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Division I
State of Washington

Supreme Court No. 90724-2
(Court of Appeals No. 70429-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON JUVENILE DIVISION FOR KING
COUNTY

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

J.H.,¹ the appellant below, asks this Court to accept review of the court of appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The court of appeals affirmed J.H.'s disposition for residential burglary in an unpublished decision on July 21, 2014. A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Over 20 years ago, the court of appeals held in State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990) that fingerprint evidence alone is sufficient find a person guilty of burglary if the trier of fact could reasonably infer that the print could only have been impressed at the time the crime was committed. This decision rests on assumptions that latent fingerprint analysis, which is the comparison of unknown prints with known prints, is scientifically based and very reliable. The assumption of reliability is unproven and the assumption of a scientific basis is false. Fingerprint analysis has not been scientifically validated and numerous cases of fingerprint misattribution show it is not reliable. With certain other categories of suspect evidence, such as dog-tracking evidence and

¹ J.H. was adjudged guilty in juvenile court. Hence, initials are used.

confessions, this Court has required corroborative evidence to sustain a conviction. This Court has not examined whether latent print evidence alone is adequate in the absence of corroborative evidence. Should this Court decide this significant question of law that this Court has not yet answered? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

A home in Des Moines was burglarized. CP 23-24 (FF 1, 3); RP 5. Police found that screens to windows in the backyard had been removed and that one window was open. CP 25 (FF 11, 13, 18, 19). An officer attempted to lift prints from the open window, but encountered difficulties in getting the prints to lift. RP 73.² The officer was able to lift prints from inside the window after using additional dust. CP 25 (FF 22); RP 79. The officer also took photos. CP 25 (FF 22).

Wade Anderson, a latent print examiner employed by King County Regional AFIS (Automated Fingerprint Identification System), examined the print evidence. See CP 25 (FF 25, 27). Anderson had been a latent print examiner for about four years. CP 25 (FF 25). Using a photo of a print, Anderson ran a computerized search through AFIS. RP 109. The computer returned a fingerprint from J.H. that was on file as a

² Unless otherwise noted, the citations to the report of proceedings are to the volume dated April 1 and April 2, 2013.

“candidate.” RP 109, 111. Anderson pulled the corresponding fingerprint card on file. RP 109. He had the known and latent prints enlarged. RP 109. He then compared the two by looking at the “ridges” in the prints, moving from the latent print to the known print. RP 109-10. Anderson stated there was not a minimum or maximum number of “detail” that he needed to declare a “match.” RP 110-11, 123. Anderson agreed that one of way putting it was, “you know it when you see it.” RP 124. Anderson testified that the “amount of detail” in the latent print he examined was “sufficient,” and concluded that the fingerprint belonged to J.H. RP 110, 113. Anderson also concluded that a different latent print also belonged to J.H. RP 111, 113. Anderson later took J.H.’s prints and compared them to the prints he had obtained from the computer system (AFIS), and concluded they both belonged to J.H. CP 25 (FF 28). Anderson did not compare any other “candidates” from the computer search to the latent prints.

As part of the process, a “verifier” examined Anderson’s work. RP 122. Anderson testified that he knew of at least two misidentifications that were discovered by a verifier in his office. RP 123.

The fingerprint evidence was the only evidence linking J.H. to the burglary. During closing argument, the State, citing State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990), argued that Anderson’s opinion that

the prints belonged to J.H. was sufficient by itself to find J.H. guilty. RP 130, 134. J.H. countered that the knowledge and science concerning fingerprints had changed considerably since Lucca was decided in 1990. RP 135-36. He argued that a recent report from the National Academy of Sciences had since criticized fingerprint evidence as not being scientifically based. RP 136. The court, recounting that Lucca was still “good law,” found J.H. guilty of residential burglary. RP 146; CP 26.

