2016 IL App (5th) 130212-U

NO. 5-13-0212

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 10-CF-837
	)	
CLEO FULTZ,	)	Honorable
	)	Randall W. Kelley,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt. Trial court did not commit reversible error by allowing witness to testify as expert on whether a particular type of firearm would be likely to deposit gunshot residue on the hands of the person who fired it.

¶ 2 The defendant, Cleo Fultz, appeals his conviction and his sentence to the Illinois Department of Corrections. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. In a one-count criminal indictment filed on September 17, 2010, the defendant was charged with first degree murder. The indictment alleged that on August 27, 2010, the defendant fatally

shot Floyd Robinson. A jury trial in the defendant's case began on October 22, 2012. Following jury selection and opening statements, the State presented its case in chief. Shirley McDonald, a dispatcher with the East St. Louis Police Department for 31 years, testified that while on duty on the date in question, at approximately 7:55 p.m., she received a 911 call from a woman who identified herself as Shauntae Bradford and who told McDonald that Floyd Robinson had been shot. McDonald authenticated a recording of the 911 call, which was admitted into evidence and played for the jury.

¶ 5 The next witness to testify was former East St. Louis police officer Christine Olson. She testified that she was on duty on the date in question, and that while in the dispatch center, she overheard a call from a male subject who stated that he had been shot and was hiding in the weeds. She and several other officers responded to the call. When she arrived at the scene, a man approached her. She told the man, who she described as "a large black male with a white t-shirt on," to stop. She walked to the man, who told her he lived at 1016 North 13th Street, and who then pointed to the house at that address. According to Olson, the man stated "that someone was shooting at him, that someone had a hit on him, and that he–but he shot first." Olson testified that the man told her "that the man in the house had a shotgun and another gun under his pillow." She did not notice any injuries on the man, who she and other officers patted down. Olson reiterated that the man she encountered told her that he−the man she encountered−shot first. The man told Olson he had thrown a gun into the weeds. The man showed Olson "the general area" where the gun was, and the gun was located and secured by other officers.

¶ 6 Officer Olson and other officers then entered the house at 1016 North 13th Street, where they found a black male, later identified as Robinson, and a black female, later identified as Bradford, in a dimly-lit back bedroom. Bradford was performing CPR on Robinson, who had "some red liquid on his chest" and was lying on a mattress. Olson observed a shell casing near Robinson. She did not observe any weapons in the bedroom. On cross-examination, Olson testified that the man she encountered outside—whom defense counsel characterized as "an individual that looks like" the defendant[1]—did not attempt to run away from her, and did not threaten her. She testified that he was not uncooperative and that he complied with her commands. She testified that a man she identified as Antwane Moore was present on the porch of the home.

¶ 7 Officer Tracy Long, who at the time of the trial had been with the East St. Louis Police Department for 18½ years, testified that on the date in question, as he responded to the call of shots fired, he observed a black male wearing a white t-shirt, blue pants, and black shoes. He identified the man as the defendant, and testified that he and Officer Olson made contact with the man. According to Officer Long, the defendant "stated that someone in the house had a gun, he shot first. And he later stated that he placed his gun in the weeds." In clarification, counsel for the State asked Long, "And when you say he

[1]Neither party directly asked Officer Olson if the man she encountered that night was the defendant. However, as he continued his cross-examination, the defendant's trial counsel referred to the man Olson encountered as the defendant as counsel asked a series of questions about the encounter.

shot first, was he referring to himself?" Long responded, "Yes, ma'am." Counsel continued, "So, he stated that he was the individual that shot first?" Long responded, "Correct."

¶ 8 Officer Long testified that after the defendant told him where the gun was, the defendant was placed in a squad car, and he and Officer Olson went to the house in question "and checked for a victim once we found out [the defendant] wasn't a victim." A man who Long identified as "Mr. Moore" approached them at the front door of the house and told them "there was a male subject down in the back room" who had been shot. In the back bedroom, Long observed Bradford performing CPR on Robinson. Long testified that he saw "a large amount" of blood, but no "evidence of any kind of discharged weapons." He testified that Bradford told him that as she and Robinson were watching television, the defendant "stepped out and immediately came back in and she heard a pop sound." Long testified that he did not see any weapons in the room.

