No. 126383

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOHN CLINE, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-2631 There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 15 CR 18158 The Honorable Vincent M. Gaughan, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Following a bench trial in the Circuit Court of Cook County, the trial court convicted defendant of residential burglary and sentenced him to eight years in prison. C116.[1]

Defendant appealed, and the Illinois Appellate Court reversed on the ground that the prosecution failed to "provide sufficient evidence from which the trial court could draw a reasonable inference that the partial fingerprint found on the scene belonged to [defendant]." *People v. Cline*, 2019 IL App (1st) 172631, ¶ 36. The People now appeal that judgment. No question is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the evidence was sufficient to prove beyond a reasonable doubt that defendant committed residential burglary.

JURISDICTION

On November 18, 2020, this Court allowed the People's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

[1] Citations to the common law record appear as "C__"; to the report of proceedings as "R__"; and to the People's appellee's brief below, which the People asked the appellate court to certify to this Court pursuant to Rule 318(c), as "Peo. App. Ct. Br. __."

STATEMENT OF FACTS

The trial evidence showed that on the evening of September 1, 2015, Tom Slowinski discovered that his apartment had been burgled. R138-41. Slowinski testified that when he left his apartment that morning, the doors were locked. R139. He lived in the apartment by himself, R140, and no one else had a key to the apartment or permission to enter in his absence, R140, R144-45. But when he returned that evening, he found the front door open and scratched. R140. The apartment had been ransacked, and several items had been stolen, R141-42, including a pair of headphones that had been removed from a metal case that the burglar had moved from its original location and left on the floor, R143-44, R147. Slowinski called the police. R141-42.

Evidence technician Hiram Gutierrez testified that he dusted the headphone case for fingerprints and found a single latent[2] fingerprint, which he lifted and inventoried. R150-52. He found no other fingerprints on the headphone case, not even prints that were unsuitable for comparison. R153. Gutierrez denied that the print he lifted from the case was a "partial print," but he agreed that it was "not a full print," if a full print was defined as "everything." R153-54.

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[2] A "latent" fingerprint is a fingerprint that is invisible until revealed through investigative processes such as dusting for fingerprints, R150-51, R166; if the fingerprint is visible without such processing, it is a "patent" fingerprint, R166.

Daniel Dennewitz, a latent fingerprint examiner with the Chicago Police Department, R161, testified that he was trained in fingerprint identification through the FBI Criminal Justice Information Services Center and an apprenticeship with the Chicago Police Department, during which he took classes with fingerprint identification experts and passed annual proficiency examinations, R161-62. He was previously qualified as an expert in the area of fingerprint identification approximately five times, R162, and had examined thousands of fingerprints, R163. Dennewitz was accepted without objection as a forensic expert in the area of fingerprint identification. *Id.*

Dennewitz testified that he compared the fingerprint lifted from the headphone case with defendant's known standard fingerprints — that is, with defendant's catalogued fingerprints taken under ideal circumstances, R166-67 — and concluded that "the two prints c[a]me from the same source": defendant's right middle finger. R171. Dennewitz explained that he had found approximately 20 points of comparison between the fingerprint on the headphone case and the fingerprint from defendant's right middle finger, nine of which he had marked on a demonstrative exhibit. R171-72. He had repeated his analysis by comparing the fingerprint found on the headphone case with a second set of defendant's known standard prints and again concluded within a reasonable degree of scientific certainty that "the two prints c[a]me from the same source." R172-73.

Defense counsel did not object to Dennewitz's testimony, *see* R163-74, or cross-examine him regarding his methodology, *see* R174-80. Rather, counsel examined Dennewitz regarding the completeness of the fingerprint found on the headphone case. *Id.* Dennewitz agreed that the fingerprint on the headphone case did not contain the entirety of the fingerprint. R176. Dennewitz explained that a full fingerprint stretches from one side of the fingernail to the other and from the end of the fingernail down to the crease at the first joint. R174-75. (The police officer who took defendant's fingerprints testified that he takes fingerprints by rolling a person's finger across the fingerprint scanner to ensure that the entire print is scanned, from the left side all the way to the right side. R157-59.) Because Dennewitz had determined that the fingerprint found on the headphone case was created by defendant's finger, Dennewitz agreed that he would assume that, had the fingerprint found on the case included additional portions of the print, those additional portions would also match defendant's fingerprint. R180. As Dennewitz explained, every fingerprint is unique; no two fingerprints are the same. R165.

Detective Timothy O'Brien testified that he interviewed defendant after defendant's arrest. R181-83. After defendant was advised of his *Miranda* rights, R183-84, he denied that he had ever been in the area of Slowinski's apartment, R184.

The defense presented no evidence, R186-87, and the trial court found defendant guilty of residential burglary, R189-91. The trial court rejected defendant's argument that Dennewitz made an improper assumption regarding the portions of the fingerprint not left on the headphone case. R190-91. As the trial court explained, because fingerprints are unique and Dennewitz had identified the fingerprint found on the headphone case as created by defendant's right middle finger, he would naturally assume that had additional portions of the print been available, they would also match defendant's right middle finger. *Id.*

Represented by new counsel, defendant moved for a new trial, alleging, *inter alia*, that trial counsel was ineffective for inadequately cross-examining Dennewitz regarding his qualifications and the basis for his opinion that the fingerprint lifted from the headphone case matched defendant's, C81; R204-206; defendant did not mention the ACE-V method of fingerprint analysis or fault counsel for failing to cross-examine Dennewitz regarding whether he attempted to verify his results with a second examiner, *see id.* After hearing testimony from trial counsel and argument from the parties, *see* R202-225, the trial court denied the motion, R227. The court noted that "no one has presented any evidence that the fingerprint examiner [wa]s incompetent" and that if there was such evidence, defense counsel "certainly would have presented that." R226.

Defendant appealed, C120, and the appellate court reversed, *People v. Cline*, 2019 IL App (1st) 172631, ¶ 36. The appellate court noted that "[n]o one disputes that someone went into Slowinski's apartment without his permission and took things," *id.* ¶ 16, but held that the prosecution failed "to provide sufficient evidence from which the trial court could draw a reasonable inference that the partial fingerprint found on the scene belonged to [defendant]," *id.* ¶ 36. The appellate court found Dennewitz's identification of the fingerprint on the headphone case incredible because he "repeatedly described the latent print as 'partial' and admitted to extrapolating a conclusion about the missing portion of the print by making an assumption." *Id.* ¶ 24.[3] The appellate court further found Dennewitz's testimony incredible because he "fail[ed] to follow standard analytical procedure for matching prints." *Id.* ¶ 18. Based on case law addressing the general acceptance of the ACE-V method of fingerprint analysis for purposes of determining its admissibility under the *Frye* standard, *id.* (citing *People v. Luna*, 2013 IL App (1st) 072253, ¶¶ 60-84), the appellate court took judicial notice of the ACE-V method as "the proper technique" for fingerprint analysis, *id.* ¶ 19.[4] Relying

[3] Although the appellate court stated that Dennewitz "repeatedly described the latent print as 'partial,'" in fact he described it as "partial" only once, in response to defense counsel's last question. R180.

