No. 1-11-1489

2014 IL App (1st) 111489-U

FIFTH DIVISION
November 20, 2014

No. 1-11-1489

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, Illinois.
	)	
	)	
v.	)	No. 05 CR 16723
	)	
JERRY BOSTON,	)	Honorable
	)	Arthur F. Hill,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in admitting defendant's palm prints, which were obtained while he was already incarcerated and had a diminished expectation of privacy, and the scientific methodology to analyze those prints does not require a Frye hearing before the prints may be admitted through an expert. Further, sufficient foundation was laid for the expert testimony on defendant's palm print evidence, as well as for the surface where it was found, where the expert described the method and how it was applied, and the wallboard had readily identifiable

characteristics. Lastly, defendant's confrontation rights were not violated when a laboratory director testified about his DNA report that was generated by non-testifying technicians.

¶ 2 Defendant Jerry Boston appeals from a judgment of the circuit court of Cook County finding him guilty of first degree murder and sentencing him to a prison term of natural life. He contends that the trial court improperly admitted palm print evidence because, according to defendant, the State lacked individualized suspicion, the State's Attorney usurped the power of the grand jury to obtain the evidence, and there was no scientific basis for identification based on his palm prints. Defendant further contends that the palm print recovered from the crime scene should have been suppressed because the State failed to lay an adequate foundation, and where the expert who testified that defendant's prints matched the one from the scene, he relied on the out-of-court verification of a non-testifying expert. In addition, defendant contends that his right to confront the witnesses against him was violated when the court admitted the testimony of a forensic DNA analyst who did not personally perform the test about which he testified, and that he was denied his right to a fair trial when the State was allowed to bolster the credibility of its witnesses during closing argument.

¶ 3 BACKGROUND

¶ 4 The record shows that on July 15, 2005, defendant was charged with the August 25, 1997 murder of his former girlfriend Tonya Pipes by stabbing and beating her. It is undisputed that Pipes was found dead in her apartment with the upper portion of her body submerged in a bathtub filled with blood, above which there was a wall with a palm print left in Pipes' blood. At the time of his indictment, defendant was serving a natural life sentence on an unrelated crime.

¶ 5 Prior to the indictment, Assistant State's Attorney LuAnn Snow appeared before the grand jury and sought a subpoena for defendant's palm prints, stating:

> "I am asking for approval of a John Doe first degree murder subpoena under Grand Jury Number April 195. What we are asking for is the Illinois Department of Corrections, through one of the fingerprint technicians, take palm prints and fingerprints of Jerry Boston, who is currently incarcerated at the Illinois Department of Corrections on a life sentence. He was the ex-boyfriend of a woman who was killed back in 1997, and the police have received information that he may be involved in the killing. There is an unidentified palm print on the wall next to where the victim was found, so they want to get his palm prints. Palm prints are different from fingerprints. Everyone arrested gets fingerprinted, but not necessarily palm printed."

¶ 6 Based on that information, the grand jury issued a subpoena directed at the Illinois Department of Corrections facility where defendant was incarcerated, instructing that a complete set of palm prints and fingerprints be taken from him. The subpoena stated that compliance may be made by tendering those items to ASA Snow, or the Cook County investigator serving the subpoena as an agent of the grand jury. It appears that Sargent William Whalen and Detective Luis Munoz obtained the palm prints from defendant and delivered them to the Illinois State Police Forensic Science Center. On July 12, 2005, the State appeared again before the grand jury, and upon introducing testimony from Sargent Whalen that defendant's palm prints matched the one found at the crime scene and that his DNA matched seminal fluid found in Pipes' vagina, the State sought a bill of indictment, which was granted.

¶ 7 Prior to trial, defendant moved to quash the subpoena and suppress the palm print evidence, arguing that the State improperly used a grand jury subpoena in lieu of seeking a search warrant, and that it violated grand jury procedures by failing to return the fingerprint card to the grand jury. The trial court denied the motion, stating that "[i]t [was its] view that information is sufficient and particularized enough not to allow [it] to lawfully quash the subpoena in this case." With respect to the State's failure to return the fingerprint card to the grand jury, the court acknowledged that when the State appeared before the grand jury for the second time seeking an indictment, that did not amount to a return for the subpoena. However, the court found that suppression of the palm print evidence would not be the proper remedy under the circumstances of this case.

¶ 8 Furthermore, defendant requested a *Frye* hearing on the palm print evidence, and alternatively, a hearing on whether the identification techniques used on the palm prints met the generally accepted standards of print identification. Those motions were also denied.

¶ 9 At trial, Pipes' mother Mildred Pipes testified to finding her daughter dead when she returned home from work on August 25, 1997. Mildred explained that Pipes had previously struggled with drugs and had been beaten up by drug dealers a year before her death. Detective Ann Chambers, who responded to the crime scene, testified that when she saw Pipes, her head, upper body and left hand were submerged in the water, which was dark with blood. There was a beer bottle and two knives floating in the water. According to the detective, there were bloody prints on the wall above the bathtub, so a wall board was cut out. Larry Simms, the former pathologist who performed Pipes' autopsy, testified that she had multiple stab wounds, and

ultimately died from cranial injuries due to blunt head trauma. Simms took oral, rectal and vaginal swabs from Pipes.

¶ 10 Detctive Munoz, who served defendant with the subpoena for his palm prints, testified that he was present when defendant's prints were taken, and that he then took them to the Illinois Crime Lab. The detective also testified that he had been present at the crime scene when the wall board with the palm print was taken out, but acknowledged that he did not see it leave the scene.

