INDEX TO APPENDIX

APPENDIX A
Illinois Appellate Court Decision

2018 IL App (5th) 140553-U

NO. 5-14-0553

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 13-CF-467
	)	
CHARLES O. KEENE,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's failure to comply with Rule 431(b)'s requirement to advise and question the jury regarding the *Zehr* principles did not amount to plain error where the evidence was not closely balanced; adequate foundation was laid to establish expert testimony regarding a latent fingerprint matched to defendant; defendant was not denied due process to fair identification procedures; and defense counsel's decision to not file a motion to suppress did not constitute ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant, Charles O. Keene, was convicted of residential burglary, a Class 1 felony. 720 ILCS 5/19-3(a) (West 2012). Due to prior convictions, defendant was sentenced as a Class X offender to 20 years in prison with 3 years of mandatory supervised release. 730 ILCS 5/5-4.5-95(b) (West 2012). On appeal,

defendant argues: (1) the trial court's failure to comply with the requirements of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire* denied his right to a fair trial by an impartial jury; (2) the State failed to lay an adequate foundation for expert testimony regarding a latent fingerprint matched to defendant; (3) the State denied defendant his due process right to fair identification procedures; and (4) defense counsel's failure to file a motion to suppress the eyewitness's positive identification of defendant constituted ineffective assistance of counsel. We affirm.

¶ 3 BACKGROUND

¶ 4 The underlying facts of this case stem from a police response to 402 South University Avenue in Carbondale in reference to a residential burglary that occurred on October 7, 2013. We limit our discussion to those facts necessary to reach our decision.

¶ 5 Jesse Warden (Warden) lived at the residence, which was commonly referred to as the "Yoga House," with four other roommates. The Yoga House was split into two general areas: the residents' area and a meditation area. The residents' area of the house included a "commons living room" and a "commons kitchen." There was a staircase in the residents' area which led to four bedrooms. The meditation area included a sitting room where people practiced meditation and yoga.

¶ 6 After arriving home from work that afternoon, Warden was lounging in his bedroom when he witnessed a black male wearing black pants, a white sweatshirt, and a black hat enter his bedroom, say something to him, and look around his room. Warden confronted the individual and chased him out of the residence before recognizing he did not have his cell phone. Warden retrieved his phone from his room and called the police.

Upon returning to his residence, Warden noticed his roommate's PlayStation 3 and a Chicago Bears jersey were located on a chair near the front door of the residence. The PlayStation 3 had been moved from a bedroom of the residence. Warden also discovered a large fishbowl in the meditation area that was used to hold cash donations was empty, and had previously not been empty. Warden further discovered a sign which states "donations welcome" that was usually located next to the fishbowl had been moved to a chair.

¶ 7 After responding to Warden's call at approximately 6:45 or 6:50 that evening, Nathan Biggs (Biggs), an officer with the Carbondale Police Department, located an individual matching Warden's description in the vicinity of Warden's residence, and identified the individual as defendant. Biggs questioned defendant about what he had been doing and whether he had been consuming alcohol, and defendant responded with inconsistent stories. Defendant initially stated he was walking to his brother's residence from the Amtrak Station, but later stated he was walking from a liquor store where he had met with friends. Defendant also initially denied having consumed alcohol, but later indicated he had consumed one drink. Defendant denied that he entered into anyone's residence or took anything from any place. Another officer, Sergeant Kevin Banks, was with Biggs on the scene when Biggs was speaking with defendant.

¶ 8 At approximately 6:30 or 7 p.m. that evening, Cloee Frank (Frank), a patrol officer for the Carbondale Police Department, was dispatched to Warden's residence. Frank picked Warden up from his residence and took him to the 300 block of West Cherry Street in Carbondale to conduct a showup. Warden positively identified defendant as the

individual who was in his bedroom. Defendant was subsequently placed under arrest. When defendant was taken into custody, a search of defendant's pants revealed he was carrying a $1 bill, 10 quarters, 11 dimes, 9 nickels, and 25 pennies, which was consistent with what Warden believed to be missing from the fishbowl. Fingerprint lifts were obtained from the PlayStation 3 and forwarded to the crime lab. Lisa O'Daniel (O'Daniel), a forensic scientist with the crime lab, processed and compared the prints from the PlayStation 3. O'Daniel later notified the State that a partial fingerprint on the PlayStation 3 belonged to defendant.