¶ 9 On cross-examination, Long testified that when the defendant first approached him, he did not have any reason to believe the defendant had committed a crime, and that the defendant was cooperative. With regard to the lighting in the bedroom where the victim was found, Long testified that "[i]t was daylight still at the time," so that although the lighting was "kind of poor," he nevertheless "could see into the room." With regard to the fact that he did not see any weapons in the room, Long testified that although he did look around for weapons, he "just looked–a visual look and left it up to the crime tech to go further." He testified that he did not see any shell casings in the bedroom, and that

although he walked around the outside of the house, he did not see any casings there either.

¶ 10 Scott Wetzler, an officer with the Illinois State Police who formerly worked as a crime scene investigator, testified that on the night in question he was dispatched to the crime scene to process it. He arrived at the scene at approximately 8:40 p.m. He testified that he photographed, and then took possession of, the firearm that had been found in the weeds by the other officers. Once he moved into the house to process it, he photographed the various areas of interest to the investigation. In the bedroom where Robinson's body had been located, he photographed "discharged cartridge casings" and "a projectile." He testified that no weapons, casings, or projectiles were found anywhere else in the house, and that he did not find any evidence of a forced entry. He reiterated that no weapons were found anywhere in the house, and that the only weapon found outside was the firearm found in the weeds. After authenticating the various photographs he took, which were admitted into evidence, Wetzler testified that in total he recovered five discharged casings and one fired projectile. He explained that the casings would have been ejected from the gun, whereas the projectile "is actually–it's a bullet which would come out of a firearm[,] *** out of the muzzle and [toward] where the firearm is pointed."

¶ 11 On cross-examination, Wetzler testified that "probably within the first 30 minutes of–of arriving on scene," he suggested to the East St. Louis officers present that if the officers desired that a gunshot residue test be conducted, paper bags be placed around the defendant's hands "[t]o protect any–any possible evidence that may or may not be present as a result of firing a weapon." Wetzler did not know when the officers followed his

suggestion, but when he administered a gunshot residue test "within a few hours of having arrived on scene," the defendant had bags on his hands. Following Wetzler's testimony, the trial was adjourned for the day.

¶ 12 On the following day, October 23, 2012, the trial resumed. Abigail Keller, a sergeant with the Illinois State Police who worked in their Fairview Heights crime lab, testified that she attended Robinson's autopsy. She testified that the autopsy was performed by Dr. Petterchak. She authenticated photographs she took of Robinson's body during the autopsy, which were admitted into evidence. She testified that the doctor found a total of four bullets inside Robinson's body, which she collected and preserved as evidence. She conducted a gunshot residue test on Robinson's hands as well.

¶ 13 The next witness to testify was Susan Bolen, who also worked for the Illinois State Police in their Fairview Heights crime lab. She testified that she was employed as a latent print examiner, and testified as to her qualifications. Upon request by the State, and without objection from defense counsel, she was certified by the court as an expert witness. She testified that she examined the firearm found in the weeds, as well as the recovered cartridges and the firearm's magazine, but did not find any latent print impressions that were suitable for comparison. She testified that environmental factors make it "definitely" possible that an otherwise suitable latent print would not be suitable.

¶ 14 Thomas Gamboe, Jr., another Illinois State Police forensic scientist in the Fairview Heights crime lab, testified that he "specialized in the areas of firearm, toolmark, footwear[,] and tire track identification." He testified that he'd been at the crime lab for over 27 years, and that he had testified as an expert witness on 182 previous occasions, in

both state and federal court. Upon request by the State, and without objection from defense counsel, the trial court ruled that Gamboe "will be certified as an expert in his field." Gamboe testified that in the case at bar, he was asked to do firearms examination only, not toolmark or footwear impression. He identified the firearm found in the weeds, then testified with regard to the methodology of identifying whether particular casings and projectiles were fired by a particular gun. He identified the five casings that were recovered at the crime scene, as well as the projectile, and identified the four bullets found during the autopsy. He testified that he examined the casings, the projectile, and the bullets, and determined that they were all fired from the gun found in the weeds. He testified that the gun found in the weeds, when fully loaded, could potentially hold "eight unfired cartridges." He noted that when it was recovered, it held five unfired cartridges, and agreed with the State that because five cartridges had been fired, it was reasonable to conclude that at some point prior to its discovery, someone had reloaded the gun.