On appeal, J.H. argued the evidence was insufficient and that Lucca should be reconsidered in light of recent history and argument that fingerprint evidence is akin to evidence for which corroboration is categorically required, such as dog-tracking evidence and confessions. The court of appeals affirmed, reasoning that J.H. failed to present adequate evidence at trial for it to consider the issue and that fingerprint evidence, unlike dog-tracking evidence and confessions, is considered to be trustworthy by Washington courts.

E. ARGUMENT

Because the reliability of latent fingerprint evidence is unknown and latent fingerprint analysis has not been scientifically validated, it should no longer be sufficient, by itself, to support a guilty disposition for burglary.

a. Background

In the United States, fingerprints have been used to identify people

for more than a century. National Research Council Report Strengthening Forensic Science in the United States: A Path Forward, at 136 (Feb. 2009) (“NAS Report”).³ The use of fingerprints to identify a person is categorized as “friction ridge analysis.” NAS Report at 136. The analysis consists of “comparisons of the impressions left by the ridge structures of volar (hands and feet) surfaces.” NAS Report at 136. “Friction ridge analysis is an example of what the forensic science community uses as a method for assessing ‘individualization’—the conclusion that a piece of evidence (here, a pattern left by friction ridges) comes from a single unambiguous source.” NAS Report at 136.

The technique used in friction ridge analysis is described by the acronym ACE-V: “Analysis, Comparison, Evaluation, and Verification.” NAS Report at 137. In the analysis phase, the examiner considers the quality and quantity of detail in the latent and known prints for comparison and evaluation. NAS Report at 137-38. Next, the examiner compares the prints, looking for details that correspond. NAS Report at 138. After comparison, the examiner evaluates the agreement of friction ridge formations in the prints and makes a conclusion. NAS Report at 138. The examiner may conclude that the prints come from the same

³ Available at http://books.nap.edu/catalog.php?record_id=12589 (last accessed August 19, 2014).

source, do not come from the same source, or that the comparison is inconclusive. NAS Report at 138. Last, a verifier repeats the process; this verifier may be aware of the first examiner's conclusion. NAS Report at 138.

The first published decision in the United States addressing the use of latent fingerprint evidence is a 1911 appeal in a murder case. People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 17 (2001). There, four witnesses testified that fingerprints left in paint at the scene of the crime were made by the defendant. Jennings, 252 Ill. at 543. On appeal, the defendant argued that this evidence was improperly admitted. Id. at 546. Without any critical analysis of whether comparison of latent prints to known prints was a reliable method of identification, the court rejected the defendant's argument. The court, citing authorities such as the Encyclopedia Britannica and a book on handwriting identification, asserted that "standard authorities on scientific subjects discuss the use of finger prints as a system of identification, concluding that experience has shown it to be reliable." Id. at 546-47. Based on these authorities and testimony of the four witnesses, the court reasoned "there is a scientific basis for the system of finger print identification" and "that this method of identification is in such general and common use that the courts cannot

refuse to take judicial cognizance of it.” Id. at 549. The court failed to address whether examination of latent prints gathered from a crime scene would pose problems different than with examination of known prints that had been created purposefully. Jennings, 252 Ill. at 546-53; see Mnookin, 67 Brook. L. Rev. at 19-20.

As in Jennings, courts accepted fingerprints “as an evidentiary tool without a great a deal of scrutiny or skepticism.” Mnookin, 67 Brook. L. Rev. at 17. Despite being a matter of probability, the courts did not require fingerprint identification to have a statistical foundation. Id. at 19. “Determining whether there was a match was simply left to the judgment of the expert examiner.” Id. at 19. Fingerprint examiners were also usually allowed to testify about identity as though it were fact, and not opinion. Id. at 30. Following Jennings, courts in other jurisdictions admitted fingerprint evidence with little analysis, relying on precedent such as Jennings. Id. at 21. Jennings was even used to support other types of evidence. For example, in 1930, this Court cited Jennings as “apt authority” and held that use of tool mark evidence was admissible. State v. Clark, 156 Wash. 543, 550-51, 287 P. 18 (1930). Earlier in the same opinion, without citation to Jennings or other authority, this Court recounted that, “Courts are no longer skeptical that by the aid of scientific appliances the identity of a person may be established by finger prints.”

