

NOTICE
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2012 IL App (4th) 110045-U

Filed 8/13/12

NO. 4-11-0045

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
RODREKUS O. WILLIAMS,)	No. 10CF577
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment because the defendant waived his argument that the foundation for the expert witness's testimony was insufficient when defendant failed to object at trial and failed to cross-examine the expert on the alleged deficiencies.

¶ 2 In April 2010, a grand jury indicted defendant, Rodrekus O. Williams, with one count of residential burglary, a Class 1 felony (count I) (720 ILCS 5/19-3 (West 2010)) and one count of unlawful possession of a weapon by a felon, a Class 3 felony (count II) (720 ILCS 5/24-1.1(a), (e) (West 2010)). In June 2010, a grand jury indicted defendant with unlawful possession of a weapon by a felon, a Class 2 felony (count III) (720 ILCS 5/24-1.1(a) (West 2010)). The State later dismissed count II.

¶ 3 Following an August 2010 trial, the jury convicted defendant of counts I and III. In January 2011, the trial court sentenced defendant to concurrent 14-year prison terms for the

two convictions. Defendant filed a motion to reconsider, which was denied. This appeal followed.

¶ 4 On appeal, defendant argues that the trial court committed plain error in admitting, without a proper foundation, expert testimony as to fingerprint evidence. We affirm.

¶ 5 I. BACKGROUND

¶ 6 On April 7, 2010, at approximately 6 p.m., Elizabeth Anderson left her home in Urbana and returned three hours later to find that the back door had been kicked open. She called the police. Upon their arrival, Anderson entered her home and discovered that her videocassette recorder (VCR) and digital video disc (DVD) player had been moved to the floor. In addition, she noticed the following items were missing: a flat screen television; two shotguns; a DeWalt drill; a Fuji camera; a quilt; and an afghan or throw that had been on her couch.

¶ 7 That same night, sometime between 5 and 7 p.m., Antoine Gray was driving on Cottage Grove with his niece to return a video when he noticed an African-American man in his early 20s walking east on Burkwood. The man was holding a blanket, and when Gray was approximately 25 or 30 feet from the man, a gust of wind blew the blanket to reveal a shotgun underneath. Gray, who was driving about 25 miles per hour, slowed down and was able to look at the shotgun for at least ten seconds. Gray then called the police, and later, Officer Jennifer DiFanis took a statement from Gray.

¶ 8 Police sergeant Richard Surles responded to a call at approximately 7 p.m. about a black male wearing a black T-shirt and blue jean shorts who was carrying a rug or carpet in the area of 1806 Cottage Grove. Surles first spotted defendant, who matched the description, in the parking lot of 1806 Cottage Grove from a distance of about 75 yards away. Surles testified it was

just beginning to get dark. As Surles pulled into the parking lot, Surles observed defendant throw what Surles believed was a rug over a concrete wall into a Dumpster area. Defendant was approximately 30 yards from Surles at this point. Surles directed Officer Chad Burnett to follow defendant into the apartment complex and stop him. Burnett was able to stop defendant in the foyer area of the complex.

¶ 9 Meanwhile, Surles searched the Dumpster and found a blue and white throw blanket and a comforter. Surles retrieved only the blue and white throw, not realizing at that time that the comforter was significant. At trial, the blanket was admitted into evidence as People's exhibit No. 2.

¶ 10 Police arrested defendant at 7:19 p.m. After he was arrested, police returned to the Dumpster area and recovered the comforter, which was admitted into evidence as People's exhibit No. 3. Police also searched the area for the shotgun but were unable to find it. Officer Matthew Quinley testified that an officer eventually recovered the shotgun from inside one of the Dumpsters at approximately 4 or 4:30 p.m. the next day. The shotgun's serial number matched one of the shotguns that was missing from Anderson's home.

¶ 11 Gray identified defendant in a one-person show-up in the presence of Officer DiFanis. Defendant told DiFanis that he was staying with his sister in apartment 212 at 1806 South Cottage Grove, located in Urbana. Defendant denied throwing a blanket over the Dumpster area, telling Surles that he had in fact been throwing a bag of trash. Surles, however, testified that he was "100 percent certain it was the white-and-blue throw."