¶ 9 On October 8, 2013, defendant was charged by information with a single count of residential burglary. 720 ILCS 5/19-3(a) (West 2012). A two-day jury trial commenced on May 12, 2014. At trial, O'Daniel testified as an expert on behalf of the State. O'Daniel opined that based on the totality of the information, the latent impression lifted from the PlayStation 3 matched defendant's fingerprint card from the Bureau of Identification. Warden, Biggs, and Frank also testified on behalf of the State, essentially recounting their version of the events as they transpired that day.

¶ 10 Defendant moved for a directed verdict at the close of the State's case, which the trial court denied. Defendant's two brothers and uncle subsequently testified on behalf of defendant. Defendant's brothers testified it was routine for defendant to go between their homes on the east and west side of Carbondale, and defendant was not at either of their homes at the time he was arrested. Landmarks between the brothers' homes included a liquor store, an Amtrak station, the downtown area, the strip, and a Dairy Queen. Defendant's uncle testified he was with defendant that morning, and defendant paid for

them to drive around and paid for drinks. Defendant's uncle testified he was not with defendant at the time he was arrested.

¶ 11 On May 13, 2014, the jury returned a guilty verdict. The case was subsequently set for sentencing. Defendant filed a motion for a new trial on May 16, 2014, which the trial court denied. Thereafter, trial counsel for defendant filed a motion to withdraw as counsel, which the trial court granted. Defendant was subsequently appointed new counsel. Due to prior convictions, defendant was sentenced as a Class X offender on October 29, 2014, to 20 years in the Illinois Department of Corrections with 3 years of mandatory supervised release. 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 I. Rule 431(b) Violation

¶ 15 Defendant first claims he was denied his right to a fair trial by an impartial jury because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), when it neglected to ask the jurors during *voir dire* whether they understood and accepted each of the four Rule 431(b) (*Zehr*) principles.

¶ 16 In *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), our supreme court held it is "essential to the qualification of jurors in a criminal case" that they know a defendant: (1) is presumed innocent; (2) is not required to offer any evidence on his own behalf; (3) must be proven guilty beyond a reasonable doubt; and (4) his failure to testify on his own behalf cannot be held against him. Our supreme court amended Rule 431(b) in 1997 to incorporate the *voir dire* principles established in *Zehr*. *People v. Haynes*, 408 Ill. App.

3d 684, 692 (2011). If requested by the defendant, the new rule required the trial court to ask potential jurors, individually or in a group, whether they understood and accepted the four *Zehr* principles. *Haynes*, 408 Ill. App. 3d at 692. At the time the rule was amended in 1997, the court was not obligated to *sua sponte* question jurors regarding the *Zehr* principles. *Haynes*, 408 Ill. App. 3d at 692.

¶ 17 Rule 431(b) was subsequently amended on May 1, 2007, to require the trial court to ask each potential juror in every case, without the defendant's prompting, whether they understand and accept each of the four *Zehr* principles enumerated in Rule 431(b). *Haynes*, 408 Ill. App. 3d at 692. This amended version of Rule 431(b) imposes a *sua sponte* duty on courts to ask potential jurors, individually or in a group, whether they understand and accept these principles. *Haynes*, 408 Ill. App. 3d at 692. The current version of Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 18 Here, the State concedes the trial court violated Rule 431(b) because it failed to properly question all potential jurors as to whether they understood and accepted each of the *Zehr* principles. Because defendant failed to raise the issue of the trial judge's Rule 431(b) errors at trial or in a posttrial motion, this issue is procedurally forfeited. *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 24. Nonetheless, defendant contends the error is reversible under the plain-error doctrine because the evidence is closely balanced.

¶ 19 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in certain circumstances. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). We apply the plain-error doctrine when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 20 When reviewing a claim of error under the first prong of the plain-error doctrine, a commonsense analysis of all the evidence must be conducted in order to determine whether the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50. That analysis must be qualitative as opposed to quantitative, and must also consider the totality of the circumstances. *Belknap*, 2014 IL 117094, ¶ 62.

¶ 21 As to the second prong of the plain-error doctrine, the defendant must show the trial court's error in failing to comply with Rule 431(b) was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Haynes*, 408 Ill. App. 3d at 693. This prong may be satisfied if the defendant can establish he was tried by a biased jury. *Haynes*, 408 Ill. App. 3d at 693. However, because a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, the failure to conduct proper Rule 431(b) questioning does not ensure the jury was biased. *Haynes*, 408 Ill. App. 3d at 693-94. The defendant must prove such bias. *Haynes*, 408 Ill. App. 3d at 694. The defendant bears the burden of persuasion under both prongs of plain-error review. *Thompson*, 238 Ill. 2d at 613.