[4] Although the appellate court asserted that "[t]he State's brief accepts the use of ACE-V as the proper methodology," *Cline*, 2019 IL App (1st) 172631, ¶ 19, in fact the People's appellee's brief never mentioned the ACE-V method at all, much less endorsed it as the only proper method of fingerprint analysis, *see* Peo. App. Ct. Br. 1-9.

on one report and one article, *id.* ¶ 21, neither of which were presented at trial, *see* R138-86, the appellate court found, "based on the literature," that verifying the testifying expert's results with a second expert was a "critical step" that was "'integral' to the process," *id.* ¶ 21, and concluded that no rational factfinder could have credited Dennewitz's testimony because there was no evidence that he verified his results with a second expert, *id.* ¶¶ 21, 26, 36.

The appellate court acknowledged that the rule against hearsay might well have barred Dennewitz from testifying that a second expert agreed with his results, but offered "a simple fix": if the prosecution wished to present the opinion of one fingerprint expert, it should have called a second fingerprint expert to corroborate the first expert's opinion. *Id.* ¶ 22.

The special concurrence agreed that the evidence was insufficient "because the fingerprint analysis was not verified by another examiner," *id.* ¶ 38 (Walker, J., specially concurring), and also would have found the evidence insufficient because no rational factfinder could infer that defendant left his fingerprint on the headphone case during the burglary rather than at some other time, *id.* ¶ 40. The special concurrence reasoned that "[g]iven the nature of headphones and a headphone case," it was possible that at some point Slowinski could have carried the headphone case in public, dropped it, and had it returned to him by defendant, who "naturally" left his fingerprint on it. *Id.*

ARGUMENT

I. Standard of Review

"When a defendant challenges the sufficiency of the evidence, a reviewing court must determine 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." *People v. Jackson*, 2020 IL 124112, ¶ 64; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact," *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006), and "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution," *Jackson*, 443 U.S. at 319 (emphasis in original). "Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses." *Jackson*, 2020 IL 1302310, ¶ 64. Although a factfinder's presumed credibility determination "is not conclusive and does not bind the reviewing court," *People v. Gray*, 2017 IL 120958, ¶ 35, a reviewing court may reject testimony as "insufficient under the *Jackson* standard . . . only where the record evidence *compels* the conclusion that no

reasonable person could accept it beyond a reasonable doubt," *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (emphasis added).

II. The Evidence Was Sufficient to Prove Beyond a Reasonable Doubt that Defendant Committed Residential Burglary.

To prove defendant guilty of residential burglary, the evidence at trial had to establish "two distinct propositions or facts beyond a reasonable doubt: (1) that a [residential burglary] occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by [defendant]." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). Viewed in the light most favorable to the prosecution, *Jackson*, 2020 IL 124112, ¶ 64, the evidence was sufficient to allow the trial court to conclude beyond a reasonable doubt both that a residential burglary occurred and that defendant was the burglar.

A. The victim's testimony was sufficient to establish that a residential burglary occurred.

The evidence was sufficient to establish the *corpus delicti* of residential burglary: that someone "knowingly and without authority enter[ed] . . . the dwelling place of another . . . with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (2015). Slowinski testified that when he left his apartment, the doors were locked and no one else had either a key to the apartment or permission to enter in his absence. R139-40. But when he returned, the front door was open. R140. Slowinski observed signs of a forced entry — there were scratches on the door, *id.* — and found that the apartment had been ransacked and several items stolen, R141-42, including

a pair of headphones that the burglar had removed from a metal case that he then left on the floor, R143-44. Viewed in the light most favorable to the prosecution, this evidence proved that someone entered Slowinski's apartment without authority and with the intent to commit theft. *People v. Stevens*, 188 Ill. App. 3d 865, 882-83 (4th Dist. 1989) (holding that evidence that residence was broken into and ransacked was sufficient to establish *corpus delicti* of residential burglary).

B. The fingerprint evidence was sufficient to establish that defendant was the burglar.

The fingerprint evidence was sufficient to establish that defendant was the burglar because it showed that his fingerprint was found (1) "in the immediate vicinity of the crime" and (2) "under such circumstances as to establish beyond a reasonable doubt that the fingerprint[] w[as] impressed at the time the crime was committed." *People v. Rhodes*, 85 Ill. 2d 241, 249 (1981). Dennewitz's expert testimony established that defendant's fingerprint was found on the headphone case in Slowinski's burgled apartment, and the circumstances under which defendant's fingerprint was found on the headphone case established that he left the fingerprint while committing burglary.

1. The expert testimony established that defendant's fingerprint was found on the headphone case in the burgled apartment.

After the trial court accepted Dennewitz without objection as a fingerprint identification expert, R163, he testified, also without objection,

that he compared the fingerprint found on the headphone case in Slowinski's apartment with defendant's fingerprints and determined that defendant left the fingerprint on the case with the middle finger of his right hand, R171-73. Dennewitz explained that he reached this conclusion based on the approximately 20 points of comparison he found between the fingerprint lifted from the case and a fingerprint standard that police took from defendant's right middle finger. R171-72. Dennewitz then repeated his analysis by comparing the fingerprint lifted from the headphone case with a second fingerprint taken from defendant's right middle finger and reached the same conclusion. R173. Viewed in the light most favorable to the prosecution, Dennewitz's expert testimony was sufficient to establish that the fingerprint found on the headphone case in Slowinski's apartment was defendant's.

The appellate court misapplied the *Jackson* standard and misunderstood the record when it reached the contrary conclusion that no rational factfinder could credit Dennewitz's testimony because there was no evidence that a second expert agreed with his opinion, *Cline*, 2020 IL App (1st) 172631, ¶¶ 18-21, 36, and because his opinion was based on a partial fingerprint, *id.* ¶ 24. Under the *Jackson* standard, the credibility of Dennewitz's expert opinion was not contingent on corroboration by a second expert. Nor was Dennewitz's expert opinion incredible simply because it was based on a partial fingerprint.

a. The credibility of a fingerprint expert's opinion is not contingent on corroboration by a second expert.