Id. at 549-50.

As the law on fingerprint evidence developed, the courts focused not on whether comparison of latent prints with known prints was truly a scientific and reliable method of identifying a person, but whether the print was adequately connected with the crime. Citing a federal case and legal treatises, the court of appeals formulated a rule that fingerprint evidence alone could support a conviction if the evidence proved it was impressed at the time of the crime:

Fingerprint evidence alone is sufficient to support a conviction where the trier of fact could reasonably infer from the circumstances that it could only have been impressed at the time the crime was committed.

State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990).

b. Cases of misidentifications call into question the reliability of fingerprint identification.

The rule that fingerprint evidence alone is sufficient to find a person guilty of a crime assumes latent fingerprint analysis is a sufficiently reliable method of identification. Cases of fingerprint misattribution and an examination of the “science” of fingerprint evidence proves these assumptions wrong.

The most famous case is that of Brandon Mayfield. In 2004, the Federal Bureau of Investigation arrested Mayfield in connection with the terrorist attacks on commuter trains in Madrid Spain. A Review of the

FBI's Handling of the Brandon Mayfield Case, U.S. Department of Justice, Office of the Inspector General, 1 (March 2006) (“OIG Report”).⁴ Using a fingerprint recovered from a bag connected with the attacks, the FBI identified Mayfield as one of twenty candidates through a computerized search of the FBI’s Integrated Automated Fingerprint Identification System. OIG Report at 1. An examiner concluded that Mayfield was the source of the print. OIG Report at 1. Two other examiners concurred with the conclusion. OIG Report at 2. After arresting Mayfield, an independent expert agreed that the print was Mayfield’s. OIG Report at 2. Spanish authorities, however, identified the print as belonging to an Algerian national. OIG Report at 2. Eventually, the FBI concluded it had erred in determining that the print belonged to Mayfield. OIG Report at 2.

The OIG Report concluded that the misidentification was caused by at least six factors: (1) Mayfield’s print was similar to the Algerian National’s; (2) bias by the examiners (after finding some similar features in the prints, examiners began to “find” additional features that were not actually there); (3) faulty reliance on extremely tiny details (examiners misinterpreted distortions in the print as real features that corresponded to

⁴ Available at http://www.justice.gov/oig/special/s0601/PDF_list.htm (last accessed August 20, 2014).

tiny details in Mayfield's print); (4) inadequate explanations for differences in appearance (rationalizations explaining differences were cumulatively too many and required acceptance of extraordinary coincidences); (5) failure to assess the poor quality of similarities; and (6) overconfidence despite disagreement by Spanish authorities, who had concluded the prints were not Mayfield's. OIG Report at 6-10. The OIG Report also identified other factors that may have caused the error, including, (1) lack of an objective standard and (2) failure in the verification process to use an analyst who was not aware of the earlier conclusion. OIG Report at 11.

There are many other accounts of latent fingerprint misidentification. In 2005, one author recounted 21 other cases. Simon A. Cole, More Than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1001-16 (2005). The full extent of misattribution remains unknown. "[N]o records document how many criminal prosecutions in federal and state courts in the United States are based totally or partially on fingerprint evidence." Jacqueline McMurtrie, Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report, 2010 Utah L. Rev. 267, 268 (2010). Further, fingerprint misattributions are largely unnoticed because there is no process for reviewing the cases. Id. Known cases of

fingerprint misattribution are likely the “tip of the iceberg.” Cole, 95 J. Crim. L. & Criminology at 1017.

c. The National Research Council Report criticizes latent fingerprint analysis as lacking a scientific basis.

In 2005, Congress authorized the National Academy of Sciences to conduct a study on forensic science. In 2009, the council issued its groundbreaking report. National Research Council Report Strengthening Forensic Science in the United States: A Path Forward (Feb. 2009) (“NAS Report”). With the exception of nuclear DNA analysis, the report criticized the use of forensic evidence in the courtroom to support conclusions of “individualization”:

Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about “individualization” (sometimes referred to as “matching” a specimen to a particular individual or other source) or about classification of the source of the specimen into one of several categories. With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

NAS Report at 7 (emphasis added).