¶ 11 With respect to defendant's DNA, Detective Munoz stated that after serving defendant with the subpoena for his palm prints, the detective asked him if he would voluntarily give his DNA, and defendant responded by asking if they wanted his DNA because semen was found in Pipes. According to detective Munoz, defendant had not been told at that point that any semen had been found. After the detective secured a warrant for defendant's DNA, he returned to the facility where defendant was incarcerated to execute the warrant, and delivered the buccal swabs to the crime laboratory. Detective Munoz saw defendant again on June 7, 2005, at which time defendant acknowledged that he had sex with Pipes in the past. When the officer informed defendant that the palm print on the wall of Pipes' bathroom was identified as belonging to defendant, he responded that it was impossible because he was never there.

¶ 12 The State also called Randy Cook, who was defendant's cellmate from June to July 2008, and testified that defendant confided in him about his actions in the murder of Pipes. According to Cook, defendant told him that he and Pipes had an argument about defendant's drugs, at which point he began hitting her and then stabbed her, and subsequently leaned her over in the bathtub. Defendant further told Cook that he cleaned his fingerprints off the telephone he used after killing Pipes, but forgot about the beer bottle in the bathtub.

Additionally, defendant explained to Cook that he did not remember how he got out of the bathtub, but that a print was left in blood. According to Cook, defendant told him that police had taken his fingerprints, and asked Cook if it is possible to get a print from blood. Cook stated that defendant then used clear tape to lift his own palm print off a toilet, then said "yeah, I think they got me."

¶ 13 Anastasis Petruncio, a forensic scientist from the Illinois State Police Forensic Science Center of Chicago, testified to the palm print comparison conducted between the palm print recovered from the crime scene and the impression taken from defendant. While she did not receive the actual wall board, she received the negative marked as taken of the wall board above the bathtub, from which she made a photograph. Petruncio explained the nature of the surface of human fingers and palms, which contain ridges and furrow, and contain points of identification that are unique to individuals. She further described the scientific methodology, known as the ACE-V method, used for fingerprint and palm print identification, which stands for analysis, comparison, evaluation and verification. With respect to the verification step, Petruncio explained that "once [she] made [her] identification [she gives] it to another analyst who will then redo that ACE-V analysis, and then come to the same conclusion [she] did and verify it."

¶ 14 According to Petruncio, she analyzed the palm print on a card marked "Jerry Boston" and concluded that it was made by the same person who made the impression on the wall board. In explaining how she reached that conclusion, Petruncio displayed to the jury the prints she examined, and pointed out some areas of similarities. She noted that an area had six points of comparison, two others where there were three, and another that had two, but explained that in making a comparison, she looked at everything and looked for any discrepancies and distortions.

After examining the entire print and comparing it to seven print cards bearing defendant's name, Petruncio concluded that he was the only person who could have made the palm print. On cross-examination, Petruncio acknowledged that she could not tell how many points of comparison she found between the prints because she did not document the levels of detail that she found. In response to defense counsel's question as to whether her laboratory manual requires her to take notes, she stated, inter alia, that "this case was one hundred percent peer reviewed and verified." Defense counsel asked Petruncio whether she was aware of studies on the frequency of certain details, FBI training standards, and a report from the National Academy of Sciences, as well as other studies about false positives, which did not change her conclusion.

¶ 15 While the court gave the jury a break during Petruncio's cross-examination, defense counsel argued that Petruncio had improperly testified that her work was verified by another analyst, and moved for a mistrial or, at least, "to instruct the witness not to say that ever again." The court stated that Petruncio could testify to the verification process that she went through, but would ask her not to "harp on the concept of verification anymore."

¶ 16 Crystal Watson, another forensic scientist at the Illinois State Police Forensic Science Lab, tested the oral, rectal and vaginal swabs taken from Pipes. While the oral and rectal swabs tested negative for semen, the vaginal swab tested positive, and was then submitted for DNA testing at a private laboratory named Orchid Cellmark. Dr. Rick Staub, the laboratory director at Orchid Cellmark, testified that a DNA analysis was conducted on those swabs, which yielded a female portion and a male portion, as well as a DNA profile for each. The female portion matched the DNA profile from the blood standard from Pipes, and while the technicians were able to obtain a full DNA profile of the male portion of the DNA, they did not receive any

standard for comparison. A report of the result was produced, and the evidence was then re-sealed and returned to the Illinois State Police Laboratory.

¶ 17 Kelly Krajmik, who was also a forensic for the Illinois State Police, testified that she received two pieces of wall paneling, one of which was marked as a board from Pipes' bathroom, as well as a buccal swab from defendant. She stated that the red-brown stain on the wall board tested positive for blood, and that she generated a DNA profile from that blood. Krajmik compared that profile to the one generated by Orchid Cellmark for Pipes, and concluded that it was fair to say that the blood on the wall came from Pipes. Krajmik also generated a DNA profile from defendant's buccal swab and compared to the DNA that Orchid Cellmark generated from the semen found in Pipes. She attested that defendant's DNA matched the profile from Pipes' vaginal swab in all 13 locations and, therefore, opined that the semen found in Pipes was consistent with having originated from defendant.