¶ 15 Counsel for the State then asked Gamboe if he could "tell us a little bit about gunshot residue, when it is left and when it is not left on a gun, an item, a person?" Defense counsel objected, on the basis that the question exceeded "the scope of the findings that were submitted in Mr. Gamboe's laboratory report." Counsel added that Gamboe "was asked to examine the gun and compare the gun to the casings and the bullets. There's no analysis of gunshot residue as it pertains to Mr. Gamboe." The trial judge then allowed the State to rephrase its question, which the State did by asking Gamboe if in his 27 years as a firearms examiner, he had ever "been in a position" where he was able to determine "whether particular types of guns leave gunshot residue on the

shooter, on the person that the gun shot, on items in the area of the gun shooting?" Defense counsel renewed his objection, which the judge sustained, stating that he did not believe there had been any "foundation in this testimony that sets forth that he did any examinations or conducted any tests to determine any issues regarding gunshot residue."

¶ 16 Counsel for the State requested permission to use her previous question to attempt to lay a foundation. The trial judge allowed her to do so. Gamboe testified that with regard to having the "opportunity to examine clothing for gunshot residue and how firearms leave gunshot residue," during the course of his employment, "[t]hat's an integral part of our job. Occasionally, we are asked to do what's called a muzzle to garment distance determination where we'll look at clothing to see if there is any gunshot residue." Gamboe further testified that in particular, "we're looking for a pattern of smoke or partially burned or unburned gunpowder that's deposited on a target. It could be clothing. It could be, you know, basically any object." He testified that examiners would then fire a series of test shots with the gun in question to try to determine at what distance a similar pattern gets deposited on the target.

¶ 17 Counsel for the State then asked the trial judge if the objection was now overruled. The judge stated that it was. The State then asked Gamboe if, based upon his experience and expertise in the field, and his "examination of this particular firearm," he had an opinion "as to what kind of gunshot residue that would leave on the shooter's hands?" Gamboe responded, "I find it very unlikely any would be left on the shooter's hands. All the gunshot residue that would come off this would come out of the barrel headed toward the target, or down range. You might get just a little bit that would come out of the

ejection port, which on this particular firearm is on the top." He testified that "[a]bout the only way I can think of that a shooter would end up with any is if they had their hand over the top," and that it was possible that "if a cartridge case would just barely tumble out and hit them on the hand, they might get a little bit of a transfer." He added that "[s]imply, the design of the firearm does not lend toward a deposit of gunshot residue close by."

¶ 18 On cross-examination, Gamboe testified that he did not test the gun found in the weeds for gunshot residue, although he did test fire it. With regard to gunshot residue in general, he testified that if the gun were "held in close to the body, you might get a little bit on the clothing" of the shooter, but otherwise, you would not. He answered additional questions about the muzzle blast of the gun, its accuracy, how long it takes to reload, and how the size of the shooter's hands would affect the shooter's ability to handle the gun.

¶ 19 Antwane Moore was the next witness to testify. He testified that Robinson was his cousin, and that on the date in question, he went to Robinson's house at 1016 North 13th Street in East St. Louis, where Robinson, Bradford, and the defendant already were. Moore testified that he took the defendant, who like Robinson was also Moore's cousin, to pick up a check in Granite City, and then the two men returned to Robinson's house and watched a movie with Robinson, and later Bradford. He testified that the room was getting dark as night fell. He and the defendant left the room, planning to play video games in a different room. As Moore left the room, he heard "boom, boom, boom" and ducked. When asked what he thought the booms were, Moore testified, "I thought somebody was shooting in the house." He did not see the defendant, or anyone else,

shooting. The defendant ran out of the house, although Moore did not see where he went. Moore returned to the bedroom and saw that Robinson had been shot. Police and medical personnel soon arrived.

¶ 20 Moore testified that there had been no disagreements between any of the people in the house prior to the shooting, that he did not hear any arguing, and that nothing negative had been said by anyone as they watched the movie together. He made an in-court identification of the defendant. He testified that on the date in question, he did see the defendant with a weapon, which the defendant told Moore he kept "for protection." He did not see Robinson with a weapon, nor did he see any weapons in the bed or anywhere around Robinson.

¶ 21 On cross-examination, Moore testified that he received disability payments because he was "kind of slow." He reiterated, several times, that prior to the shooting, everybody was getting along, stating that they were "just chilling and talking." He was asked if he had told the police that he heard shots outside of the house, to which he replied, "That's what I thought I heard coming outside. But then the police came in and said no, the bullet up in the–on the bed. They brought me up in the room and showed me the bullet. They say there ain't no bullets outside." He testified that he was not given a gunshot residue test, and that he believed Bradford was not really upset by the shooting, but was "faking" it. On re-direct examination, Moore testified that no one else had entered the house, which was locked.