The *Jackson* standard does not require that a second expert agree with Dennewitz's expert opinion before a rational factfinder may credit it. *See Gray*, 2017 IL 120958, ¶ 36 ("The testimony of a single witness is sufficient to convict if the testimony is positive and credible, even where it is contradicted by the defendant."); *see also People v. Ford*, 239 Ill. App. 3d 314, 319 (5th Dist. 1992) (holding that rational factfinder could credit single fingerprint expert's opinion despite his admission that other fingerprint experts might disagree). Because defendant did not object to Dennewitz's acceptance as a fingerprint identification expert or to his testimony, the trial court was free to decide what weight to afford that testimony in light of any infirmities exposed through cross-examination. *People v. Hall*, 194 Ill. 2d 305, 332 (2000) ("Any infirmities in the testimony of the State's expert witness merely go to the weight of the evidence and the expert's credibility as a witness."). The trial court credited Dennewitz's testimony. R190-91.

The appellate court erred not only in rejecting the trial court's credibility determination in favor of its own, *see Jackson*, 2020 IL 124112, ¶ 64, but particularly in doing so based on extra-record materials. The appellate court held that no rational factfinder could credit Dennewitz's opinion because he "fail[ed] to follow standard analytical procedure for matching prints," *Cline,* 2019 IL App (1st) 172631, ¶ 18, by not "attempt[ing]

to verify his results with another examiner," *id.* ¶ 21. But nothing in the record suggested that standard analytical procedure required Dennewitz to attempt to verify his results with another examiner; Dennewitz did not testify that such verification is part of the standard procedure, and defendant did not cross-examine him on whether verification was required, much less on whether a second examiner verified Dennewitz's analysis in this case. Instead, the appellate court found fault with Dennewitz's methodology based entirely on extra-record materials. First, the appellate court found that ACE-V was "the proper technique" for fingerprint comparison, *id.* ¶ 19 (citing *People v. Luna*, 2013 IL App (1st) 072253), based on a decision holding simply that the ACE-V method of fingerprint comparison is generally accepted within the relevant scientific community and therefore admissible under the *Frye* standard, *see Luna*, 2013 IL App (1st) 072253, ¶ 84. Having decided, based on this misuse of admissibility case law, that ACE-V was the only acceptable method of fingerprint analysis, the appellate court then found, "based on the literature" (consisting of an article and a report[5], neither of which were presented at trial, *see* R138-87), that verification of a fingerprint expert's results by a second expert was "integral" to the process under the ACE-V method. *Cline*, 2019 IL App (1st) 172631, ¶ 21. Because there was no

[5] *Cline*, 2019 IL App (1st) 172631, ¶ 21 (quoting *Latent Prints: A Perspective on the State of the Science*, 11 Forensic Sci. Commc'n No. 4 (2009), and Nat'l Research Council of the Nat'l Acad., *Strengthening Forensic Science in the United States: A Path Forward* 139 (2009)).

evidence that Dennewitz "took this critical step," *id.*, the appellate court concluded that no rational factfinder could credit his testimony, *id.* ¶¶ 21, 28, 36.

The appellate court's reliance on extra-record materials to reject the trial court's credibility determination was improper. *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (quoting *Jackson*, 443 U.S. at 318) ("[T]he sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence.'"); *see People v. Magee*, 374 Ill. App. 3d 1024, 1030 (1st Dist. 2007) (refusing to consider scientific articles and psychological studies that were not presented at trial and striking portion of defendant's brief relying on them in support of his challenge to witnesses' credibility). Indeed, had the trial court done what the appellate court implicitly faulted it for not doing — that is, had the trial court sought out and relied upon extra-record sources to inform its evaluation of Dennewitz's testimony — it would have committed reversible error. *See People v. Yarbrough*, 93 Ill. 2d 421, 429 (1982) ("Due process does not permit [the trial judge] to go outside the record . . . or conduct a private investigation in a search for aids to help him to make up his mind about the sufficiency of the evidence."); *People v. Harris*, 57 Ill. 2d 228, 232-33 (1974) ("It is clear . . . that a trial judge in his deliberations is limited to the record made before him at trial and should he draw conclusions based on any private investigation made by him the accused will have been denied due process of law.").

Moreover, even if Dennewitz had testified that he employed the ACE-V method — the appellate court acknowledged that he "did not refer to the ACE-V [method] specifically during his testimony," *Cline*, 2019 IL App (1st) 172631, ¶ 20 — and that verification by a second expert was part of that process, the absence of evidence that a second expert agreed with his conclusions would not have rendered his testimony incredible. *See Forward v. State*, 406 S.W.3d 601, 606 (Ct. App. Tx. 2013) ("The jury was free to take the lack of verification into account when it determined whether to believe the expert's testimony; however, the lack of verification did not render the expert's testimony unreliable."); *United States v. John*, 597 F.3d 263, 275 (5th Cir. 2010) (rejecting defendant's challenge to reliability of fingerprint evidence based on lack of verification). Because Dennewitz's expert opinion was admitted without objection, any criticism that he did not seek corroboration by a second expert would "go only to the weight of the evidence, not its sufficiency." *Snelson v. Kamm*, 204 Ill. 2d 1, 26 (2003); *see In re Det. of Erbe*, 344 Ill. App. 3d 350, 373 (4th Dist. 2003) (challenges to sufficiency of evidence based on "alleged infirmities" in expert opinions "simply attack the weight of the evidence and the credibility of those witnesses"). To the extent that defendant believed Dennewitz's opinion was not credible because Dennewitz did not properly follow the ACE-V method, it was incumbent upon him to expose that deficiency through cross-examination. Given that defendant likely had Dennewitz's report, *see* R163; C30 (prosecution's answer

to discovery stating that expert reports would be tendered to defense), it is entirely possible that counsel declined to cross-examine Dennewitz about whether a second expert agreed with his conclusions because doing so would elicit damaging testimony that a second expert *had* agreed, which testimony the prosecution itself could not have presented. *See Kim v. Nazarian*, 216 Ill. App. 3d 818, 828 (2d Dist. 1991) (holding that expert's testimony about corroborating expert's "out-of-court opinion would impermissibly circumvent the rule against hearsay" because although corroboration of a testifying expert's opinion by a second expert "might reinforce the expert's confidence in the opinion," it is "not the *basis* of the expert's opinion.") (emphasis in original).