¶ 18 In showing that defendant was at Pipes' home at the time of the homicide, the State also called Linda Thomas, a record keeper for AT&T, who testified that on the night in question, there was a 15-minute phone call placed from Pipes' home phone number at 2:25 am to a number that was established to be the home of Dwayne Booker. Steven Conwell, who was serving time for attempted murder and had his charge reduced in exchange for his testimony, stated that he knew both defendant and Booker, and it was defendant who introduced them.

¶ 19 After the State's case-in-chief, defendant moved for a directed verdict, which was denied. Defendant declined to testify. At closing arguments, defense counsel attacked the conclusion from the fingerprint expert, stating that the methodology used was "model-T science in a space shuttle world." He further pointed out that Conwell testified because he made a deal with the

State and claimed that Cook had fabricated his testimony against defendant. The prosecutor remarked that Petruncio's testimony was not refuted by any expert, and stated that while "the burden [of proof] remains on the State," "if [the defense has] a witness that can attack the State's evidence, they have every right to call them." He further noted that Petruncio followed the ACE-V method, which called her to analyze the print, compare and evaluate it, and the result had to be verifiable. The prosecutor then stated that "[a]ny other expert in the world could have come in and verified her findings," and "[there] are many experts out there available." In addition, he noted to the jury that defense counsel asked Petruncio several questions, but he was not an expert, so "no matter what articles or topics [the defense] believes that Ms Petruncio should be aware of, she was the expert." With respect to the testimony from detectives Munoz and Whalen, the prosecutor stated that "[t]hey happen to be two of the finest police officers *** that the city has ever seen." Regarding to Conwell, the prosecutor told the jury that if he had a propensity to lie, he would have said that defendant confessed, rather than testified about something as simple as the fact that defendant introduced him to Booker. The State then asserted, regarding Cook, that he "could not have known any of the things that he told Detective Munoz and that he told [the jury], there was nothing in the papers about that."

¶ 20 After closing arguments, the jury found defendant guilty of first degree murder. After a hearing on aggravation and mitigation, defendant was sentenced to natural life in prison. His motion to reconsider the sentence was denied.

¶ 21 ANALYSIS

¶ 22 On appeal from that judgment, defendant now contends that his conviction should be reversed and this cause remanded for a new trial because the trial court erred in denying his

motion to suppress the palm print evidence. Defendant maintains that there was insufficient individualized suspicion to support the subpoena issued by the grand jury, that the State improperly used the grand jury subpoena to further its own investigation, and that the State violated grand jury procedure by failing to make the subpoena returnable to the grand jury.

¶ 23 We first note that in determining whether the trial court properly ruled on a motion to suppress, the factual findings of fact and credibility assessments made by the trial court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). However, we review *de novo* the ultimate question posed by the legal challenge to the trial court's ruling on the suppression motion. *Id*.

¶ 24 The grand jury in Illinois has broad investigative powers. See, *e.g.*, *People v. I.W.I.*, 176 Ill. App. 3d 951, 956 (1988). Section 112-4 of the Illinois Code of Criminal Procedure provides:

> "The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney." 725 ILCS 5/112-4(b) (West 2005).

In fact, it is well established that the grand jury's power to subpoena any person under investigation also gives it the right to demand any subpoenaed individuals to provide evidence within the limitations imposed by constitutional guarantees of individual rights. *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 389 (1992). Thus, the reasonableness of any such intrusion is determined by balancing the need for the intrusion against the protected interest of the private citizen. *Id*. at 392. As our supreme court has explained, a grand jury subpoena for

physical evidence of an invasive nature must be supported by probable cause. *People v. Watson*, 214 Ill. 2d 271, 383 (2005); *In re May*, 152 Ill. 2d at 393-96. In contrast, a subpoena for non-invasive physical evidence, such as fingerprints or palm prints, does not require such a showing, and needs to be supported only by "some showing of individualized suspicion as well as relevance." *People v. Watson*, 214 Ill. 2d 271, 383 (2005); *In re May*, 152 Ill. 2d at 393-96.

¶ 25 Defendant in this case does not dispute that the State was not required to show probable cause to obtain his palm prints, but argues that the subpoena for those palm prints were not even supported by the requisite individualized suspicion, since the only connection between defendant and the crime under investigation was his relationship to the victim. However, courts of this state have repeatedly found that convicted persons lose some rights to personal privacy that would otherwise be protected under the fourth amendment. *People v. Ramos*, 353 Ill. App. 3d 133, 146 (2004) (citing *People v. Garvin*, 349 Ill. App. 3d 845, 855 (2004)). In fact, in addressing the constitutionality of a statute requiring DNA samples from convicted felons, this court found that "upon conviction of a felony, a defendant loses any realistic expectation of privacy in identifying information, such as DNA extraction, even if that information is used only for law enforcement and deterrent purposes ***" *Id*. at 147. Although a similar decision in *People v. Peppers*, 352 Ill. App. 3d 1002, 1007 (2004) noted, in dictum, that the intrusion into a felon's privacy when taking a DNA extraction is not done in the process of investigating a "particular crime," our supreme court has held, in the context of conducting searches of parolees without reasonable suspicion, that such a search during the course of an investigation does not violate that person's rights under the fourth amendment due to their "severely limited

expectations of privacy by virtue of their status alone." *People v. Wilson*, 228 Ill. 2d 35, 44 (2008).