¶ 22 Shauntae Bradford testified that she was employed as a legal assistant with a law firm, and that Robinson had been her fiancé. They had been dating for 10 years. She

testified that the defendant was her cousin by marriage, and that on the date in question, she, the defendant, and Robinson all lived in the home. The defendant had been living with her and Robinson, "[o]ff and on for about four years." When she got home from work that day, Robinson, the defendant, and Moore were watching a movie. She joined them, lying on the bed with Robinson. She described the lighting in the room as "dim," because "[e]verything was off in the house except for the TV." She did not notice any tension, anger, or arguments between the men, either before or after Moore and the defendant went to Granite City. At some point, Moore and the defendant got up to leave. Bradford testified that the men said they were "going to go smoke." They returned, then very soon thereafter left again. Bradford testified that as they left, she heard Moore say, "hey, they shooting." She did not hear any gunshots. She testified that soon thereafter, she "heard the first shot fired," then saw an arm and leg enter the room "and a lot of shots went off." According to Bradford, the shooter was wearing "a white t-shirt" and "some dark colored pants, or shorts." Bradford testified that Robinson "jumped to his knees," facing towards the door. After the last shots were fired, Robinson fell forward on the bed, onto his stomach. Bradford testified that she attempted to awaken him, but could not. She testified that she could not see the shooter, and could not identify the shooter. She called 911. When officers arrived, they asked her if there were any guns in the area, and she told them no. Counsel for the State then asked Bradford if there were any guns in the area, and she testified that there were not. Upon further questioning by the State, she reiterated that there had been no arguments between the men, that at no point did she see Robinson with a weapon, and that at no point did Robinson threaten the defendant.

¶ 23 On cross-examination, Bradford testified that prior to the night in question, the house had never been shot at, and that she still lives at the house. She testified that Robinson had no life insurance policies naming her as a beneficiary, and that she did not benefit monetarily at all from Robinson's death. She also testified that the two had no checking or savings accounts together, and that although Robinson worked, she made more money than he did, although there was not a "big disparity" in their incomes. She testified that the defendant did not pay rent to live with them, and that when Robinson mentioned the possibility of Moore moving in too, she told him she didn't think that was a good idea. When Robinson then suggested that he would ask Moore to pay rent, she deferred to him on the matter. She testified that she was not tested for gunshot residue, that she did not own a firearm, and that there were no firearms in the house.

¶ 24 The State then called Dr. James Petterchak, who in due course was certified as an expert in forensic medicine. Petterchak testified that he performed an autopsy on Robinson's body, and that Robinson had six gunshot wounds. He described the direction of entry of one of the gunshots as "back to front, slightly downward, and slightly left to right." He testified that there were no controlled substances, and no alcohol, in Robinson's system, and that he had determined the cause of Robinson's death to be multiple gunshot wounds to the chest. On cross-examination, he testified that the path of some of the bullets was "pretty much straight down" and opined that the most likely position for the bullets to have come from was "[f]rom shots that were oriented perpendicular to his back" rather than at an angle. On re-direct examination, Dr. Petterchak testified that Robinson could have received his injuries if he was kneeling or

sitting on a bed, but with the top half of his body "up and vertical" and his back to the shooter.

¶ 25 Following Dr. Petterchak's testimony, the State rested. The defendant moved for a directed verdict. His motion was denied. The defendant then presented his case, beginning with the testimony of Dr. Daniel Cuneo. Dr. Cuneo testified that he is a clinical psychologist who deals primarily with the courts, doing fitness and sanity evaluations. He estimated that he had testified at trial over 2500 times. Upon request by the defendant, and without objection from the State, Dr. Cuneo was certified by the trial judge as an expert witness in clinical psychology.

¶ 26 Dr. Cuneo testified that pursuant to a court order, he had evaluated the defendant "as to his fitness to stand trial, his sanity, and his ability to waive his Miranda rights." It was his expert opinion that the defendant was fit to stand trial, although the defendant "clearly had a mental illness, major depressive disorder recurrent–or major episode recurrent" as well as, *inter alia*, "mild mental retardation." Dr. Cuneo testified that cognitively, the defendant "functions like a nine to ten-year-old," and that he reads at a second grade level, unable to "read such simple words as 'felt' and 'split.' " Because of his limited intellectual abilities, the defendant is "easily led." Dr. Cuneo also testified that the defendant's mother died in 2000, an event that "was probably the onset of his depressive difficulties" because of his closeness to her. Dr. Cuneo testified that after the death of his mother, the defendant "kind of bounced around" before coming to live with Bradford, who "kind of assumed the mother's role for him at that time."