At bottom, defendant's attack on Dennewitz's credibility on appeal — for allegedly not employing a generally accepted methodology of fingerprint analysis — was not a challenge to the sufficiency of the evidence at all, but a forfeited challenge to the admission of Dennewitz's opinion. *People v. DeLuna*, 334 Ill. App. 3d 1, 19-21 (1st Dist. 2002) (defendant's challenge to sufficiency based on prosecution's failure to prove its expert relied on types of facts generally relied upon by experts in his field, used properly functioning equipment, or ran tests properly was "an attack going to the admissibility of the evidence presented in [the expert's] opinion, not to its sufficiency"); *see also People v. Jones*, 16 Ill. 2d 569, 575 (1959) (rejecting defendant's sufficiency challenge based on lack of evidence regarding expert's

qualifications where defendant "made no objection to the lack of qualification proof"); *People v. Clayborne*, 2020 IL App (3d) 170518, ¶ 23 ("reject[ing] defendant's characterization of his argument as a challenge to the sufficiency of the evidence" where his "argument is substantively a challenge to the admission of [the expert's] testimony" because "when presented with a true challenge to the sufficiency of the evidence, a reviewing court may consider improperly admitted evidence along with the other trial evidence"). As this Court has previously held, "by failing to object at trial, a defendant waives any argument that an expert's opinion lacks an adequate foundation." *People v. Bush*, 214 Ill. 2d 318, 333-34 (2005); *Snelson*, 204 Ill. 2d at 25 (finding defendant's challenge to "underlying foundations of [expert's] testimony at trial" forfeited because defendant did not object at trial). Because defendant did not object to the admission of Dennewitz's testimony for lack of foundation as to his qualifications or methodology, the trial court was free to consider and credit the testimony. *Snelson*, 204 Ill. 2d at 26-27.

b. A fingerprint expert's identification need not be based on a full fingerprint to be credible.

The appellate court reasoned that no rational factfinder could credit Dennewitz's testimony that the fingerprint found on the headphone case was defendant's because Dennewitz "repeatedly described the latent print as 'partial' and admitted to extrapolating a conclusion about the missing portion of the print by making an assumption." *Cline*, 2020 IL App (1st) 172631, ¶ 24. But neither Dennewitz's recognition that the print he identified as

defendant's was not a full print, nor his assumption about what a full print would have shown, rendered his identification incredible to any rational factfinder.

Dennewitz's identification of the fingerprint found on the headphone case as defendant's was not incredible just because the fingerprint found on the case was not a full fingerprint. *See United States v. George*, 363 F.3d 666, 673 (7th Cir. 2004) (rejecting defendant's claim that fingerprint identification based on partial print was unreliable because the argument "goes to the weight and credibility of the evidence" and so was "best left to the finder of fact, not an appellate court"). As Dennewitz testified, a full fingerprint stretches all the way from one side of the fingernail to the other and from the end of the fingernail down to the crease at the first joint. R174-75. That is why fingerprints are taken by rolling the finger across the fingerprint scanner; otherwise, only a portion of the fingerprint will be captured. R159. If an expert's fingerprint identification was incredible unless based on a comparison of two full fingerprints, then virtually no fingerprint identification would ever be credible, for an expert could analyze a full fingerprint recovered from a crime scene only if a person rolled his or her entire fingertip across a surface, from one side of the fingernail to the other and from the tip of the fingernail all the way to the crease at the first joint. The fact that Dennewitz analyzed less than a full fingerprint was no more fatal to the credibility of his identification of the fingerprint as defendant's

than the fact that an eyewitness only saw an offender's face in profile would be fatal to the eyewitness's identification of that offender as the defendant.

Nor was Dennewitz's identification of the fingerprint on the headphone case as defendant's incredible because he assumed that, had a more complete fingerprint been recovered from the case, the portions of the print beyond those he had analyzed would also match defendant's fingerprint. After Dennewitz concluded to a reasonable degree of scientific certainty that the partial print recovered from the scene of the crime was defendant's, R173, the defense cross-examined him on whether he assumed, based on that conclusion, that the remainder of the print, had it been left, would also match defendant's, R180. Dennewitz answered that he did, because he had already concluded that defendant's finger had left the partial print. *Id.* The appellate court misunderstood Dennewitz's testimony that he made an assumption based on his identification as testimony that he made his identification based on an assumption. Similarly, the eyewitness who identifies a defendant as the offender based on having seen the offender's face in profile would naturally assume that, had she seen the other side of the offender's face, that side would also match defendant's face. Once a witness makes an identification based on the available information, the witness's assumption that additional information, if available, would support that identification does not undermine the credibility of the initial identification.

If anything, it is evidence of the witness's confidence in the initial identification.

2. The evidence established that defendant left his fingerprint on the headphone case during the burglary.

The evidence that defendant's fingerprint was found on an object known to have been handled by the burglar established that defendant left his fingerprint on the case during the burglary. The evidence technician testified that he found a single fingerprint — the fingerprint identified by Dennewitz as defendant's, R169, R171-73 — on a headphone case that the burglar had picked up, emptied, and discarded on the floor during the course of the burglary. R143-44, R146-47, R150-52. Like the nearly identical evidence in *Rhodes*, this evidence was sufficient to establish that defendant left his fingerprint during the burglary. In *Rhodes*, the Court found that a burglary victim's testimony that a clock radio was in one place before the burglary and another place afterward, 85 Ill. 2d at 246-47, "reveal[ed] that the defendant's fingerprint left on the clock radio could only have been impressed at the time of the commission of the offense," *id.* at 250. Accordingly, viewed in the light most favorable to the prosecution, the evidence that defendant's fingerprint was the only one found on a headphone case handled by the burglar was sufficient to prove that defendant left his fingerprint on the case while committing burglary. *See id.*

In reasoning that the evidence was insufficient to establish that defendant left his fingerprint on the case during the burglary, the special concurrence failed to "allow all reasonable inferences from the record in favor of the prosecution." *Cunningham*, 212 Ill. 2d at 280. The special concurrence speculated that "because the headphone case is portable," *Cline*, 2020 IL App (1st) 172631, ¶ 39 (Walker, J., specially concurring), and "Slowinski did not testify that he had never taken the headphone case outside of his apartment," *id.* ¶ 40, it was possible that that at some point Slowinski could have carried the headphone case in public, dropped it, and had it returned to him by defendant, who "naturally" left his fingerprint on it, *id.* But the *Jackson* standard forecloses such speculation against the prosecution where the evidence supports a reasonable inference of guilt. *Jackson*, 2020 IL 124112, ¶ 70 ("[T]he trier of fact is not required to disregard inferences that flow normally from the evidence before it, nor need it seek out all possible explanations consistent with innocence and raise them to a level of reasonable doubt."); *Sutherland*, 223 Ill. 2d at 271 (evidence was sufficient to prove defendant guilty even though DNA evidence could not exclude his maternal relatives as suspects because "'speculation that another person might have committed the offense does not necessarily raise a reasonable doubt of the guilt of the accused'") (quoting *People v. Manning*, 182 Ill. 2d 193, 211 (1998)); *Hall*, 194 Ill. 2d 305, 332 (2000) ("a hypothesis of innocence may be rejected by the trier of fact" when "based on mere surmise or

possibility"); *People v. Campbell*, 146 Ill. 2d 363, 387 (1992) (prosecution was "not required to seek out and negate every conceivable possibility that [the defendant's] print was impressed at some time other than during the commission of the offense") (citing *Rhodes*, 85 Ill. 2d at 249). Indeed, identical speculation failed to persuade the *Rhodes* Court, which found evidence of the defendant's fingerprint on a clock radio moved during the burglary sufficient to prove the defendant guilty of residential burglary, 85 Ill. 2d at 246-47, 250, despite the dissent's objection that the prosecution did not prove that the clock radio never left the victim's home such as to "eliminate the possibility" that "the fingerprint might have been put on the clock radio when it was removed from the victim's dwelling, for repairs or some other reason, or for that matter even before the present owner received the clock radio," *id.* at 252 (Simon, J., concurring in part and dissenting in part).[6]