¶ 26 Defendant in this case was not only a convicted felon at the time that his palm prints were taken, but his was incarcerated at that time, and his expectation of privacy in his identifying information was, therefore, severely limited due to that status. Furthermore, although our supreme court has not specified the quantum of proof necessary to satisfy the threshold level of individualized suspicion, a brief statement of the nature of the investigation will suffice to satisfy that requirement. *In re May*,152 Ill. 2d at 393. *In re May*, 152 Ill. 2d 381, and *In re Paul Rende*, 262 Ill. App. 3d 464 (1993). ASA Snow testified to the grand jury that defendant was the ex-boyfriend of the woman whose murder was under investigation, and that police had information that he may be involved in the killing. ASA Snow further explained that there was a palm print on the wall next to where the victim was found, which is why the State was asking for palm prints. Thus, considering defendant's limited expectation of privacy, together with the information presented in support of the subpoena, we conclude that it did not violate his rights under the fourth amendment.

¶ 27 Defendant's reliance on In *In re May*, 152 Ill. 2d 381, and *Rende*, 262 Ill. App. 3d 464, for the proposition that the subpoena for his palm prints violated his fourth amendment rights is misplaced. Defendants in both cases had not been charged with, or ever been convicted of any crime, and were not imprisoned at the time the State issued subpoenas for fingerprints, palm prints and line up appearances. See *In re May*, 152 Ill. 2d at 393-94; *Rende*, 262 Ill. App. 3d at 469-70. Furthermore, the subpoena in *In re May*, 152 Ill. 2d at 393-94 was based solely on testimony that there was a relationship between the defendants, as well as a relationship between

one of the defendants and the victim, without even describing the nature of that relationship. In *Rende*, 262 Ill. App. 3d at 469-70, the subpoena was supported only by testimony that defendant "may be a subject" of the investigation in question. In contrast, defendant in this case did not enjoy the same level of privacy as defendants in *In re May* and *Rende*, due to his status as prisoner and convicted felon, and the State testified not only that the police had information on his possible involvement in the killing, but also that he was the victim's ex-boyfriend.

¶ 28 Defendant, however, also challenges the process by which the subpoena was issued by claiming that the police and the State abused the subpoena power of the grand jury to further their investigation. According to defendant, the grand jury was not investigating the victim's murder when it issued the subpoena, and its power was improperly used to further the investigation conducted by police and the State. Defendant further maintains that the State misused the grand jury process to obtain his fingerprints and palm prints because the subpoena was not made returnable to the grand jury, and once obtained, they were taken to the crime laboratory instead of the grand jury.

¶ 29 While defendant correctly notes that the grand jury's subpoena power may not be used to further independent investigations by the police or the prosecutor (*People v. Delaire*, 240 Ill. App. 3d 1012, 1021 (1993)), the grand jury may make disclosures, pursuant to section 112-6(c)(1) of the Illinois Code of Criminal Procedure of 1963 (Code), to the State's Attorney for use in the performance of his duties, and to "such government personnel as are deemed necessary by the State's Attorney *** to enforce State criminal law" (725 ILCS 5/112-6(c)(1) (West 2004)). In this case, the subpoena ordering defendant's fingerprints and palm prints stated that "[c]ompliance with [that] subpoena may be made by tendering such items to ASA Snow, or the

Cook County investigator serving the subpoena as an agent of the Cook County Grand Jury." Unlike the subpoena in *DeLaire*, 240 Ill. App. 3d at 2025, on which defendant relies, the subpoena in this case allowed ASA Snow and the investigator serving the subpoena to act as agents of the grand jury, in compliance with section 112-6(c)(1) of the Code. Further, as the State correctly notes, ASA Snow state, in addressing the grand jury, that she was requesting approval of a murder subpoena under "Grand Jury Number April 195." Regardless of whether that grand jury number was the same as the one that later issued the indictment against defendant, the request indicates that the subpoena was made pursuant to a grand jury investigation, as opposed to a "rogue" police investigation.

¶ 30 Furthermore, while grand jury subpoenas are returnable to the grand jury, similarly to how a witness who is subpoenaed by the grand jury must report to the grand jury (*People v. Wilson*, 164 Ill. 2d 436, 458 (1997)), the State argues that in this case, it would serve no purpose to return defendant's fingerprints and palm prints to the grand jury before sending them to the crime laboratory for analysis. We note, however, that even where the evidence sought pursuant to a grand jury subpoena is improperly kept from the grand jury, such error does not warrant reversal if the defendant is not prejudiced by the process used to obtain the evidence. See, *e.g. Wilson*, 164 Ill. 2d at 459 (defendant not prejudiced by misuse of grand jury subpoena power to obtain his mental records where the State could have obtained them if it had followed proper procedure). Here, even if defendant's fingerprints and palm prints had been returned to the grand jury before being submitted to the crime laboratory, the State and the investigators assigned to this matter could have still obtained that evidence from the grand jury. Thus, defendant was not prejudiced by any improper procedures and reversal is not warranted.

¶ 31 Defendant next contends that the trial court improperly denied his motion *in limine* to exclude evidence of the partial palm print attributed to him because the method used to match a known print to a latent print, the friction ridge analysis, or ACE-V, is not generally accepted in the scientific community. Alternatively, he contends that the trial court should have at least conducted a hearing pursuant to *Frye v. United States*, 293 F. 1013 (1923) to determine whether the friction ridge analysis used to match latent prints is a generally accepted technique. He maintains that no valid scientific basis for latent print identification has ever been demonstrated, and that the relevant scientific community does not accept that even latent fingerprint analysis can consistently, and with a high degree of certainty, demonstrate a connection between the prints and a specific individual. Thus, according to defendant, the claim that a match to a portion of his palm is sufficient to identify him is similarly unreliable. Our review is *de novo*. *In re Commitment of Simons*, 213 Ill. 2d 523, 530-31 (2004).