The report specifically recognized the growing controversy and skepticism toward the assumed scientific foundation and reliability of fingerprint analysis:

For nearly a century, fingerprint examiners have been comparing partial latent fingerprints found at crime scenes to inked fingerprints taken directly from suspects. Fingerprint identifications have been viewed as exact means of associating a suspect with a crime scene print and rarely were questioned. Recently, however, the scientific foundation of the fingerprint field has been questioned, and the suggestion has been made that latent fingerprint identifications may not be as reliable as previously assumed. The question is less a matter of whether each person's fingerprints are permanent and unique—uniqueness is commonly assumed—and more a matter of whether one can determine with adequate reliability that the finger that left an imperfect impression at a crime scene is the same finger that left an impression (with different imperfections) in a file of fingerprints.

NAS Report at 43 (footnotes omitted).

The report states what most courts had failed to appreciate, that the process whereby latent print examiners determine that two different sources could not produce impressions with the same degree of agreement among details is a “subjective assessment.” NAS Report at 141. Despite the obvious subjectivity involved, latent fingerprint analysts commonly fail to acknowledge any uncertainty in their opinion. NAS Report at 47. Addressing claims by fingerprint examiners that their method of individualization has an error rate of zero, the report dismissed these claims as “not scientifically plausible.” NAS Report at 142.

As recognized by the report, impressions left by a given finger will inevitably vary and the problems this may cause have not been adequately

studied:

Uniqueness and persistence are necessary conditions for friction ridge identification to be feasible, but those conditions do not imply that anyone can reliably discern whether or not two friction ridge impressions were made by the same person. Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source. The impression left by a given finger will differ every time, because of inevitable variations in pressure, which change the degree of contact between each part of the ridge structure and the impression medium. None of these variabilities—of features across a population of fingers or of repeated impressions left by the same finger—has been characterized, quantified, or compared.

NAS Report at 144.

Finally, the report was critical of the ACE-V methodology, stating that following the framework does not imply that “one is proceeding in a scientific manner or producing reliable results”:

ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper . . . presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: “We have reviewed available scientific evidence of the validity of the ACE-V method and found none.”

NAS Report at 142-43 (footnotes and citation omitted).

Ultimately, the report recommended that more scientific research and study on friction ridge analysis be conducted. NAS Report at 143. Until that is done, latent print analysis does not rest on a scientific foundation and its reliability remains unknown.

d. To support a guilty finding, evidence standing by itself must be sufficiently reliable and strongly probative of guilt. Otherwise, corroborative evidence of guilt is required. Latent print evidence should not be sufficient by itself to find a person guilty.

Where a class of evidence is probative of guilt, yet weak or of questionable reliability, Washington courts require other corroborative evidence of guilt to find a person guilty of a crime. Two examples are dog-tracking evidence and confessions.

Washington permits dog-tracking evidence, but restricts its use to corroborative purposes only. State v. Loucks, 98 Wn.2d 563, 566-67, 656 P.2d 480 (1983). In Loucks, this Court held that dog-tracking evidence is insufficient to support a conviction absent corroborating evidence and reversed a burglary conviction because it was premised solely upon a tracking dog's identification of the defendant. Id. at 566, 569.

In adopting the rule requiring corroborative evidence, the Loucks Court reasoned that dog-tracking evidence had inherent dangers of error

that could only be mitigated by requiring corroborative evidence. Id. at 567. The Court noted that police dogs cannot be conclusively relied on to follow the trail of one person and that a dog trainer cannot answer many questions on the reliability of the dog's conclusions. Id. at 567.