¶ 27 On cross-examination, Dr. Cuneo testified that although the defendant was not delusional, and did not have hallucinations, "[t]here was a paranoid flavor at times to his thinking." With regard to the defendant's sanity, Dr. Cuneo's expert opinion was that despite the defendant's mental illness and limited intellectual functioning, "he still knew that shooting an individual is wrong, he still knew that shooting can cause death and he could have controlled his behavior if he so desired."

¶ 28 The next witness called by the defendant was Mary Wong, a forensic scientist with the Illinois State Police for the past 17 years, who had testified at trial "[a] couple hundred times." Upon request by the defendant, and without objection from the State, the trial judge certified Wong as an expert "in forensic science." Wong testified that in the case at bar, she had "analyzed two prima gunshot residue evidence collection kits," one of which was administered to the defendant, and one to Robinson. Her expert opinion with regard to the defendant was that "he may not have discharged the firearm with either hand, if he did, then the particles were either removed by activity, not detected by the procedure or not deposited." Her expert opinion with regard to Robinson was that he "either came in contact with a prima gunshot residue related item, discharged a firearm or was in the vicinity of a discharged firearm."

¶ 29 On cross-examination, Wong agreed that there is variability with regard to when gunshot residue will or will not be found, that sometimes gunshot residue is not deposited on the hands "because the hands were moved away or the hands were covered," and that the more time that has passed between the firing of a gun and the testing for residue, the

less likely it is that residue will be there. On re-cross-examination, Wong reiterated her earlier-stated conclusions with regard to both the defendant and Robinson.

¶ 30 Closing arguments were made and the jury was instructed. The jury received five verdict forms, which allowed the jury to find the defendant: (1) not guilty; (2) guilty of first degree murder; (3) guilty of first degree murder but mentally ill; (4) guilty of second degree murder (harboring an unreasonable belief in self-defense); and (5) guilty of second degree murder but mentally ill. Following deliberations, the jury found the defendant guilty of first degree murder but mentally ill. The jury also found that the defendant was armed with a firearm, and personally discharged that firearm, proximately causing great bodily harm, permanent disfigurement, or death to another person. The defendant filed a timely posttrial motion in which he alleged that he had not been proven guilty beyond a reasonable doubt, and that the trial court erred by allowing Gamboe to testify about gunshot residue because Gamboe "had never tested the purported murder weapon for [gunshot residue]" and therefore should not have been allowed "to testify generally about that type of gun." He also claimed that allowing Gamboe to so testify "denied the defense the opportunity to properly prepare for cross examination of the State's expert witness." Following a hearing, the motion was denied. Following his sentencing hearing, the defendant was sentenced to 45 years' imprisonment: 20 years for murder, and 25 years for having committed the murder with a firearm. This timely appeal followed.

¶ 31 ANALYSIS

¶ 32 On appeal, the defendant contends that: (1) he was not proven guilty beyond a reasonable doubt; and (2) it was error for the trial judge to allow Gamboe to render an expert opinion as to whether the gun used to kill Robinson would be likely to deposit residue on the hands of the shooter, because Gamboe was not "disclosed or qualified as an expert" on the subject.

¶ 33 With regard to the defendant's first contention, we begin by examining our standard of review. The principles a reviewing court must consider when evaluating a defendant's challenge to the sufficiency of the evidence used to convict that defendant are well-settled. The relevant question a reviewing court must ask is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (Emphasis in original.)" *People v. Jackson*, 232 Ill. 2d 246, 280 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Our standard of review does not allow us to substitute our "judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses." *Id*. at 280-81. Moreover, we apply this standard regardless of whether the evidence in question is direct or circumstantial, and we are mindful of the fact that "circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction." *Id*. at 281. We are mindful as well of the fact that, "in weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id*. Applying

this standard, we "will not reverse a conviction unless the evidence is 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt.' " *Id*. (quoting *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)).