¶ 22 After careful consideration, we find the evidence in this case was not so closely balanced such that the " 'error alone severely threatened to tip the scales of justice against [defendant].' " *Haynes*, 408 Ill. App. 3d at 693 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). Warden presented credible testimony regarding the incident, and positively identified defendant both at the showup and at trial. The record shows Warden's identification of defendant was made after he was afforded ample time to view the suspect at his residence, and was made within a reasonable time following the burglary. We further note that when defendant was stopped by police shortly after the burglary was committed, defendant was wearing the same clothes provided in Warden's description of the suspect. Additionally, the currency discovered on defendant's person was consistent with what Warden believed to be missing from the fishbowl. Most telling, however, is the

fact that there is corroborating evidence of defendant's presence inside Warden's residence, namely defendant's fingerprint on the PlayStation 3.

¶ 23 We further find no basis in the record for a second prong plain-error review of defendant's contention regarding the court's violation of Rule 431(b), as we find "no evidence in the record that would lend support to a possible claim of a biased jury." *Haynes*, 408 Ill. App. 3d at 694. For these reasons, defendant has failed to meet his burden of showing the trial court's Rule 431(b) error: (1) threatened to tip the scales of justice against defendant; or (2) affected the fairness of his trial and challenged the integrity of the judicial process.

¶ 24 Defendant alleges this case is closely balanced based on the State's failure to offer proof of defendant's intent to commit a theft prior to entering the residence, which defendant indicates is a public place. Defendant further argues the jury was biased against defendant because the jury sent a note during jury deliberations to the trial judge inquiring about possible fingerprints on the fishbowl, to which the judge informed the jury that it had all the evidence. We find defendant's arguments misplaced.

¶ 25 "A person commits residential burglary when he or she knowingly and without authority enters *** the dwelling place of another *** with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (West 2012). A defendant's intent can be proven by inferences drawn from his conduct and from surrounding circumstances. *People v. Hopkins*, 229 Ill. App. 3d 665, 672 (1992). Relevant circumstances the trier of fact should consider when deciding whether the evidence was sufficient to infer a defendant's intent to commit theft include the time, place, and manner of entry into the premises, the

defendant's activity within the premises, and any alternative explanations which may explain his presence. *Hopkins*, 229 Ill. App. 3d at 672. In this case, the residence had signs near the front entrance which directed people to the left for the meditation area and to the right for the residents' area. Although the meditation area of the residence was open to the public, Warden testified he observed defendant peeking into his bedroom in the residents' area of the house. The bedrooms are not open to the public. Further, the PlayStation 3 containing defendant's fingerprint was moved from a bedroom of the residence to an area near the front door.

¶ 26 It is well settled that a challenge to the sufficiency of the evidence to convict a defendant must fail if any rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could conclude the State proved the essential elements of the crime beyond a reasonable doubt. *Hopkins*, 229 Ill. App. 3d at 672. When applying this standard, we find the evidence in this case was sufficient to prove defendant's intent.

¶ 27 Regarding the jury's note sent to the trial judge during deliberations inquiring about possible fingerprints on the fishbowl, we find nothing in the record which supports defendant's contention that the jury's conduct was biased against defendant. As our supreme court has observed, "[c]areful consideration of the evidence adduced and exhibits admitted is what we expect of jurors in any trial." *People v. Wilmington*, 2013 IL 112938, ¶ 35. For these reasons, we reject defendant's arguments.

¶ 28 II. Adequate Foundation for Expert Testimony

¶ 29 Defendant next argues he is entitled to a new trial because the State failed to lay an adequate foundation for O'Daniel's expert testimony which opined the partial latent fingerprint lifted from the PlayStation 3 matched defendant.

¶ 30 Initially, we note the parties disagree as to the standard of review. Defendant cites to *People v. Safford*, 392 Ill. App. 3d 212, 221-22 (2009), for the proposition that whether a party has laid an adequate foundation for an expert's opinion is a question of law reviewed *de novo*. Conversely, the State cites to *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 108, which disagreed with *Safford* and the string of cases that followed *Safford*. In *Simmons*, the First District Appellate Court concluded our supreme court has repeatedly applied an abuse of discretion standard of review when presented with the question of whether a party laid a sufficient foundation for an expert's testimony, and the cases on which *Safford* relied did not support its conclusion that review of whether an adequate foundation has been laid is a question of law reviewed *de novo*. *Simmons*, 2016 IL App (1st) 131300, ¶¶ 109-14.