¶ 32 In Illinois, the admission of expert testimony is governed by the *Frye* test, pursuant to which scientific evidence is admissible when it is " 'sufficiently established to have gained general acceptance in the particular field in which is belongs.' " *Simons*, 213 Ill. 2d at 529 (quoting *Frye*, 291 F. at 1014). However, our supreme court has recognized that "the *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel,' " (*People v. McKnown (McKnown II)*, 236 Ill. 2d 278, 282-83 (2010)), and "[o]nce a principle, technique or test has gained general acceptance in the particular scientific community, its general acceptance is presumed in subsequent litigation; the principle, technique or test is established as a matter of law" (*Donaldson v. Central Illinois Public Service Company*, 199 Ill. 2d 63, 79 (2002), *abrogated on other grounds by Simons*, 213 Ill. 2d at 530).

Further, "general acceptance" of a methodology does not mean "universal acceptance," and does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts." *Simons*, 213 Ill. 2d at 530. The inquiry under *Frye* is the general acceptance of a methodology, not its application to a particular case. *Donaldson*, 199 Ill. 2d at 77.

¶ 33 A court may determine the general acceptance of a scientific methodology either: "(1) based on the results of a *Frye* hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject." *People v. McKnown (McKnown I)*, 226 Ill. 2d 245, 254 (2007). The court in this case denied defendant's motion *in limine*, stating that it "heard witnesses testify many, many times as *** examiners used both fingerprints and palm prints for purposes of identification," that those identification methods are "well established scientifically," and "no allegation has been raised sufficient for [the court] to grant a *Frye* hearing on this issue." Defendant contends that the trial court erred in taking judicial notice of general acceptance of latent print identifications because that methodology has been subject to recent challenges and has not been subject to a *Frye* hearing in Illinois and it is, therefore, "novel."

¶ 34 However, this court has explicitly rejected defendant's argument that the ACE-V methodology used to make fingerprint and palm print identifications is novel so as to require a *Frye* hearing before being admitted through expert testimony. *People v. Luna*, 2013 IL App (1st) 072253, ¶¶63-69; *People v. Mitchell*, 2011 IL App (1st) 083143, ¶31. In *Luna*, 2013 IL App (1st) 072253, ¶¶ 65-68 [internal citations omitted], this court held that although modern scientific advances in our era may affect our inquiry as to the novelty of a long used methodology, courts have uniformly rejected challenges to the admissibility of print evidence

under either *Frye* or *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) (a test that looks at the reliability of the expert's methodology, as well as his conclusions, even though courts applying this test also consider the general acceptance of the methodology in the relevant scientific community). Similarly, the court in *Mitchell*, 2011 IL App (1st) 083143, ¶ 31 reasoned that "[u]ntil our supreme court decides otherwise, as it did with regard to the HGN [horizontal gaze nystagmus] evidence in *People v. McKnown*, 226 Ill. 2d 245, 257, 314 Ill. Dec. 742, 875 N.E.2d 1029 (2007), there is no authority in this state for defendant's claim that the circuit court erred in rejecting defendant's motion for a *Frye* hearing on the admissibility of fingerprint evidence."

¶ 35 While defendant relies on a 2009 report by the National Research Council (NRC)[1] questioning fingerprint analysis technology as a reason why this court should disregard Illinois' history of accepting print identification evidence, we have previously rejected this argument by a defendant who relied on this very same report. *Luna*, 2013 IL App (1st) 072253, ¶¶ 70-81. For instance, various critiques in the report, such as an expert's inability to testify to the probability that the match is mistaken, go to the weight of the evidence, rather than its admissibility under *Frye*. *Id*. at ¶¶ 70-72. More significantly, this court found that the report does not establish a lack of general acceptance in the relevant scientific community, does not undermine the uniform body of precedent rejecting challenges to print identification, and does not reflect the views of the entirety of such relevant community. *Id*. at ¶¶ 73-77. In doing so, this court pointed out that while the report critiques certain aspects of ACE-V technology, it " 'does not conclude that fingerprint evidence is so unreliable that courts should no longer admit it.' " *Id*. at ¶ 73 (quoting

[1] National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009).

Commonwealth v. Gambora, 933 N.E. 50, 58 (Mass. 2010)). Accordingly, we conclude that the circuit court did not err in denying defendant's motion to exclude palm print evidence, or in admitting that evidence without a *Frye* hearing.

¶ 36 Defendant, nevertheless, contends that, regardless of the reliability of the methodology used to analyze his prints, the trial court still erred in admitting testimony from the fingerprint expert because: (1) the State failed to lay adequate foundation; and (2) her identification relied on the out-of-court verification of another examiner who did not testify.

¶ 37 With respect to defendant's challenge to the sufficiency of the foundation, we note that in order for expert testimony to be admitted, its proponent must lay an adequate foundation which establishes that the information upon which the expert based her opinion is reliable. *People v. Negron*, 2012 IL App (1st) 101194, ¶ 34. When a fingerprint expert testifies, she must lay an adequate foundation that explains how she reached her conclusions. *Id*. Whether those foundational requirements have been met is a question of law, which we review *de novo*. *Id*.