¶ 12 At approximately 9:15 p.m., Officer Matt Rivers arrived at Anderson's home in response to a residential burglary call. Anderson provided Rivers with serial numbers for the

missing television and one of the shotguns. Rivers took a photograph of a footwear impression that he noticed in a layer of dust on the DVD player. The photograph was admitted into evidence as People's exhibit No. 11. Rivers also spoke to Surles and requested that Surles seize defendant's tennis shoes. Later that evening, Surles gave the shoes to Rivers. Rivers compared the shoes with the pictures he had taken of the footwear impression. He noticed that the tread on the bottom of defendant's shoes was in a distinct pattern, and the pattern was consistent with the markings that Rivers saw on top of the DVD player. The trial court admitted the shoes as People's exhibit No. 4, and the photographs of the impressions as People's exhibit Nos. 12 and 13.

¶ 13 Officer Brian Ashell arrived to Anderson's home sometime after midnight while Rivers was still there. Ashell collected a gel reproduction of a shoe impression from a piece of linoleum near the entryway of Anderson's home. After collecting the impression, Ashell admitted it into evidence at the Champaign police department. Ashell acknowledged that he did not know how many officers had been at Anderson's home that day, and he did not research the types of shoes that the officers had worn.

¶ 14 Beth Patty testified as an expert in the field of footwear impression analysis. She testified that in comparing a gel lift to a shoe, she first looks at the pattern elements on the bottom of the shoe. If she sees the same types of elements present on both the impression and the shoe, she makes a test impression with the shoe by powdering the bottom of the shoe with black fingerprint powder and then placing a clear adhesive lifter over the powder. She is then able to do an overlay to compare the unique flaws and details of the shoe with the gel print.

¶ 15 In this case, Patty made a photocopy of the gel lift that Ashell had submitted. She

also made a test impression of the shoes that Surles seized from defendant. In comparing the gel lift to the test impression, Patty saw sufficient similarities to conclude the gel lift was made by defendant's left shoe. In particular, she noticed similarities in the "M" shapes and also noticed nicks and flaws taken out of the "M" shapes that lined up in the same areas on the print and the shoe. Patty's opinion was verified by another examiner. On cross-examination, Patty admitted that additional footwear impressions were captured on the gel lift, but she did not know how many. She did not compare the gel lift to any other shoe prints. In addition, she did not know how many shoes like defendant's were made or sold in Illinois.

¶ 16 The day after the burglary occurred, Officer Quinley spoke with defendant's sister, Jamie Calhoun, who told Quinley that defendant had been staying there for about 10 days. In Calhoun's apartment, Quinley found a 42-inch television (TV) with the same serial number as the TV missing from Anderson's home, a DeWalt drill, and a digital camera.

¶ 17 Dave Smysor, an investigator with the Urbana police department, testified that, a few days after the incident at Anderson's home, Smysor collected latent prints from the TV found in Calhoun's home. After collecting the prints, Smysor packaged them as evidence and left them in the evidence locker at the Urbana police department. The trial court admitted the prints into evidence as People's exhibit No. 9. Deputy Sapp testified that he collected fingerprints from the defendant on the day of defendant's arrest. The court admitted defendant's prints into evidence as People's exhibit No. 10.

¶ 18 Forensic scientist Brian Long testified, without objection, as an expert in the field of latent print examination. Long compared People's exhibit No. 9 with People's exhibit No. 10. He testified he did a "side by side comparison," using a magnifying glass, to look for "agreement

in the individual characteristics and the flow of the ridges." Based on his comparison, Long concluded that the latent print in People's exhibit No. 9 was made by the same person whose fingerprint was on People's exhibit No. 10. Long's conclusion was verified by another latent print examiner who conducted an independent comparison of the prints. Defense counsel did not make any objections to Long's testimony during direct examination.