Latent print evidence is analogous. Just as a fact finder has to trust in a dog's capability to accurately identify and follow a scent, the fact finder must trust a print analyst's capability to accurately compare prints. With appropriate training, experience, and under the right conditions, a fingerprint analyst or a scent-smelling dog may be able to accurately identify a person. But neither are infallible in exercising their skill and both must operate under conditions that may not be ideal. While tracking a scent, a dog may mistakenly follow another scent. Similarly, a fingerprint analyst may mistakenly conclude that features on the two prints are the same. In some ways, the danger of error with a fingerprint analyst is greater because the examiner is human and subject to bias. See McMurtrie, 2010 Utah L. Rev. at 280 (recounting studies showing that fingerprint examiners were susceptible to common cognitive bias that influenced their conclusions); NAS Report at 142 ("ACE-V does not guard against bias . . .").

As with dog-tracking evidence, a confession is also inadequate to support a conviction absent corroborating evidence. This is the "corpus

delicti” rule. The “corpus delicti rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone.” City of Bremerton v. Corbett, 106 Wn.2d 569, 575-76, 723 P.2d 1135 (1986). “Corpus delicti” means “body of the crime.” State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In general, the corpus delicti doctrine “is a principle that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession.” State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). It “prevents a defendant from being convicted based on his or her confession alone and requires independent evidence sufficient to establish every element of the crime charged.” Id. at 250-51. The corpus delicti rule has been applied in cases of burglary. See e.g., State v. DuBois, 79 Wn. App. 605, 612, 904 P.2d 308 (1995) (reversing juvenile’s disposition for burglary based on juvenile defendant’s confession; evidence was insufficient to establish corpus delicti).

Analogizing to dog-tracking evidence and confessions, J.H. asked that the court of appeals adopt a categorical rule requiring corroborative evidence in cases involving solely latent fingerprint evidence. He framed the issue as one of sufficiency of the evidence. Sufficiency of the evidence may always be raised for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998). Nevertheless, the

court of appeals held that J.H.'s challenge was precluded because his challenge at trial was inadequate. Op. at 6. In making this determination, the court cited to a case involving a challenge to the admissibility of polygraph evidence. Op. at 6, n.9 (citing State v. Woo, 84 Wn.2d 472, 475, 527 P.2d 271 (1974)). J.H., however, challenged the sufficiency of latent fingerprint evidence to sustain his adjudication of guilt, not its admissibility. Thus, the court's refusal to consider J.H.'s challenge conflicts with precedent, calling for review. RAP 13.4(b)(1), (2).

Alternatively, the court reasoned that the record was inadequate to consider a categorical change. Op. at 6. The court, however, was free to take judicial notice of pertinent authorities. See ER 201. J.H. cited many scholarly articles in his briefing. The State cited none. In Loucks, this Court did not demand an "adequate record" before holding that dog-tracking evidence was insufficient by itself to sustain a conviction. See Loucks, 98 Wn.2d 563. Neither were scientific studies necessary for courts at common law to adopt the corpus delicti rule.

Finally, the court reasoned that history justified treating latent print evidence different from dog-tracking evidence and confessions because unlike these two categories, there has not been a historical judicial distrust of latent print evidence. Op. at 7. This history, however, is an aberration. Had the courts known in the early twentieth-century what is known now,

courts would not have trusted latent print evidence.

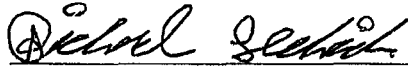
Whether latent fingerprint evidence alone is sufficient to find a person guilty of a crime is a significant constitutional question under due process and is also an issue of substantial public importance. RAP 13.4(b)(3), (4). This Court has not addressed the issue. The rule in Lucca should be examined by this Court in light of recent history and science. This Court should grant review.

F. CONCLUSION

J.H. respectfully asks that this grant the petition for review.

DATED this 20th day of August, 2014.