¶ 38 Defendant argues that Petruncio's testimony that the palm prints on the wallboard of the victim's bathroom matched those of defendant lacked scientific foundation because Petruncio made no notes of the side-by-side comparison between the prints. In doing so, he relies heavily on *People v. Safford*, 392 Ill. App. 3d 212 (2009), to support his contention that Petruncio's opinion lacked adequate foundation, claiming that "*Safford* is on all fours" with this case. We disagree.

¶ 39 In *Safford*, this court held that "[t]he trial court erred in admitting the testimony of the fingerprint identification expert where the foundation requirements were not met," we noted that the expert in question was unable to describe what he saw in common between the prints from

the crime scene and defendant's known prints, which made his identification beyond challenge during cross-examination. *Id*. at 223, 230-31. While the expert in that case testified about the general process used in fingerprint identification, the three levels of analysis, and the characteristics that he looked at each level, he did not explain how he arrived at his conclusion, such that his testimony "amounted to no more than 'take my word for it.' " *Id*. at 224.

¶ 40 However, this court has, on three different occasions, found that *Safford* was distinguishable from instances where a fingerprint expert testified to the procedure followed to compare latent prints to defendant's known prints. See *People v. Harmon*, 2013 IL App (2nd) 120439; *Negron*, 2012 IL App (1st) 101194; and *Mitchell*, 2011 IL App (1st) 083143. In *Mitchell*, 2011 IL App (1st) 083143, ¶ 26-27, the court found that where the expert testified that she found 13 points of comparison, and demonstrated 5 of them to the jury, she provided "ample grounds" to challenge her conclusion that defendant's prints matched the latent prints. Similarly, in *Negron*, 2012 IL App (1st) 101194, ¶ 37-40, this court found that foundation was adequate where the expert explained how he compared the prints in that case and what he looked for, noting that while the expert's failure to detail how many points of comparison he found that went to the weight of the testimony, not admissibility. See also in *Harmon*, 2013 IL App (2nd) 120439, ¶ 42 (foundation was adequate where the expert testified to the procedure, as well as to applying it to his analysis, and finding 12 points of comparison).

¶ 41 In this case, after explaining in detail how fingerprints and palm prints are made, and the methodology of the ACE-V method, Petruncio carefully described how she applied that method in comparing defendant's known prints to those found on the wallboard above Pipes' bathtub. She also showed the jury a condensed version of the prints she examined, pointing out areas of

similarities, including one area with six points of comparison, two areas with three and another with two. She explained on cross examination that she looks at all levels of details, but does not document overall points of comparison. Thus, we conclude that, similarly to *Mitchell*, *Negron* and *Harmon*, this case is distinguishable from *Safford* because she explained the manner in which she reached her conclusion, such that her opinion was open to challenge during cross-examination. Accordingly, the foundation to her testimony was adequate and the trial court did not err in admitting her expert testimony.

¶ 42 Turning to defendant's second challenge to Petruncio's identification of defendant's palm prints, defendant claims that testimony that Petruncio's conclusion was verified by an analyst who did not testify at trial was hearsay, and was, therefore, inadmissible. According to defendant, the admission of that testimony was a violation of not only the rules of evidence, but also of his constitutional right to confrontation. He further maintains that the error was compounded by the State's remarks in closing argument that Petruncio's conclusions had to be verifiable and that any expert could have verified them.

¶ 43 The States initially responds that defendant waived this contention because he failed to timely object to Petruncio's statements regarding verification, and once he brought it to the court's attention, he asked that the court at least instruct her not to mention the verification from that moment on, which the court did. See *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). Defendant, in turn, contends, that he did not waive this challenge because he raised the issue in court and asked for a mistrial shortly after those statements were made, and alternatively, argues that even if it was waived, it would be reviewable under plain error. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 44 We agree with defendant that, under these circumstances, he did not waive this argument. However, although defendant is also correct in claiming that Petruncio's testimony that her conclusion was verified was inadmissible hearsay, any error committed in admitting that testimony was harmless beyond a reasonable doubt and does not warrant reversal.

¶ 45 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception." *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Hearsay evidence is generally inadmissible because its reliability cannot be cross-examined. *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004). "[T]estimony by a third party as to statements made by another nontestifying party identifying an accused as the perpetrator of a crime constitutes hearsay testimony and is inadmissible." *People v. Lopez*, 152 Ill. App. 3d 667, 672 (1987). In fact, this court has held, in *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005), that a fingerprint expert's testimony that another analyst agreed with her identification was inadmissible hearsay because it was offered to prove the matter asserted, namely, that defendant was the perpetrator. In doing so, the court noted that while her testimony as to the verification process, whereby other scientists review every identification, merely showed a minimized risk of human error, her statement that the identification at hand had been agreed upon by those scientists constituted hearsay. *Id.*, see also *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994) (fingerprint expert's testimony that another expert checked her identification for accuracy and agreed with her conclusion was inadmissible hearsay).

¶ 46 Here, Petruncio did not testify merely to the verification process of the ACE-V methodology in which another expert performs the same analysis on the prints to be compared. Similarly to the expert in *Yancy*, she stated that "this case" was reviewed and verified. While the

State correctly notes that she made that statement on cross-examination, it was not made in response to defense counsel's question, which inquired about her laboratory's requirements to take notes. Thus, defendant did not elicit that portion of her testimony, which was offered to prove that defendant was the person who left his palm print on Pipes' wall.