Moreover, the inference that defendant innocently left his fingerprint on the headphone case sometime before the burglary is implausible. The record provides no basis to speculate that defendant ever encountered

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[6] Indeed, *Rhodes* actually found a fingerprint on an object moved during a burglary sufficient to prove residential burglary under the demanding pre-*Jackson* "reasonable hypothesis of innocence" standard, which held circumstantial evidence insufficient unless "inconsistent with any reasonable hypothesis of innocence." *Rhodes*, 85 Ill. 2d at 249. This Court has since clarified that "the reasonable hypothesis of innocence standard of review is no longer viable in Illinois" and that the now-familiar *Jackson* standard governs all sufficiency challenges, "whether the evidence is direct or circumstantial." *People v. Pintos*, 133 Ill. 2d 286, 291 (1989).

Slowinski; Slowinski testified that he did not know defendant, R144, and defendant denied that he was ever in the area of Slowinski's apartment building, R184. And if defendant "naturally" left his fingerprint on the case simply by touching it sometime before the burglary, *id.* ¶ 40, then one would expect to find evidence of fingerprints left by others who touched the case, including Slowinski and the burglar, but the evidence technician testified that he found no other prints on the case at all, not even prints too smudged or too faint to be suitable for comparison. R153. Thus, to infer that defendant innocently left his fingerprint on the case before the burglary, one would have to believe that not only did the burglar leave no fingerprints of his own when he handled the case, he somehow obliterated the fingerprints of Slowinski and every other person who had ever handled the case *except* defendant. Viewed in the light most favorable to the prosecution, the evidence did not compel the trial court to infer that defendant innocently left his fingerprint on the headphone case sometime before the burglary rather than while committing the burglary. *See Jackson*, 2020 IL 124112, ¶ 70.

* * *

In sum, the evidence was sufficient to prove beyond a reasonable doubt that defendant committed residential burglary. The evidence showed that Slowinski's apartment was broken into, various items were stolen, and defendant's fingerprint was the only print found on a headphone case that the burglar picked up, emptied, and left on the floor. Viewed in the light

most favorable to the prosecution, this evidence was constitutionally sufficient to prove that defendant entered Slowinski's apartment without authority and with the intent to commit theft. *See* 720 ILCS 5/19-3(a).

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

February 10, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 10, 2021, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail address of the person named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail the original and nine copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

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APPENDIX

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Illinois Official Reports

Appellate Court

People v. Cline, 2020 IL App (1st) 172631

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN CLINE, Defendant-Appellant.
District & No.	First District, First Division No. 1-17-2631
Filed	March 2, 2020
Supplemental opinion upon denial of rehearing	July 13, 2020
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 15-CR-18158; the Hon. Vincent M. Gaughan, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	James E. Chadd, Patricia Mysza, and Jennifer L. Bontrager, of State Appellate Defender's Office, of Chicago, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg and David H. Iskowich, Assistant State's Attorneys, of counsel, and Anne Bayly Buck, law student), for the People.

Panel

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Griffin and Justice Walker concurred in the judgment and opinion.
Justice Walker also specially concurred, with opinion.

OPINION

¶ 1 John Cline's conviction for residential burglary hangs on the thread of testimony by a fingerprint expert about an incomplete analysis of a partial print. That print was found on a portable object at the scene. The State makes much of the respect we must pay to the trial court's factual and credibility findings, which we acknowledge we must. But this case is about the sufficiency of credible evidence, not the credibility of sufficient evidence, and the fingerprint expert's testimony lacks the specificity required to support Cline's conviction.

¶ 2 Background

¶ 3 Tom Slowinski testified that the front and the back doors were locked when he left his apartment around 8:15 a.m. on September 1, 2015. When he returned that evening, he saw the front door was ajar and had scratches. Inside, the apartment appeared "ransacked and torn apart." He noticed items missing, including his laptop and headphones, so he called the police. At trial, Slowinski identified a photograph of a "Shore Headphone" case. When he left the apartment that morning, the headphones were in the case. When he returned, the case had been moved, and the headphones were gone. He did not know Cline and had not given Cline permission to be inside his apartment. During cross-examination, Slowinski testified that he had been out of town the week before the incident and had given a house key to a friend. He did not know whether the friend knew Cline.

¶ 4 Testimony revealed that a Chicago Police Department evidence technician processed the headphone case and identified a "fingerprint ridge impression," which he "lifted" with clear plastic contact paper. At a police station, a department aide fingerprinted Cline, and after apprising Cline of the *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), a detective asked Cline if he would have reason to be at Slowinski's address or inside an apartment there. Cline said "he would not be over in that area."

¶ 5 Daniel Dennewitz testified that for about eight years he had worked in the Chicago Police Department latent prints unit, analyzing and comparing latent fingerprints, and had done fingerprint analysis for "[j]ust over a year or so." Dennewitz received training in fingerprint identification and examination and had been qualified as an expert in the area of fingerprint examination and identification on five occasions. After Cline's counsel declined to question Dennewitz about his qualifications, the trial court found Dennewitz qualified to testify as an expert in the area of fingerprint identification.

¶ 6 Dennewitz explained that identifications involve a side-by-side comparison of the unknown fingerprint to a "known print" at three different levels of detail. The first level of detail includes "the actual ridge pads, the flow of the ridges, [and] the pattern." But, with level one, a fingerprint only can be excluded rather than identified. Level two spots the uniqueness in the "detail within the ridge pads" themselves, such as "a ridge end, a bifurcation of the

friction ridge pads, and a dot." The analyst looks at the positioning of these details, or their "pattern," and if they coincide then the two prints came from the same source.