Respectfully submitted,



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Appendix A

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 70429-0-1
)	
Respondent,)	
)	
v.)	
)	
JAHAD V.D. HILL,)	UNPUBLISHED OPINION
B.D. 04/18/95,)	
)	
Appellant.)	FILED: July 21, 2014

VERELLEN, A.C.J. — Based on expert testimony that fingerprints at the scene of a burglary were Jahad Hill's, the juvenile court found him guilty of residential burglary. Hill appeals, arguing that the reliability of latent fingerprint identification is suspect and that this court should reconsider its holding in State v. Lucca that such identifications can be sufficient, standing alone, to support a criminal conviction.¹ Because this argument was not adequately preserved below and because the record is insufficient to warrant a departure from Lucca in any event, we affirm.

FACTS

On September 14, 2012, someone burglarized the home of Chester and Therese Pasternak in Des Moines, Washington. The burglar took jewelry and other personal property.

¹ 56 Wn. App. 597, 784 P.2d 572 (1990).

No. 70429-0-1/2

Officer Langhofer of the Des Moines Police Department investigated the burglary. Most of the window screens on the backside of the house had been removed and a window was open. Officer Langhofer found a hand impression on the open window. When he had difficulty lifting fingerprints from the window, he contacted a detective and the automated fingerprint identification system (AFIS) lab. The detective suggested Officer Langhofer take a photograph of the prints, and the AFIS technician suggested that he use more fingerprint powder. Officer Langhofer eventually recovered two latent prints: one on the inside and another on the outside of the window.

Bolney Wade Anderson, a King County latent print examiner, did a computer search of known prints with one of the latent prints from the Pasternak's home. The search disclosed a match between the latent print and Hill's prints.

Anderson then obtained Hill's known prints and performed his own comparison. He enlarged the known and latent prints and then compared the two by looking at ridges in the prints. He determined that the window prints matched Hill's left middle and little fingers. His comparison procedure and results were reviewed and verified by a verifier and a quality control person.

Based on the fingerprint evidence, the State charged Hill with residential burglary. At trial, Officer Langhofer and Bolney Anderson testified to the facts set forth above. On cross-examination, Anderson testified that no verifier had ever disagreed with his conclusions. He admitted, however, that other examiners in his office had made at least two misidentifications that were discovered by a verifier. He also conceded that there is no minimum number of details required before he can

declare a match between prints. Defense counsel did not ask the expert about the reliability of latent fingerprint analysis or call an expert for the defense. The defense rested without calling witnesses.

During closing argument, the prosecutor argued that under this court's decision in Lucca, the fingerprint evidence was sufficient, by itself, to support a conviction. Hill countered that the reliability of fingerprint evidence had been called into question since Lucca. He argued that a 2009 report from the National Academy of Sciences (NAS report) "critiqued fingerprint evidence as not being scientifically-based, [but] simply being a matter of matching pictures as preschoolers do in their assignments."² The following colloquy ensued:

COURT: Mr. McGuire, I don't have any evidence of the National Academy of Sciences study. Can I consider it?

MCGUIRE: I think the court can take judicial notice of it, yes. I don't think it's evidence, no, but I think it certainly is part of the prism through which the court can as an educated, modern jurist consider the framework with which to consider evidence.

I don't think it's at all out of line for the court to educate oneself in terms of evidence. That isn't to say that I'm asking you to believe a certain finding from any study. I'm not suggesting that. I'm simply saying that the National Academy of Sciences has raised a number of critical questions about fingerprint evidence and about the quality of that evidence for court purposes, and I think it certainly is fair to consider where that is the only evidence that identifies Jahad Hill as being involved in any way with this crime. I think it is important that the court consider all viewpoint[s] that would permit an overall objective viewing of the evidence that has been proffered.

² Report of Proceedings (Apr. 2, 2013) at 136 (referring to National Research Council *Strengthening Forensic Science in the United States: A Path Forward* (Nat'l Academy of Sciences 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>).

Whether one fingerprint as in Lucca would be sufficient today, I think is another question. Hopefully, we don't have to address that question in this case, but whether fingerprint evidence alone is sufficient in today's world with the evolution of science is a much larger question.

....

STATE: . . . Mr. McGuire's request of Your Honor, the trier of fact, to do your own independent research on something that has not been testified to or admitted into evidence regarding some study that I'm not quite even sure what the result of that study was is absolutely inappropriate. . . .