¶ 47 However, the admission of hearsay testimony "is harmless error when it is merely cumulative or is supported by a positive identification and other corroborative circumstances." *Smith*, 256 Ill. App. 3d at 615 (citing *People v. Mitchell*, 200 Ill. App. 3d 969, 975 (1990)). Furthermore, the improper admission of hearsay evidence is harmless and does not warrant reversal where there is no reasonable probability that the verdict would have been different if the evidence had been excluded. *Yancy*, 368 Ill. App. 3d at 385. Although defendant's palm print identification was significant in placing defendant at the crime scene, nothing in the record indicates that the jury was influenced by the finding of the analyst who verified Petruncio's conclusion. Further, defendant's semen was found inside Pipes' body, and defendant's former cellmate testified that defendant confided in him about stabbing Pipes, leaning her over the bathtub and leaving a palm print on the wall. Under these circumstances, it is unlikely that the verdict would have been different if the court had excluded Petruncio's testimony that another analyst agreed with her finding.

¶ 48 Defendant's reliance on *Smith*, 256 Ill. App. 3d 616-17 is misplaced. In that case, the jury sent questions which indicated that it was not merely interested in the fingerprint evidence in general, but in the non-testifying examiner's finding in particular. *Smith*, 256 Ill. App. 3d at 616. Further, unlike the case at bar, where defendant's DNA was found in the victim, the identification of defendant in *Smith* was corroborated only by witnesses whose testimony greatly

differed from defendant's appearance, and one of them previously misidentified him. *Id*. Moreover, unlike the prosecutor in this case, who stated during closing remarks that "any" analyst could have verified Petruncio's conclusion, the prosecutor in *Smith* cast blame on defendant for not calling the second analyst to refute the testifying expert's findings. *Id*.

¶ 49 Somewhat similarly to his first challenge to Petruncio's testimony regarding the palm prints on Pipes' wallboard, defendant next claims that the trial court erred in admitting the wallboard itself because that evidence also lacked sufficient foundation. According to defendant, the State failed to establish that reasonable measures were employed to protect the wallboard from contamination between the time of its removal from the wall and the time that the palm prints were lifted from it.

¶ 50 When the State seeks to introduce an object into evidence, it must lay an adequate foundation either through its identification by witnesses " 'or through the chain of possession.' " *People v. Woods*, 214 Ill. 2d 455, 466 (2005) (quoting *People v. Stewart*, 105 Ill. 2d 22, 59 (1984)). The character of the object sought to be introduced into evidence determines which method of establishing a foundation must be employed. *Id*. If an item has readily identifiable and unique characteristics, and its composition is not easily subject to change, an adequate foundation is laid by testimony that the item sought to be admitted is the same item recovered and is in substantially the same condition as when it was recovered. *Id*. In contrast, where the physical evidence is not readily identifiable or may be susceptible to tampering, contamination or exchange, the State is required to establish a chain of custody. *Id*. at 467.

¶ 51 Defendant maintains that while the wallboard from Pipes' bathroom was readily identifiable, the palm print left in blood was not. He claims that the State failed to establish the

requisite chain of custody because it did not call the evidence technicians who brought the wallboard to the photography laboratory, where it stayed overnight in an unsealed box. However, the State correctly responds that the bloody prints on the wallboard were readily identifiable and did not, therefore, require showing of a chain of custody to be admitted. As this court found in *People v. Morris*, 2013 IL App (1st) 111251, ¶¶ 87-88, patent blood stains on a readily identifiable object are likewise identifiable themselves, in spite of their biological nature that may otherwise render it fungible. See also *People v. Span*, 2011 IL App (1st) 083037, ¶ 75 (likewise, fingerprints on a readily identifiable bag of chips do not require proof of a chain of custody); *Kuykendall v. State*, 299 Ga. App. 360, 362 (2009) (Georgia Court of Appeals held that semen on a sheet was as readily identifiable as the sheet itself, which could be admitted without a chain of custody).

¶ 52 As noted above, the State in this case introduced testimony from Pipes' mother, who identified the board as a piece of the paneling from the bathroom where Pipes was discovered, as well as testimony from detectives Chambers and Munoz, who observed technicians cut out a section of Pipes' wall and stated that it looked the same as when it was recovered. Thus, there was proper foundation for the admission into evidence of the wallboard containing defendant's palm prints.

¶ 53 Defendant next contends that his confrontation clause rights were violated when the trial court permitted Dr. Staub, the laboratory director of Orchid Cellmark who did not analyze Pipes' vaginal swabs, to testify about the report, and to the fact that the technicians at his laboratory generated two DNA profiles from those swabs. It is undisputed that defendant did not object to that testimony at trial or raise that issue in his posttrial motion. Thus, we must determine

whether this issue is reviewable as plain error. Ill. S. Ct. R. 615(a); *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 32. The first step in a plain error analysis is deciding whether any error occurred at all, since there can be no plain error if no error occurred in the first instance. *Id*.

¶ 54 The confrontation clause of the sixth amendment of the United States Constitution, which applies to the states under the fourteenth amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const. amend. VI; see also *People v. Stechly*, 225 Ill. 2d 246, 264 (2007). Pursuant to this clause, the United States Supreme Court has held that testimonial statements from witnesses who are not present are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). However, the confrontation clause does not bar statements admitted for purposes other than the matter asserted. *Id*. at 59, n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

¶ 55 Although Dr. Staub did not testify that the semen in Pipes came from defendant, defendant contends that Dr. Staub's statement regarding the male DNA profile generated from Pipes' vaginal swab was testimonial and should not have been admitted at trial because: (1) the analysts who generated the profile did not testify; (2) the State did not show that they were unavailable; and (3) it was offered to prove the matter asserted, that the profile later identified to match defendant's was collected from Pipes.

