whitmore's DNA on the recovered ski mask would advance his claim that he was not present at the crime scene. The evidence presented at trial established that two people, both wearing ski

masks, committed the crimes.

¶ 5 It is quite possible that the recovered ski mask belonged to the codefendant. Therefore, the possibility that Whitmore's DNA may be absent from the ski mask does not advance his claim that he was not present at the crime scene.

¶ 6 Moreover, the State presented testimony from two witnesses identifying Whitmore as one of the perpetrators. Mark D. Harden, one of the attempted-murder victims testified that he and Whitmore were members of the same street gang and that he had known Whitmore practically all of his life since they both grew up together in the same housing project. Harden testified that he would see Whitmore at least two or three times a day because they both sold drugs in the same area. Harden claimed that when Whitmore and codefendant barged into the apartment wearing ski masks with their guns drawn, he thought they were "playing." Harden recognized both men by their voices and clothing.

¶ 7 It is not necessary that a witness identify an accused by his facial features. *People v. Hicks*, 134 Ill. App. 3d 1031, 1038 (1985). The identity of a defendant may be established by proof of his voice or clothing. *Hicks*, 134 Ill. App. 3d at 1038; *People v. Bonds*, 87 Ill. App. 3d 805, 810 (1980) (voice); *People v. Ward*, 66 Ill. App. 3d 690, 693 (1978) (clothing).

¶ 8 Lee O. Gilliams, the father of one of the attempted-murder victims testified that approximately four hours before the crimes were committed, he saw Whitmore and codefendant in a parking lot adjacent to the home where the crimes occurred. He had known Whitmore and codefendant since they were young boys. Whitmore was wearing a rolled-up ski mask and the codefendant was wearing a ski mask covering the lower portion of his face.

¶ 9 Gilliams lived next door to the home Whitmore and codefendant broke into, and his property shared a common wall with the home. When he heard banging noises coming from next door he went to investigate. As Gilliams walked up to the front door of the home, he saw Whitmore and the codefendant standing behind a screen door just inside the doorway. Neither man was wearing a ski mask. When Gilliams approached to within five feet of the front door he saw Whitmore pointing a handgun at him through the screen door. As Gilliams turned to run he was shot in the left leg. He called out the names of Whitmore and codefendant and they ran toward the expressway. Gilliams eventually picked Whitmore's photograph out of a photo-array.

¶ 10 Under these circumstances, even if the recovered ski mask tested negative for the presence of Whitmore's DNA, this would not advance his claim that he was not present at the crime scene, "but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Savory*, 197 Ill.2d at 215.

¶ 11 Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

¶ 12 Affirmed.