Now, the prints on the inside portion of this window track that is up in State Exhibit No. 10, Mr. Anderson noted that [Hill's] prints, he found that his middle left finger and also his left little finger were a match. On each of those fingers, he said that there were multiple bifurcations that were the same, multiple end points that were the same. This is—fingerprint analysis, your Honor, is a science. Mr. Anderson is an expert. He said that no two people have the same fingerprints. He pointed out that even identical twins don't have the same fingerprints. Mr. Hill's fingerprints, no one else's, were found on this window here.³

In its oral ruling, the court noted that the only disputed questions were whether the prints were Hill's and what weight the court should give them. The court found that the prints were Hill's and that, under Lucca, that fact was alone sufficient to prove Hill's guilt beyond a reasonable doubt. Hill appeals.

DECISION

The sole issue on appeal is whether the fingerprint evidence was sufficient, by itself, to support Hill's adjudication of guilt. Hill acknowledges our prior holding that "[f]ingerprint evidence alone is sufficient to support a conviction where the trier of fact

³ Id. at 137-40.

could reasonably infer from the circumstances that it could only have been impressed at the time the crime was committed.”⁴ He argues, however, that the NAS report and various documented incidents of erroneous fingerprint identification “prove that findings of guilt resting only on latent fingerprint analysis pose an unacceptable risk of erroneous identification.”⁵ Noting that Washington courts have not allowed convictions to rest solely on dog tracking evidence or confessions due to their fallibility,⁶ Hill asks us to make the same categorical determination regarding latent fingerprint evidence.⁷ We decline to do so for several reasons.

First, Hill did not adequately preserve or support this argument below. He did not argue, as he does on appeal, for a categorical change to the status of latent fingerprint evidence. He simply argued that the NAS report had “raised a number of critical questions about fingerprint evidence,” and that the trial court could consider the NAS report in weighing the evidence. He also did not offer the NAS report into evidence. Nor did he offer any evidence of false positive rates associated with latent fingerprint identification.⁸ Because there may be fact questions regarding the degree

⁴ Lucca, 56 Wn. App. at 599.

⁵ Appellant’s Br. at 19.

⁶ See State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983) (dog tracking evidence); State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010) (confessions).

⁷ Fingerprints can be patent or latent. United States v. Herrera, 704 F.3d 480, 482-87 (C.A.7 2013) (“Patent fingerprints are made by pressing a fingertip covered with ink on a white card or similar white surface, and are visible. Latent fingerprints are prints, usually invisible, left on a smooth surface when a person touches it with a finger or fingers. Laboratory techniques are employed to make a latent fingerprint visible so that it can be compared with other fingerprints.”).

⁸ In a decision filed earlier this year, the Massachusetts Supreme Court stated that “preliminary statistical evidence has begun to emerge” showing a small false positive error rate for fingerprint analysis. However, the court suggested that changes to the status of such evidence not be made until research on error rates and populations frequencies “reach

of the alleged unreliability of latent fingerprint evidence, it was incumbent on Hill to present evidence of unreliability to the trial court. Hill's failure to preserve or create a record supporting the argument he makes on appeal precludes review.⁹

Second, even if we were to address the argument for the first time on appeal, the record is insufficient to even consider a categorical change to the status of latent fingerprint evidence. As previously noted, the record contains no evidence of error rates in latent fingerprint analysis. Nor does Hill cite a single case from any jurisdiction holding that latent fingerprint evidence is insufficient, standing alone, to support a conviction. And while the NAS report does raise questions regarding the reliability of latent fingerprint evidence, courts have found it insufficient to warrant changes to the status of such evidence.¹⁰ A statement in the report itself cautions against giving it too much weight:

a point that permits more reliable conclusions." Commonwealth v. Joyner, 467 Mass. 176, 4 N.E.3d 282, 289-92 nn.7, 11 & 12 (2014).