¶ 56 Defendant relies on *Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct. 2705, 2710 (2011), which involved a report of defendant's blood alcohol, and on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which addressed the analysis of narcotics, for the general

proposition that results of all forensic testing is testimonial in nature. However, the Supreme Court has later held, in *Williams v. Illinois*, 567 U.S. __, 132 S. Ct. 2221 (2012) (plurality op.), that testimony from a DNA expert about a male profile generated by other analysts from a victim's vaginal swabs did not violate defendant's rights under the confrontation clause. In that case, where the expert who compared defendant's DNA profile with the profile generated by a non-testifying analyst at Cellmark laboratory, the Court found:

> ¶ 57 "[T]his form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 567 U.S. at __, 132 S.Ct. at 2228.

¶ 58 Justice Thomas, who concurred in the judgment, found that the type of statement generated by Cellmark lacked the requisite "formality and solemnity" to be considered testimonial for purposes of the confrontation clause. *Id*. at 2255 (Thomas, J., concurring in judgment); see also *People v. Kendrick*, 2013 IL App (1st) 090120-B, ¶ 30 (even where the DNA profile was generated after a suspect was identified, testimony based on that report created by someone else does not violate defendant's right to confrontation); *Negron*, 2012 IL App (1st) 101194, ¶ 56 ("the admission of the expert testimony of an expert who did not perform the DNA analysis in a report does not violate the confrontation clause."). Thus, the trial court in this case

committed no error in allowing Dr. Staub to testify that a male DNA was generated from Pipes' vaginal swab and to present a chart showing the results, which were later used by Krajmik to compare to defendant's known profile. Having found no error, we need not address the issue of whether it would amount to plain error.

¶ 59 Lastly, defendant contends that he was denied his right to a fair trial by the prosecutor's remarks during closing argument which, according to defendant, improperly bolstered the testimony of police, as well as the expert and informant witnesses. He maintains that the State improperly disparaged defense counsel and misstated the evidence in his comments about Conwell and Cook's testimony.

¶ 60 Prosecutors are afforded wide latitude in closing arguments, and may comment on the evidence, draw legitimate inferences therefrom and comment on the credibility of the witnesses. *People v. Williams*, 289 Ill. App. 3d 24, 35 (1997). In reviewing comments made at closing arguments, this court asks whether the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Misconduct in closing argument warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *Id*. If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that those improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id*. When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Id*. at 122.

¶ 61 First, as in his challenge to Petruncio's testimony, defendant again, points to the prosecutor's remark that any expert could have verified Petruncio's opinion on defendant's palm prints. He also points to the remark that her conclusions were never refuted and that, unlike Petruncio, defense counsel was not a fingerprint expert. According to defendant, the State improperly shifted the burden of proof to defendant and disparaged defense counsel.

¶ 62 We note that while a prosecutor cannot undermine the defendant's presumption of innocence or shift the burden of proof by commenting on defendant's failure to call a witness that was equally available to the State, he can comment on the fact that pieces of evidence on the record are undenied and unexplained. *People v. Eagle*, 76 Ill. App. 3d 427, 435 (1979). Furthermore, the prosecution may respond to comments by defense counsel which invite or provoke response (*People v. Graca*, 220 Ill. App. 3d 214, 221 (1991), and its remarks are not improper when they are confined to attacking the defense theory and not defense counsel personally (see, *e.g.*, *People v. Baugh*, 358 Ill. App. 3d 718, 743 (2005) (no error where prosecutor referred to defense theory and defendant's testimony as "a joke," but did not attack them personally)). Here, the prosecution specifically reminded the jury that the burden of proof was not shifted to the defense, and was justified in pointing out that Petruncio's opinion that the bloody palm prints above Pipes' bathtub were made by defendant was unrefuted. Further, his comment on the fact that defense counsel was not a fingerprint expert was not personal, and was in response to the defense questions on cross-examination about studies questioning Petruncio's methods and his remark that her methodology was "T-model" technology.

¶ 63 Defendant also challenges the prosecutor's comment that detectives Whalen and Munoz were "two of the finest" in the city, and comments that Conwell had no reason to lie and that

Cook could not have known about the details he told Detective Munoz. He maintains that the prosecutor improperly vouched for the detectives' credibility, and improperly bolstered the informants' testimony with facts not in evidence, namely, that Conwell did not know the significance of his testimony, and that Cook could not have known details of the crime other than from defendant.

¶ 64 However, the prosecutor's comments about the detectives, who testified to their long experience, was a proper response to defense counsel's remarks that they had made up their minds about defendant and failed to investigate further. See, e.g., *Williams*, 289 Ill. App. 3d at 36-37 (prosecutor's comments that police officers had no reason to lie were not improper where they were made in response to defense counsel's remark that if his theory did not make sense, the jury had to doubt the officers' veracity). Similarly, the prosecutor's remarks on Conwell and Cook's testimony were made in response to defense counsel's comments that Conwell only testified because of a deal made with the State, and that Cook fabricated his testimony. Furthermore, since the significance of Conwell's testimony linking defendant to Booker was not readily apparent, and the facts of this case were not in a newspaper, the prosecutor's comments were properly based on inferences from the evidence. Accordingly, we conclude that the challenged prosecutorial remarks do not warrant reversal.

¶ 65 CONCLUSION

¶ 66 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 67 Affirmed.