¶ 31 After reviewing several of our supreme court decisions, we agree with *Simmons*. See *People v. Lerma*, 2016 IL 118496, ¶ 23 ("[W]e review the trial court's decision to admit evidence, including expert witness testimony, for an abuse of that discretion."); *People v. Becker*, 239 Ill. 2d 215, 234 (2010) ("Decisions of whether to admit expert testimony are reviewed using this same abuse of discretion standard."); *People v. Williams*, 238 Ill. 2d 125, 136 (2010) ("We apply the abuse of discretion standard to the defendant's foundational challenge to the trial court's admission of *** expert

testimony."). Accordingly, we will review the trial court's decision to admit O'Daniel's expert testimony for an abuse of discretion.

¶ 32 We now turn to the merits of defendant's foundational challenge. A witness may be qualified to testify as an expert "by knowledge, skill, experience, training, or education." Ill. R. Evid. 702 (eff. Jan. 1, 2011); *Simmons*, 2016 IL App (1st) 131300, ¶ 115. Put in other words, a person may testify as an expert if his experience and qualifications provide him knowledge that is not common to laypersons, and where his testimony will assist the trier of fact in reaching its conclusions. *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006). There is no predetermined formula for how an expert obtains specialized knowledge or experience, which can be acquired by the expert through practical experience. *Gordon*, 221 Ill. 2d at 428. Accordingly, formal academic training is not required to qualify a person as an expert. *Gordon*, 221 Ill. 2d at 429. "An expert need only have knowledge and experience beyond that of an average citizen." *Gordon*, 221 Ill. 2d at 429.

¶ 33 The admission of expert testimony requires the proponent to lay an adequate foundation showing the information on which the expert bases her opinion is reliable. *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 565 (2008). If a proper foundation has been laid, the expert's testimony is admissible, but the weight to be given that testimony is for the jury to determine. *Fronabarger*, 385 Ill. App. 3d at 565. As previously stated, the admission of expert testimony is within the sound discretion of the trial court, and will not be reversed unless the trial court abused its discretion. *Fronabarger*, 385 Ill. App. 3d at 565-66. An abuse of discretion will be found only where the court's ruling is so

arbitrary or fanciful that no reasonable person would take the view adopted by the trial court. *Simmons*, 2016 IL App (1st) 131300, ¶ 114.

¶ 34 Here, we find the State laid a proper foundation for O'Daniel's expert testimony. O'Daniel testified she had been employed by the Illinois State Police Crime Lab, also known as the Southern Illinois Forensic Center, since April 1995. She worked for the crime lab as a latent fingerprint examiner and a tire track/footwear examiner. Her degrees included a bachelor of science in biology, a bachelor of science in forensic science, and a master's in public administration. At the time of trial, O'Daniel had worked as a latent fingerprint examiner for approximately 19 years. O'Daniel further testified she engages in "continuous study" in order to stay up-to-date regarding new technology and techniques in the field of fingerprint analysis.

¶ 35 Regarding the fingerprint examination concerning this case, O'Daniel testified she lifted all available features of the latent print from the PlayStation 3 to form her opinion that the print matched defendant. O'Daniel testified her opinion was based on the totality of the information presented to her. O'Daniel explained the methodology used as well as the steps used in her analysis. O'Daniel testified she had all three levels of detail present in making her identification, including level three detail–the highest level of detail in a print. O'Daniel testified she made an identification based upon a reasonable degree of certainty in her field which concluded the latent fingerprint matched defendant's print.

¶ 36 In light of the foregoing, we cannot say the trial court abused its discretion in allowing O'Daniel's expert testimony. The record shows O'Daniel is a qualified latent fingerprint examiner who thoroughly explained the procedure she followed to make a

comparison of the latent print to defendant's known prints. The record further shows O'Daniel thoroughly explained the analysis process she specifically used in this case, which concluded the latent print matched defendant.