¶ 19 On cross-examination, Long stated that he was aware of technology that could overlay scanned images of the fingerprints. He said, however, that he and his coworkers typically "use [their] own magnifying glasses and do the comparisons [themselves]." In general, Long said he spends a few minutes comparing each set of fingerprints, although some prints could take just a few seconds, while others could take longer. He did not recall or make note of how long he spent comparing defendant's prints. On re-cross-examination, Long testified that on average, he compares approximately 10 to 20 fingerprints daily.

¶ 20 On this evidence, the jury convicted defendant of both residential burglary and unlawful possession of a weapon by a felon. In January 2011, the trial court sentenced defendant to concurrent 14-year prison terms for the two convictions. Later that month, defendant filed a motion to reconsider sentence, which was denied. This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 For the first time on appeal, defendant argues that the trial court erred in admitting, without a proper foundation, expert testimony as to fingerprint evidence. Specifically, defendant contends that Long failed to disclose the precise points of similarity between the latent print and defendant's print that led Long to determine that the two fingerprints matched.

Defendant concedes that he failed to object to the admission of the expert testimony at trial, but

asserts that this court should nevertheless address his claim under a plain-error analysis. We disagree.

¶ 23 Generally, a defendant waives the right to challenge an alleged error on review if the defendant either fails to object at trial to the error or fails to raise the issue again in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). "This rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005).

¶ 24 Under plain-error analysis, a reviewing court may consider an unpreserved error where (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010). Our court has held, however, that plain-error analysis applies only to those cases involving procedural default, not cases involving affirmative acquiescence. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011).

¶ 25 In *Bowens*, the defendant argued on appeal that the trial court erred by failing to excuse the trial judge's husband from the jury for cause. *Bowens*, 407 Ill. App. 3d at 1095, 943 N.E.2d at 1253. During *voir dire*, defendant challenged the husband's inclusion on the panel for cause, but when the trial court denied that challenge, the defendant did not use a peremptory challenge to excuse the juror. *Bowens*, 407 Ill. App. 3d at 1100, 943 N.E.2d at 1257. This court

held that the defendant had waived his challenge to the court's refusal to grant his motion to remove the juror for cause. *Bowens*, 407 Ill. App. 3d at 1099, 943 N.E.2d at 1257. The court reasoned that, by failing to use a peremptory challenge to remove judge's husband when the defendant had two remaining peremptory challenges, the defendant affirmatively acquiesced in the judge's husband's jury service. *Bowens*, 407 Ill. App. 3d at 1100, 943 N.E.2d at 1257.

¶ 26 We find *Bowens* analogous to the present case. Here, defendant not only failed to object to the allegedly deficient foundation, but he also failed to cross-examine the expert about the alleged deficiencies. Defendant argues at length that the expert, in accordance with *People v. Safford*, 392 Ill. App. 3d 212, 910 N.E.2d 143 (2009), should have been forced to disclose the specific points of comparison he made between defendant's fingerprint and the latent fingerprint. In *Safford*, the expert witness testified that he had compared a latent print with the defendant's fingerprint and determined that the two prints matched. *Safford*, 392 Ill. App. 3d at 216, 910 N.E.2d at 147. On cross-examination, the expert admitted that, during his analysis, he did not note the points of comparison he found between the two prints. *Safford*, 392 Ill. App. 3d at 220, 910 N.E.2d at 150. The *Safford* court concluded that the trial court erred in allowing the expert to testify to his conclusion that the fingerprints matched because the expert did not provide an evidentiary foundation for his testimony. *Safford*, 392 Ill. App. 3d at 219, 910 N.E.2d at 149.

¶ 27 Unlike in *Safford*, in this case defendant never *asked* Long to disclose his points of comparison. Defendant was given the opportunity to do so during cross-examination, but for whatever reason, elected not to. As this court stated in *Bowens*, "the law does not permit a party to intentionally fail to avail himself of the resources provided ***, only to complain about the result on appeal." *Bowens*, 407 Ill. App. 3d at 1101, 943 N.E.2d at 1258. Because we find

defendant's actions amounted to affirmative acquiescence, not simply procedural default, plain-error analysis does not apply.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.