¶ 7 Dennewitz identified State's exhibit number 5, the fingerprint lift. There were four latent prints on the lift. Dennewitz determined "A2" was suitable for comparison. He chose this print because it had a "sufficient amount of detail" from which he could form an opinion. Dennewitz compared A2 to a known print of Cline's right middle finger and concluded that they came from the same source. Dennewitz identified the State's exhibit number 7, which was a "demonstration" of the comparison. Of the about 20 points of comparison, 9 points were diagramed on the exhibit. He then did a second comparison of Cline's right middle finger, "using the same identification procedure," and concluded, within a reasonable degree of scientific certainty based on his experience, training, and education, that the two prints came from the same source.

¶ 8 During cross-examination, Dennewitz acknowledged that the latent print only showed one side of the finger—"the core[,] which is the middle of the print." Dennewitz explained that he marked nine points on the recovered print, three points from the left, three from the bottom, and three from the right of the "core." Because the latent fingerprint was incomplete, Dennewitz had to assume that what was not captured in the partial print would be the same as those areas in Cline's known print.

¶ 9 Cline did not present evidence.

¶ 10 In finding Cline guilty of residential burglary, the trial court said that Slowinski did not give Cline permission to be in the apartment and, although Cline denied it, his fingerprint was identified on a headphone case inside the apartment, placing Cline there.

¶ 11 Cline obtained posttrial counsel, who filed a motion and supplemental motion for a new trial, alleging, in part, that trial counsel did not examine Dennewitz to undermine his conclusion that the recovered fingerprint belonged to Cline. At the hearing on Cline's motion, trial counsel testified that his strategy was twofold. First, he sought to convince the court that Dennewitz assumed "the other part of the fingerprint" belonged to Cline and thus had not made a "positive identification." To achieve that goal, he asked Dennewitz whether he had assumed the missing part of the print belonged to Cline. Counsel did not ask the court to look at the fingerprint evidence and draw a conclusion, as Dennewitz was an expert and had testified five times before. Second, in any event, the State failed to prove that Cline was not a guest of Slowinski's friend who had his house keys, and it was impossible to determine when Cline's fingerprint appeared on the headphone case.

¶ 12 In denying Cline a new trial, the trial court noted that trial counsel could have retained an independent fingerprint analyst to review Dennewitz's analysis. The court also noted Dennewitz had found at least 20 points of comparison and no evidence indicated that Dennewitz was incompetent. Cline received a sentence of eight years in prison.

¶ 13 Analysis

¶ 14 Cline contends the State failed to prove him guilty beyond a reasonable doubt when (i) the only evidence tying him to the offense consisted of a single, partial fingerprint on a "portable object" and (ii) Dennewitz's testimony regarding that partial fingerprint was incomplete. We agree.

¶ 15 When a defendant challenges his or her conviction based on the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. We make all reasonable inferences from the record in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. The trier of fact resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. In a bench trial, we owe "great deference" to the trial judge, but we are not "a mindless rubber stamp on every bench trial guilty verdict." *People v. Hernandez*, 312 Ill. App. 3d 1032, 1037 (2000). Our constitutional responsibility includes "examin[ing] the record for a lack of evidence linking the defendant to the crime charged." *Id.* We do so here and find the evidence wanting.

¶ 16 A person commits residential burglary when he or she knowingly and without authority enters or remains in the dwelling of another with the intent to commit a felony or theft there. 720 ILCS 5/19-3(a) (West 2014). No one disputes that someone went into Slowinski's apartment without his permission and took things. Cline disputes that he was that person.

¶ 17 To sustain a conviction based "solely on fingerprint evidence," the fingerprint must have been found in the immediate vicinity of the crime and under circumstances establishing beyond a reasonable doubt that the fingerprint was made at the time of the offense. *People v. Rhodes*, 85 Ill. 2d 241, 249 (1981). The particular location of the evidence or the surrounding "attendant circumstances" may establish the fingerprint having been left at the time of the offense. *People v. Campbell*, 146 Ill. 2d 363, 387 (1992). Of paramount importance, even above the considerations of location and timing, however, is that the evidence must allow a reasonable fact finder to conclude that the fingerprint found at the scene corresponds to defendant's known fingerprint. *Rhodes*, 85 Ill. 2d at 249.

¶ 18 We begin with the fingerprint expert's failure to follow standard analytical procedure for matching prints. This court has recognized, citing a wealth of precedent, that "ACE-V" is the accepted method for fingerprint comparison. *People v. Luna*, 2013 IL App (1st) 072253, ¶¶ 60-84. This method requires four steps: (i) *Analysis*, during which the examiner determines whether there is sufficient ridge detail to make a comparison between the latent fingerprint and the exemplar fingerprint; (ii) *Comparison*, during which the examiner does a visual measurement or comparison of the unique details of the prints; (iii) *Evaluation*, during which the examiner determines whether a "sufficient quantity and quality of friction ridge detail is in agreement between the latent print and the known print"; and (iv) *Verification*, during which another examiner repeats the first three steps and arrives at the same conclusion. *Id.* ¶ 61 (citing National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 137 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [https://perma.cc/KMC9-7WG3]). In substance this method has been commonly accepted and followed by fingerprint examiners for "over the last hundred years" and as a four-step process since 1959. *Id.*

¶ 19 In *Luna*, we collected a sample of 16 state and federal cases rejecting challenges to the ACE-V method of fingerprint analysis under any standard of admissibility. *Id.* ¶ 68. Of course, this case does not involve admissibility, but the widespread acceptance of the ACE-V method as the proper analytical tool for fingerprint evidence warrants our taking judicial notice of it as the gold standard. *Id.* ¶ 69. The State's brief accepts the use of ACE-V as the proper methodology, and in light of the court's extensive analysis of the general acceptance of ACE-

V in *Luna*, we similarly take judicial notice of the ACE-V methodology as the proper technique.

¶ 20 Dennewitz did not refer to the ACE-V specifically during his testimony, but our review of the record and questioning at oral argument show that he performed only the first three steps. Dennewitz testified about the initial analysis, during which he determined whether (and which) prints were suitable for comparison. He then matched unique points of ridge detail on the unknown partial print to Cline's known print.