¶ 37 Defendant centers his foundational challenge around his contention that O'Daniel's testimony was faulty and problematic because O'Daniel focused on her credentials and the general fingerprinting process more than explaining the specifics of defendant's case. As a result, defendant claims O'Daniel's general explanation denied defendant a fair opportunity to cross-examine the evidence and witness against him. In support of his position, defendant cites to *Safford*, which found reversible error where a fingerprint examiner, who was qualified as an expert witness and testified regarding the general fingerprint identification process, did not provide an adequate factual basis for his opinion. *Safford*, 392 Ill. App. 3d at 226. We disagree.

¶ 38 Unlike the insufficient testimony of the expert in *Safford*, O'Daniel thoroughly explained the basis of her opinion that the prints matched defendant. O'Daniel explained she does not use points of identification when making a fingerprint comparison. Rather, in accordance with policy procedure, O'Daniel explained she considers: the totality of all the information present; the first level detail, which is ridge flow; the second level detail, which are the minutiae points; and the third level detail, which are the ridge sides and the pores visible in the print. O'Daniel explained this process adequately and in great detail. The record further shows the defense had an opportunity to cross-examine O'Daniel regarding her analysis and comparison of the prints. Any doubts with regard to O'Daniel's testimony concerning her analysis or comparison were ones which the jury decided

against defendant. As a reviewing court, we will not substitute judgment for that of the trier of fact on questions regarding the weight of the evidence or credibility of the witnesses. *People v. Ford*, 239 Ill. App. 3d 314, 319 (1992). For these reasons, we reject defendant's argument.

¶ 39 III. Showup Identification

¶ 40 Defendant argues the police officers arranged an unnecessary and highly suggestive showup which caused Warden to make an unreliable identification of defendant. Defendant maintains his showup was unnecessary because "there was no exigency or necessity that could justify the procedure." Consequently, defendant contends he was denied his due process right to fair identification procedures.

¶ 41 Criminal defendants are afforded a due process right to be free from identification procedures that are unnecessarily suggestive and conducive to irreparable mistaken identification. *People v. Jones*, 2017 IL App (1st) 143766, ¶ 27. Our supreme court has determined an immediate showup identification near the scene of the crime is proper police procedure. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994). Further, the weight to be given identification evidence is presumptively a question for the jury. *Moore*, 266 Ill. App. 3d at 796. Pretrial identifications, such as the showup employed in this case, implicate the due process clause only where the identification procedure was so unnecessarily suggestive or impermissibly suggestive such that there exists a substantial likelihood of irreparable misidentification. *Moore*, 266 Ill. App. 3d at 796-97; *Jones*, 2017 IL App (1st) 143766, ¶ 27.

¶ 42 A two-part test is used to determine whether an identification procedure comports with due process. *Jones*, 2017 IL App (1st) 143766, ¶ 27. First, the defendant must show the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *Moore*, 266 Ill. App. 3d at 797. If the defendant meets this burden, the State then bears the burden of establishing that under the totality of the circumstances, the identification is nonetheless reliable. *Moore*, Ill. App. 3d at 797. The factors to be considered in determining reliability include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty shown by the witness at the confrontation; and (5) the length of time between the witness and the confrontation. *Moore*, 266 Ill. App. 3d at 797.

¶ 43 After careful consideration, we find defendant has failed to meet his burden of showing the showup procedure was so unnecessarily suggestive and conducive to irreparable misidentification that defendant was denied due process of law. In contrast, we find the showup conducted in this case was justified by exigent circumstances.

¶ 44 The facts demonstrate that immediately following the residential burglary and Warden's pursuit of the suspect, Warden called police and provided a description of the suspect. Shortly thereafter, police spotted an individual matching Warden's description near Warden's residence, where the residential burglary occurred. Warden's description to the police was consistent and highly accurate. An officer then transported Warden to the scene where he positively identified the suspect as defendant. The record shows Warden had ample opportunity to view defendant, both while defendant was in his bedroom and

while Warden chased defendant out of his residence. The record further indicates the showup took place within a reasonable time following the crime.

¶ 45 Considering Warden's opportunity to view defendant, Warden's degree of attention, the accuracy of Warden's preliminary description, Warden's level of certainty, and the brief timeframe between the crime and the confrontation, we cannot say there was a very substantial likelihood of irreparable misidentification. We reiterate that our supreme court has repeatedly " 'approved prompt showups near the scene of the crime as acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits.' " *Jones*, 2017 IL App (1st) 143766, ¶ 27 (quoting *People v. Lippert*, 89 Ill. 2d 171, 188 (1982)). We further note that aside from that point, the identification testimony was for the trier of fact to weigh. *People v. Lindsey*, 72 Ill. App. 3d 764, 777 (1979). Accordingly, we reject defendant's argument.