¶ 34 The crux of the defendant's challenge to the sufficiency of the evidence is his contention that he was not proven guilty beyond a reasonable doubt because: (1) no eyewitness claimed to have seen the defendant shoot Robinson, and (2) no physical evidence connected him to the crime. Specifically, he notes that although both Moore and Bradford were present at the scene of the shooting, neither identified the defendant as the shooter. He also contends that the gunshot residue evidence did not establish that the defendant was the shooter, that no suitable fingerprints were obtained, and that Dr. Petterchak's testimony "regarding the angle of the bullets upon entry contradicts Bradford's account of the shooting and the State's entire theory of the case," and points to Bradford, rather than the defendant, as the shooter. The State counters that the defendant himself admitted to shooting Robinson, and that in any event there was sufficient circumstantial evidence to support his conviction. Against the backdrop of the standard of review recited above, we review, in the light most favorable to the prosecution, the evidence−direct or circumstantial−that was presented at the defendant's trial.

¶ 35 As described in detail above, at trial police officers Olson and Long both testified that the man they met near the scene of the shooting−whom Olson described as "a large black male with a white t-shirt on," and whom Long described as a black male wearing a white t-shirt, blue pants, and black shoes and whom Long identified at trial as the

defendant−told them that he[2] had shot first at someone who the man believed was trying to kill him. Their testimony is consistent with that of Dr. Cuneo, who testified that the defendant is mentally ill, and that although he was not delusional when Dr. Cuneo examined him, "[t]here was a paranoid flavor at times to his thinking." Olson testified that the man told her he lived at 1016 North 13th Street−the house where Robinson also lived and where he was shot−and pointed to the house at that address. Both officers testified that the defendant told them he had disposed of his gun in the weeds, and showed them the area where he had done so. The firearm was eventually located and recovered. Long testified that when he spoke with Bradford at the scene of the shooting, she told him that while she and Robinson watched television, the defendant left the room, "and immediately came back in and she heard a pop sound." Although at trial Bradford

[2]Counsel for the defendant on appeal suggests to this court that perhaps the officers misunderstood the defendant, and that "he" shot first meant that the person the defendant believed was trying to kill him shot first. We do not believe the officers could have made this mistake. Despite the defendant's mild mental retardation, there is nothing in the record to support the notion that he would have said anything other than "I shot first" if referring to himself (as apparently he did), and "he shot first" if referring to someone else. Both officers testified clearly and unequivocally that the defendant indicated that the defendant shot first, and neither officer purported to be quoting the defendant directly when they used the term "he" in their testimony, described in detail at the outset of this order.

could not identify the defendant as the shooter, she testified that the shooter was wearing a white t-shirt and dark-colored pants or shorts, a description that clearly matches the description of the defendant given by Long, and of the man she encountered given by Olson. Likewise, although Moore did not see who was shooting, and therefore could not identify the defendant as the shooter, his testimony, like Bradford's, clearly put the defendant in the house at the time of the shooting, and established that the defendant kept a weapon "for protection"–a weapon Moore had seen in the possession of the defendant on the day of the shooting. His testimony also established that no one else had entered the house, which was locked.

¶ 36 With regard to physical evidence, at the crime scene officers found shell casings and a projectile that they later determined had been fired from the gun the defendant had possessed and had discarded in the weeds. Bullets removed from Robinson's body during the autopsy also had been fired from the gun the defendant had possessed and had discarded in the weeds. No witness offered any testimony indicating that Robinson, Bradford, or anyone else other than the defendant possessed a weapon at the time of the shooting, and multiple witnesses testified that no guns were found in the house after the shooting. No latent print impressions that were suitable for comparison were found on the firearm the defendant discarded in the weeds. The gunshot residue test performed on the defendant was not conclusive, leaving open the possibility that he may, or may not, have discharged the firearm, and that "if he did, then the particles were either removed by activity, not detected by the procedure or not deposited." Wetzler testified that "probably within the first 30 minutes of–of arriving on scene," he suggested to the East St. Louis

officers present that if the officers desired that a gunshot residue test be conducted, paper bags be placed around the defendant's hands "[t]o protect any–any possible evidence that may or may not be present as a result of firing a weapon." Wetzler did not know when the officers followed his suggestion, but when he administered a gunshot residue test "within a few hours of having arrived on scene," the defendant had bags on his hands.[3] Wong testified that there is variability with regard to when gunshot residue will or will not be found, that sometimes gunshot residue is not deposited on the hands "because the hands were moved away or the hands were covered," and that the more time that has passed between the firing of a gun and the testing for residue, the less likely it is that residue will be there.