¶ 21 But, nothing in the record establishes that Dennewitz attempted to verify his results with another examiner. Cline describes this step as "integral" to the process, and based on the literature, we agree. The FBI describes verification as the step that "allow[s] for identifying potential errors committed in [analysis] of the first examiner." *Latent Prints: A Perspective on the State of the Science*, 11 Forensic Sci. Commc'n No. 4 (2009), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/oct2009/review/2009_10_review01.htm#References [https://perma.cc/7NP4-TLLX]. This step has particular importance because "[i]n the United States, the threshold for making a source identification is deliberately kept subjective" in that "the outcome of a friction ridge analysis is not necessarily repeatable from examiner to examiner." National Research Council of the National Academies, *supra* at 139. In other words, the concurring judgment of two examiners carries weight, while the disparate judgments of two examiners provides ground for impeachment. Missing is whether Dennewitz took this critical step. See *People v. Negron*, 2012 IL App (1st) 101194, ¶ 23 (examiners results "verified independently by another latent print examiner"); *People v. Safford*, 392 Ill. App. 3d 212, 220 (2009) (examiner had "each of his print identifications *** verified by another examiner").

¶ 22 At oral argument, the State insisted Dennewitz could not have testified about an independent verification because that testimony would be inadmissible hearsay. It may have been. *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005) (citing *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994)). We find, however, a simple fix: the State should have called the verifying examiner. The State called multiple witnesses to testify to each step of the fingerprint collection process—one who discovered and lifted the partial print, one who printed Cline for the comparison print, and Dennewitz, who analyzed the print. The only witness the State inexplicably failed to call was as crucial, a verifying examiner.

¶ 23 The State routinely calls multiple forensic experts, often in the same field, to speak to different stages of the analytical process. *E.g.*, *People v. Prince*, 362 Ill. App. 3d 762, 769-70 (2005) (forensic biologist testified that she analyzed floor mats and found presence of blood; two more forensic biologists testified they tested samples from same floor mats and arrived at same conclusion on origin of blood). Where, as here, the State's entire case hinges on a single partial fingerprint, confirmatory testimony in compliance with standard fingerprint procedure is essential to Dennewitz's inferential method and opinion.

¶ 24 In addition, Dennewitz repeatedly described the latent print as "partial" and admitted to extrapolating a conclusion about the missing portion of the print by making an assumption.

> "Q. You're assuming when you tell this Judge that the partial lift is the same print of Mr. Cline that the stuff that's not there *** is going to be the same, that's your assumption isn't it?

> A. It's my opinion that from what I see on the partial print is the same. The stuff that I do not see I would, yes, I would have to assume that it's going to be the same if that was captured at the crime scene, but it's not."

The State " 'may not leave to conjecture or assumption' " essential elements of its case. *People v. Smith*, 2014 IL App (1st) 123094, ¶ 15 (quoting *People v. Laubscher*, 183 Ill. 2d 330, 335-36 (1998)).

¶ 25 The State relies on *People v. Span*, 2011 IL App (1st) 083037, that a single fingerprint is enough to convict. *Span*'s facts differ materially from this case. In *Span*, officers recovered two latent fingerprints from a Lays chip bag after the defendant robbed a 7-11 store. *Id.* ¶¶ 4-17. Because the parties stipulated to the testimony of the fingerprint examiner (see *id.* ¶ 17), nothing indicates whether the prints were full or partial prints or whether all the steps involved in ACE-V had been followed. Critically, a wealth of additional evidence supported guilt: (i) surveillance video showed the perpetrator leaning over the front of a counter and handling a bag of chips and (ii) one of the officers identified the defendant in court as the perpetrator after recognizing him from the video. *Id.* ¶¶ 5, 13-14. In stark contrast, we are confronted with a partial fingerprint as the only evidence purportedly linking Cline to the crime.

¶ 26 We also find unhelpful the State's equating the headphone case found in Slowinski's apartment to the jewelry box found in *People v. Ford*, 239 Ill. App. 3d 314 (1992). In *Ford*, the defendant left a fingerprint on a jewelry box during a burglary. *Id.* at 315. The jewelry box "had been in [the victim's] family for many years," and she had "never taken it out of her home" or permitted anyone to remove it from her dresser. *Id.* at 318. Here, nothing suggests that Slowinski treated the headphone case like the jewelry box's owner, that the headphone case never left his home, or how long he had owned the headphones. Of course, trial courts need not search for hypotheses supporting innocence (*People v. Newton*, 2018 IL 122958, ¶ 24), and had this been the only deficiency in the evidence, the case might have been decided otherwise. But, the evidentiary lapse vital to a fingerprint expert's identification cannot be excused or disregarded.

¶ 27 Additionally, some of the same problems with *Span*'s precedential value to this case apply equally to *Ford*. We know Dennewitz only compared Cline's print with the latent print at nine points; in *Ford*, there is no information about the completeness of the print because the examiner did not take notes. *Ford*, 239 Ill. App. 3d at 316. We know that the fingerprint expert did not verify his results with a second examiner; in *Ford*, there is no indication either way because the expert's only mention of a second examiner was the possibility that two examiners could theoretically disagree about their conclusions. *Id.* at 319. In short, the lack of testimonial detail about the sufficiency of the print analysis in *Ford* makes it an unhelpful comparison to the analysis of Cline's print, and the distinct difference between the type of objects on which the prints were left in both cases cements the lack of utility in attempting to compare the evidence here to that in *Ford*.

¶ 28 While the State bears the burden to prove the defendant guilty beyond a reasonable doubt (*People v. Murray*, 2019 IL 123289, ¶ 28), the finder of fact's determinations of the defendant's guilt "are not conclusive," and reversal is justified when the evidence is so unsatisfactory that there remains a reasonable doubt as to guilt. *Id.* ¶ 19. The State's case against Cline turns exclusively on a flawed examination of a single, incomplete fingerprint. On these facts, the State has failed to carry its burden.

¶ 29 Reversed.

¶ 30 **SUPPLEMENTAL OPINION UPON DENIAL OF REHEARING**

¶ 31 The State filed a timely petition for rehearing, which we denied in a separate order. We reject two arguments the State made in its petition: (i) that the lack of testimony about verification does not mean verification never took place and (ii) that testimony about the testing procedure is merely foundational, as opposed to part of the substantive evidence the State must introduce to sustain its burden.

¶ 32 We take the second argument first and find that testimony about the steps of fingerprint verification is substantive testimony. The cases the State relies on for its broad assertion that "the absence of any mention of verification is relevant only to foundational issues" are distinguishable. For example, *People v. Woods*, 214 Ill. 2d 455, 468 (2005), involved a stipulation to the chain of custody, which is not at issue here. As to *People v. Bush*, 214 Ill. 2d 318, 321-22 (2005), the State ignores the substance of the parties' stipulation to a forensic chemist's testimony, which included: " 'he *** used tests and procedures commonly—commonly accepted in the field of forensic chemistry for the testing of narcotics.' " Of course, as we set out in our original opinion, the live testimony in Cline's case shows exactly the opposite—by omitting the verification step, the fingerprint expert failed to use testing methods commonly accepted by fingerprint experts.