¶ 46 IV. Ineffective Assistance of Counsel

¶ 47 Finally, defendant argues his counsel's failure to file a motion to suppress Warden's identification constitutes ineffective assistance of counsel. Specifically, defendant argues that because the partial fingerprint lift and Warden's eyewitness account were the State's main evidence linking defendant to the crime, counsel's failure to attack Warden's identification of defendant cannot be considered sound trial strategy. Defendant maintains there is a reasonable probability the outcome of trial would have been different had Warden's identification been suppressed.

¶ 48 Claims of ineffective assistance of counsel are evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668

(1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-28 (1984). In order to succeed on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88; *Albanese*, 104 Ill. 2d at 526; *People v. Mack*, 2016 IL App (5th) 130294, ¶ 26.

¶ 49 To establish deficiency under the first prong of the *Strickland* test, an individual must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361 (2000). Further, there is a strong presumption that counsel's conduct falls within the wide range of professional assistance. *People v. Crutchfield*, 2015 IL App (5th) 120371, ¶ 34. With these principles in mind, we note matters of trial strategy are generally immune from claims of ineffective assistance of counsel and will not support such claims unless counsel's strategy was so unsound that counsel failed to conduct any meaningful adversarial testing of the State's case. *Crutchfield*, 2015 IL App (5th) 120371, ¶ 34.

¶ 50 As to the second prong of the *Strickland* test, a reasonable probability is one that is sufficient to undermine confidence in the outcome, namely that counsel's deficient performance caused the result of the trial to be unreliable or fundamentally unfair. *Mack*, 2016 IL App (5th) 130294, ¶ 27. This prong precludes relief based solely upon an attorney's substandard performance. *People v. Lefler*, 294 Ill. App. 3d 305, 312 (5th Dist. 1998). As a reviewing court, our task is to measure an inferior performance against its potential effect on the outcome of trial. *Lefler*, 294 Ill. App. 3d at 312. Accordingly, even

when counsel's mistakes are egregious, we examine them in the context of all the case's evidence to determine whether they create a reasonable probability of a different result. *Lefler*, 294 Ill. App. 3d at 312.

¶ 51 Both prongs of the *Strickland* test must be satisfied in order to succeed on a claim of ineffective assistance of counsel, and the failure to satisfy either prong will be fatal to the claim. *Mack*, 2016 IL App (5th) 130294, ¶ 27. A court need not address both components of the inquiry if the defendant makes an insufficient showing on one. *People v. Ramos*, 339 Ill. App. 3d 891, 900 (2003). Accordingly, we need not determine whether counsel's performance was deficient prior to examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Ramos*, 339 Ill. App. 3d at 900. Claims of ineffective assistance are reviewed *de novo*. *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005).

¶ 52 After careful consideration, we cannot say counsel's decision to not file a motion to suppress Warden's identification of defendant amounted to ineffective assistance, as we find there is not a reasonable probability the result of the proceeding would have been different had Warden's identification of defendant been suppressed. Aside from Warden's identification of defendant, officer testimony placed defendant in the immediate vicinity of the residence following the burglary, and defendant's partial fingerprint was found inside the residence. This is evidence which clearly lends support to the State. For these reasons, there is not a reasonable probability the result of the proceeding would have been different had Warden's identification been suppressed. Accordingly, defendant's ineffective assistance claim must fail.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Jackson County is hereby affirmed.

¶ 55 Affirmed.

APPENDIX B

Illinois Appellate Court Order Denying Petition for Rehearing

FILED
March 07, 2018
APPELLATE
COURT CLERK

5-14-0553

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES O. KEENE, Defendant-Appellant.	Jackson County Trial Court/Agency No.: 13CF467

ORDER

This cause has been considered on defendant-appellant's petition for rehearing and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing be, and the same hereby is, denied.

APPENDIX C

Illinois Supreme Court Order Denying Petition for Leave to Appeal

SUPREME COURT OF ILLINOIS
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May 30, 2018

In re: People State of Illinois, respondent, v. Charles O. Keene, petitioner. Leave to appeal, Appellate Court, Fifth District. 123428

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 07/05/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court