¶ 37 With regard to Dr. Petterchak's testimony about the angle of bullet entry, we note that on re-direct examination, Dr. Petterchak testified that Robinson could have received his injuries if he was kneeling or sitting on a bed, but with the top half of his body "up and vertical" and his back to the shooter, testimony that was consistent with the account of the shooting given by Bradford. Bradford also testified that Robinson had no life insurance policies naming her as a beneficiary, and that she did not benefit monetarily at all from Robinson's death. She further testified that the two had no checking or savings

[3]We note as well that Wetzler testified that he arrived "on scene" at approximately 8:40 p.m. Dispatcher McDonald testified that the 911 call came in at approximately 7:55 p.m., meaning that Wetzler didn't even arrive on scene until approximately 45 minutes after the shooting.

accounts together, and that although Robinson worked, she made more money than he did, although there was not a "big disparity" in their incomes.

¶ 38 In light of the foregoing evidence presented to the jury, and the standard of review explained in detail above, we cannot conclude that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Indeed, it is difficult to imagine how the jury could have concluded that the defendant was *not* the shooter in this case. We find no merit to the defendant's sufficiency of the evidence claim.

¶ 39 The defendant's second contention on appeal is that it was error for the trial judge to allow Gamboe to render an expert opinion as to whether the gun used to kill Robinson would be likely to deposit residue on the hands of the shooter, because Gamboe was not "disclosed or qualified as an expert" on the subject. With regard to the disclosure of Gamboe as an expert witness, the defendant asserts that "Gamboe had not been disclosed as an expert in the field of gunshot residue prior to trial, and defense counsel had not been provided with his qualifications." This, according to the defendant, led to unfair surprise and prejudice when Gamboe was allowed to testify. The State responds by pointing out that the defendant "gives no record citation to support his argument, because nothing in the record supports this proposition." As the State also notes, when trial counsel objected to Gamboe's testimony about gunshot residue, counsel's objection was that gunshot residue testimony was "beyond the scope of the findings that were submitted in Mr. Gamboe's laboratory report." However, the State points out, the laboratory report is not

included in the record on appeal, and thus there is no way to know what was or was not in the report.

¶ 40 It is certainly true that the record does not show a clear discovery violation, by means of a failure to disclose, by the State in this case, and it is axiomatic that the burden to present this court with a complete record on appeal is on the appellant–in this case, the defendant. See, *e.g.*, *People v. Fernandez*, 344 Ill. App. 3d 152, 160 (2003) ("any doubts arising from the incompleteness of the record will be construed against defendant, whose responsibility it was as appellant to present a complete record on review"). It is also true that at trial, defense counsel did not object on the basis that he had never been provided with Gamboe's qualifications. Moreover, it is clear that Gamboe was listed as a proposed witness in materials furnished by the State to the defendant more than a month prior to trial–as a "forensic scientist," which, we note, is the same designation given by the State to Wong when the State disclosed to the defendant that the State might call her as a witness. The record contains no information about the defendant's disclosure of his witnesses to the State, or the level of specificity employed by the defendant in so doing.

¶ 41 The lack of a clear discovery violation notwithstanding, even if we were to assume, *arguendo*, that the State did fail to adequately disclose the range of the expected subject matter of Gamboe's testimony, the defendant would not be entitled to a new trial. When the State does not adequately disclose information to a defendant, "the failure to comply with discovery requirements does not always necessitate a new trial." *People v. Tripp*, 271 Ill. App. 3d 194, 203 (1995). That is because although compliance with discovery rules is mandatory, reversal is required only where there is "a showing of

surprise or undue prejudice," and "[a] new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court fails to eliminate the prejudice." *Id*.

¶ 42 In the case at bar, although both trial and appellate counsel have done the best they could to make a case for the defendant, the facts before the jury in the trial court, and before this court on appeal following the conviction of the defendant by that jury, remain: two police officers testified that the defendant told them he had fired the gun, then discarded it in the weeds, and the defendant showed them the area where the gun was subsequently found. The gun the authorities recovered from that area was matched to the bullets removed from the victim's body, and to shell casings and a projectile found at the scene of the shooting. The defendant's own expert, Mary Wong, testified that there is variability with regard to when gunshot residue will or will not be found, that sometimes gunshot residue is not deposited on the hands "because the hands were moved away or the hands were covered," and that the more time that has passed between the firing of a gun and the testing for residue, the less likely it is that residue will be there. The officer who conducted the gunshot residue test on the defendant testified that: (1) "probably within the first 30 minutes of–of arriving on scene," he suggested to the East St. Louis officers present that if the officers desired that a gunshot residue test be conducted, paper bags be placed around the defendant's hands "[t]o protect any–any possible evidence that may or may not be present as a result of firing a weapon"; and (2) he did not know when the officers followed his suggestion, but when he administered a gunshot residue test