¶ 33 We find a much closer analogy in decisions from our court and our supreme court examining the sufficiency of evidence in narcotics cases. For example, our supreme court has found evidence insufficient where a forensic chemist improperly tested only two of five packets containing a white rocky substance, leading to a disparity in the weight of the drugs (an essential element of the offense). *People v. Jones*, 174 Ill. 2d 427, 429-30 (1996). Similarly, we have found evidence of drug weight insufficient where a forensic chemist improperly commingled the contents of six packets of suspected heroin. *People v. Clinton*, 397 Ill. App. 3d 215, 223 (2009). The gravamen of these cases is that an analyst's proper *performanc*e of testing protocol is part of his or her substantive testimony, not merely foundational, and can therefore lead to a failure of proof. We find the lack of testimony about fingerprint verification to be more analogous to the failures in *Clinton* and *Jones* than to other, more technical aspects of foundation (*e.g.*, functioning equipment, chain of custody, acceptance of a scientific test or method more broadly in the scientific community).

¶ 34 Having found the testimony about fingerprint verification to be substantive, we must necessarily reject the State's first argument because it drastically diminishes its burden of proof in a criminal case; indeed, taken to its logical conclusion, the State's argument hollows out its burden entirely. The State argues, citing *People v. Austin*, 2017 IL App (1st) 142737, ¶ 69, that "absence of evidence is not evidence of absence." Read in isolation, this quotation inverts the standard of proof allowing the State to proceed by silence instead of presenting evidence to prove its case.

¶ 35 In any event, the State's selective quotation misapplies *Austin*. There, the State charged the defendant with, among other things, armed robbery. *Id.* ¶ 1. To prove the firearm element of the offense, three officers testified that the defendant had a "black" or "blue-steel" handgun, and two lay-witnesses also testified that the defendant had a gun. *Id.* ¶ 69. The only evidence the State did not supply was the gun itself. *Id.* In context, this court's quotation of the maxim "absence of evidence is not evidence of absence" applied only to the physical production of

the gun, not to evidence of the gun writ large. Of course, the State had to present *some* evidence about the presence of the gun—either testimony or the gun itself. Our statement in *Austin* did not absolve the State of *its* burden to present affirmative evidence of the elements of the offense.

¶ 36 Here, evidence of a partial fingerprint is the only evidence linking Cline to the offense—in other words it was part of the essential element of his identity as the offender. There is absolutely no testimony that the fingerprint analyst verified his results. A more analogous situation to *Austin* would be testimony about verification uncorroborated by the verifying witness or a second report. We are instead left with the question, "What inference can be drawn concerning [the verification of fingerprint testing results]? Without more, the answer is none at all." See *Jones*, 174 Ill. 2d at 427. It was the State's burden to provide sufficient evidence from which the trial court could draw a reasonable inference that the partial fingerprint found on the scene belonged to Cline. It failed to do so here. We adhere to our original disposition and reverse the circuit court's judgment.

¶ 37 JUSTICE WALKER, specially concurring:

¶ 38 I agree with the decision to reverse defendant's conviction because the fingerprint analysis was not verified by another examiner. However, I must write separately because the fingerprint itself was insufficient evidence to sustain a conviction beyond a reasonable doubt in this case. The only evidence linking defendant to the crime is a single, partial fingerprint on a portable item. There was no evidence that defendant left his partial fingerprint "under such circumstances as they could only have been made at the time the crime occurred." *People v. Span*, 2011 IL App (1st) 083037, ¶ 35. Therefore, I find that the State failed to establish the temporal proximity of the fingerprint to the burglary. Fingerprint evidence is circumstantial evidence. *Id.* Hence, to sustain a conviction solely on circumstantial fingerprint evidence, the fingerprint must satisfy both the physical and temporal proximity criteria. *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991).

¶ 39 Here, defendant's fingerprint was only found on a headphone case and nowhere else in the apartment. The headphone case was located where other items were stolen, so the physical proximity criterion is satisfied, but the temporal proximity was not satisfied because the headphone case is portable. I recognize that the portability of an object alone does not defeat temporal proximity. In *People v. Ford*, 239 Ill. App. 3d 314 (1992), following a burglary, the only fingerprint suitable for comparison was found on a silver jewelry box. There was testimony that the jewelry box had never been taken out of the house. *Id.* at 317-18. This court held that, because of this fact, defendant's fingerprint on the jewelry box satisfied the temporal proximity criterion. *Id.* at 318.

¶ 40 Here, Slowinski did not testify that he had never taken the headphone case out of his apartment. Given the nature of headphones and a headphone case, it is reasonable that Slowinski traveled with them. Headphones and headphone cases are not like a jewelry box, a vase, silverware, a television, or bookcase, which are generally kept at home. Many residents of this state have been walking behind someone who dropped a phone or a headphone case, and residents have then picked up the item to be immediately returned as a courtesy. The residents naturally left a fingerprint on the item. Because of the nature in which headphones and headphone cases are used, a reasonable person cannot conclude that the partial fingerprint must have been made during the burglary. I find the evidence here is unsatisfactory. Where

there is no other evidence linking defendant to the crime, a single fingerprint on a portable item that is generally brought into the public does not satisfy the temporal proximity criterion to find guilt beyond a reasonable doubt.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.) **No. 15 CR 18158-01**
)
JOHN CLINE,)
)
Defendant.)

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below:

Court to which appeal is taken: First District Appellate Court of Illinois
Appellant's name: John Cline
Appellant's address: Illinois Department of Corrections (I.D.O.C.)
Trial Counsel: John P. Carroll 608 S. Washington Ave. Naperville, IL 60540-6663
Post-Trial Counsel: Raymond G. Bendig, P. O. Box 31862, Chicago, IL 60631-0862
Appellant's Counsel: State Appellate Defender 203 N. LaSalle, 24thFlr, Chicago, IL 60601
Date of Judgment: September 7, 2017
Offense: Residential Burglary
Sentence: 8 years I.D.O.C. on September 7, 2017

Post-Trial Counsel

Appellant, being duly sworn, says that at the time of his conviction he was and he now is unable to pay for the Record or an attorney on appeal.

John Cline by post-trial counsel

ORDER

It is Ordered that the State Appellate Defender is appointed counsel on appeal and the Record including the transcripts of proceedings for December 14, 2016, May 31, 2017, June 20, 2017, July 20, 2017, and September 7, 2017 be furnished to Appellant free of charge.

ENTER: Judge

Index to the Record on Appeal

People v. Cline, No. 15 CR 18158 (Cook Cty. Cir. Ct.)

Common Law Record

Report of Proceedings

First Supplement to the Report of Proceedings

Second Supplement to the Report of Proceedings

Supplement to the Common Law Record and Report of Proceedings