⁹ Cf. State v. Woo, 84 Wn.2d 472, 475, 527 P.2d 271 (1974) (noting that "[t]here is nothing in the records, by way of testimony or exhibit, concerning the trustworthiness of the most modern polygraph equipment. The type of equipment proposed to be used in the instant cases and its reliability are not disclosed. . . . If we are to consider a departure from a virtually unanimous rule against the admissibility of polygraph examinations . . . we must be furnished with a record sufficiently adequate to permit review of the subject."); State v. Pleasant, 21 Wn. App. 177, 184, 583 P.2d 680 (1978) (accord).

¹⁰ See Johnston v. State, 27 So.3d 11, 21 (Fla. 2010) (NAS report "lacks the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty"); United States v. Rose, 672 F. Supp. 2d 723, 726 (D.Md. 2009) (despite NAS report, "fingerprint identification evidence . . . is generally accepted in the relevant scientific community, has a very low incidence of erroneous misidentifications, and is sufficiently reliable to be admissible under Fed. R. Ev. 702"); Commonwealth v. Gambora, 457 Mass. 715, 933 N.E.2d 50, 55-61 & n.22 (2010) ("nothing in this opinion should be read to suggest that the existence of the NAS [r]eport alone will require the conduct of . . . hearings as to the general reliability of expert opinions concerning fingerprint identifications").

The committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation.¹¹⁾

In addition, the report “does not appear to question the underlying theory which grounds fingerprint identification evidence; as the report states, there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person’s life.”¹²⁾ In short, the record is inadequate to contemplate the categorical change Hill requests.

Finally, it is important to remember that Washington cases prohibiting convictions based solely on dog tracking evidence and confessions are different in one very significant respect, i.e., both were based on a historical distrust of such evidence.¹³⁾ That is not the case with latent fingerprint evidence. On the contrary, “the reliability of fingerprint identification has been tested in our adversarial system for over a century” and has long been accepted by both the scientific community and Washington courts.¹⁴⁾ Accordingly, given the long-standing acceptance of such evidence, any change to its status must be based on a solid scientific foundation that is not presented here.¹⁵⁾

¹¹⁾ NAS report at 7.

¹²⁾ Gambora, 933 N.E.2d at 58.

¹³⁾ See Loucks, 98 Wn.2d at 566-67; Dow, 168 Wn.2d at 249.

¹⁴⁾ State v. Pigott, ___ Wn. App. ___, 325 P.3d 247, 250 (2014).

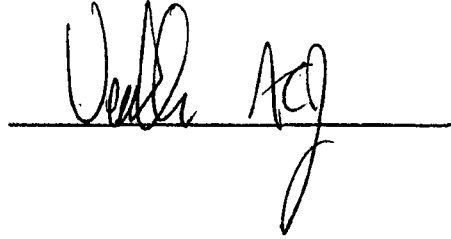
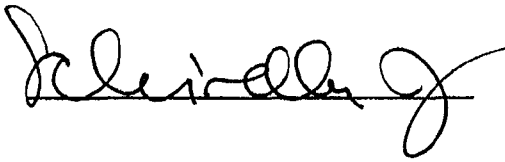
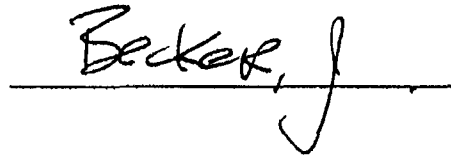
¹⁵⁾ We note that even critics of fingerprint evidence still find it more probative than eyewitness identification of a stranger, which Washington courts consider alone sufficient to support a conviction. Joyner, 4 N.E.3d at 291-92; State v. Delker, 35 Wn. App. 346, 351, 666 P.2d 896 (1983) (eyewitness testimony alone sufficient to establish identity).

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For these reasons, we adhere to our decision in Lucca. The juvenile court's adjudication of guilt is supported by sufficient evidence.

Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Walt AG", written above a horizontal line.A handwritten signature in cursive script, appearing to read "Reinold J", written above a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J", written above a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70429-0-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mafe Rajul, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


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Washington Appellate Project

Date: August 20, 2014