"within a few hours of having arrived on scene," the defendant had bags on his hands.[4] In light of these facts−particularly the testimony of two witnesses that the defendant told he had fired the gun−and the other facts discussed thoroughly above, any possible error in the admission of Gamboe's testimony about gunshot residue was not prejudicial to the defendant, because the issue of whether the defendant did or did not have gunshot residue on his hands was of marginal significance, and we cannot say that the exclusion of Gamboe's testimony about gunshot residue could reasonably have been expected to alter the jury's verdict. We note as well that, in light of the record before us, we cannot conclude that any disclosure violation that might have occurred was willful on the part of the State, or that prior notice that Gamboe's testimony would include testimony about gunshot residue could have helped the defense discredit the marginally significant evidence about gunshot residue that Gamboe eventually provided. See *People v. Tripp*, 271 Ill. App. 3d 194, 203 (1995). Finally, although not determinative in the case at bar, we note that although defense counsel could have requested a recess, or a continuance, following the trial judge's ruling that Gamboe could testify about gunshot residue, so that counsel could, as he put it in his posttrial motion, "properly prepare for cross examination of" Gamboe, counsel did not do so, and our supreme court has held that the failure to

[4]We reiterate that the officer testified that he arrived "on scene" at approximately 8:40 p.m. Dispatcher McDonald testified that the 911 call came in at approximately 7:55 p.m., meaning that the officer, Wetzler, didn't even arrive on scene until approximately 45 minutes after the shooting.

attempt such remedial actions is a relevant factor to consider in determining whether there was really any actual surprise or undue prejudice to a defendant. See *People v. Robinson*, 157 Ill. 2d 68, 78 (1993).

¶ 43 With regard to whether Gamboe was qualified to testify as an expert witness on the issue of gunshot residue, we note that it is well established that the determination of whether a witness qualifies as an expert is within the sound discretion of the trial court, and a reviewing court will not disturb the trial court's decision unless the trial court abused its discretion in admitting the testimony of the witness. See, *e.g.*, *People v. Jordan*, 103 Ill. 2d 192, 208, 209 (1984). Moreover, "[i]t is well established that an individual will be permitted to testify as an expert if his [or her] experience and qualifications afford him [or her] knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *Id.* at 208. We note as well that, with regard to indicia of expertise, an "expert may gain his or her knowledge through practical experience rather than scientific study, training, or research." *People v. Novak*, 163 Ill. 2d 93, 104 (1994).

¶ 44 In support of his contention on appeal, the defendant claims that Gamboe "was certified as an expert in forensic identification, not gunshot residue." In fact, as described in detail above, upon request by the State, and without objection from defense counsel, the trial court ruled that Gamboe "will be certified as an expert in his field." Wong, likewise, was not certified as an expert in gunshot residue–upon request by the defendant, and without objection from the State, the trial judge certified Wong as an expert "in forensic science." In both cases, the witnesses then testified to their expertise with regard

to gunshot residue. Gamboe specifically testified that with regard to having the "opportunity to examine clothing for gunshot residue and how firearms leave gunshot residue," during the course of his employment, "[t]hat's an integral part of our job. Occasionally, we are asked to do what's called a muzzle to garment distance determination where we'll look at clothing to see if there is any gunshot residue." Gamboe further testified that in particular, "we're looking for a pattern of smoke or partially burned or unburned gunpowder that's deposited on a target. It could be clothing. It could be, you know, basically any object." He testified that examiners would then fire a series of test shots with the gun in question to try to determine at what distance a similar pattern gets deposited on the target. Counsel for the State then asked the trial judge if the defendant's objection to Gamboe testifying about gunshot residue was now overruled. The judge stated that it was. The State then asked Gamboe if, based upon his experience and expertise in the field, and his "examination of this particular firearm," he had an opinion "as to what kind of gunshot residue that would leave on the shooter's hands?" It was at that point that Gamboe offered his expert testimony on gunshot residue with regard to the firearm in question in this case. Based upon Gamboe's testimony about his expertise in the field, we do not believe the trial judge abused his discretion by concluding that Gamboe was qualified to testify as an expert. Moreover, even if the judge had erred, the defendant suffered no prejudice as a result of the judge's ruling, as explained in detail above, and therefore any such error would have been a harmless one.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 47 Affirmed.