

NO. 68653-4-1

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

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King County Prosecutor
Appellate Unit

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STATE OF WASHINGTON,

Respondent,

v.

S.K.,

Appellant.

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

The Honorable Bruce Hilyer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to present a defense when the trial court excluded the testimony of a defense expert witness.

Issue Pertaining to Assignment of Error

Both the state and federal constitutions guarantee every criminal defendant the right to present a defense and challenge the State's evidence and its witnesses. The verdict in appellant's case turned on whether the court concluded that appellant was responsible for latent prints found at the scene of the crime. A prosecution expert testified the prints belonged to appellant. A proposed defense expert would have challenged the foundation for that conclusion, but the court excluded his testimony. Was this a violation of appellant's constitutional rights?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged S.K. with one count of Residential Burglary. Based on prints found on a television in the victim's home, S.K. was accused of entering the home without permission and stealing a number of items. CP 1-3.

Prior to trial, the defense moved for a Frye¹ hearing, arguing that latent print analysis (and the ACE-V methodology in particular) was not generally accepted in the relevant scientific community. Supp. CP ____ (sub no. 48, Defense Motion for a Frye Hearing and Motion to Exclude Latent Print Testimony). The State opposed the motion, which was denied. Supp. CP ____ (sub no. 52, State's Response to Defense Motion); CP 19-21.

After a bench trial, the Honorable Bruce Hilyer found S.K. guilty and imposed a sentence of 55-62 weeks in JRA. CP 15-18, 22-25. S.K. timely filed his Notice of Appeal. CP 26-28.

2. Trial Testimony

James Nguyen arrived at his Renton home the evening of September 9, 2011, and found that someone had broken in. RP² 66-69. The bedrooms had been ransacked, and several items were missing from the home, including computers, cameras and related equipment, a projector, video games, a DVD player, and musical instruments. RP 71-80. Nguyen noticed footprints on his back deck. RP 70. There also were footprints in the backyard

¹ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

² "RP" refers to the verbatim report of proceedings for March 5-6, 2012.

grass and damage to his fence, suggesting someone had climbed over it. RP 70.

In the basement, Nguyen found that his television set had been removed from its wall bracket and was sitting nearby on the floor. RP 79-80. Nguyen testified that he regularly cleaned the television during the five years it had hung on the wall and most recently cleaned it in February 2011. RP 80-83, 93-99.

King County Deputy Sheriff Jeremy Davy investigated the crime. RP 110-111. The entry point was a window accessible from the back deck. RP 114. Regarding the television, it appeared that someone had attempted to steal it by lifting it off its mount on the wall. It was "sitting half-cocked at an angle" on the floor. RP 115. Davy could see latent fingerprints on the television and lifted them for examination. RP 121-130.

In order to prove that S.K. left the prints on the television, the State called latent fingerprint examiner Cynthia Zeller. RP 140. Zeller testified that everyone has friction ridge skin on the bottoms of their hands and feet, which is an area of raised ridges and valleys. RP 143. The specific combination of ridges and valleys, however, is unique to every individual. RP 144.

Zeller testified that when she receives a friction ridge latent print, she first examines it to ensure there is enough detail to place the print in the Automatic Fingerprint Identification System (AFIS). RP 146. The AFIS system then compares the print to known prints in the system and provides a "candidate list" of possible matches. RP 146-148. Zeller then compares the latent print to those on the list and, after confirming consistent information, conducts a formal comparison of prints that appear to be the same. RP 148-150. The result might be individualization (a match), exclusion, or inconclusive. RP 150-152.

Zeller testified to her training, experience, and certifications. RP 140-143. She indicated that she had done close to a hundred thousand comparisons in 2011 alone. None of her individualizations had been found to be erroneous in 2011 or in any prior year. RP 152-153.

Zeller examined the prints found on Nguyen's television. RP 155. There were six lift cards total. RP 158. Of these, three were of sufficient quality to place in the AFIS system, and all three appeared to be palm impressions. RP 159-162. Using one of the prints, the AFIS system produced a candidate list that included prints from S.K. collected in 2008. RP 162-168, 175-176, 178.

Zeller confirmed that S.K. was a possible match and, after comparing the latent print with S.K.'s known AFIS print, concluded there was an individualization. RP 168-169. Zeller then determined that the two remaining latent prints also matched S.K.'s known prints. RP 169-171.

On January 25, 2012, Zeller took new prints from S.K. and confirmed that they matched his 2008 prints in the AFIS system. RP 172-173. Later, Zeller also compared these prints to another of S.K.'s prints – added to the AFIS system in 2011 after Zeller's initial analysis – and concluded they matched as well. RP 173-175, 178-180. Zeller testified that, given the good detail in the latent prints, the comparisons were "fairly easy." RP 180.

In response to Zeller's testimony, the defense sought to call Dr. Simon Cole, the same expert they had hoped to call as a witness at the proposed Frye hearing. RP 51. The State moved to exclude his testimony, arguing he had nothing relevant to offer. RP 50-52.

Dr. Cole has a Ph.D in Science and Technology Studies from Cornell University and currently serves as Associate Professor and Chair of the Department of Criminology, Law & Society at the University of California-Irvine. Supp. CP ____ (sub no. 60,

Summary of Expert Testimony and CV). He is an expert on the interplay between science, technology, law, and criminal justice. He has written extensively on the subject of latent fingerprint identification and has been awarded nine research grants on the subject, including grants from the National Science Foundation and National Institutes of Health. Dr. Cole has delivered more than 40 invited lectures to organizations in six countries, including the National Academy of Science. Id.

In S.K.'s case, Dr. Cole was prepared to testify generally regarding the fallibility of the process used to examine and compare latent prints. Moreover, based on his review of the materials in S.K.'s case specifically, Dr. Cole would testify that Zeller's conclusions were not grounded in empirical studies demonstrating the accuracy of her methods. Id. And if there is no accuracy measurement, it is not possible to convey confidence in the ultimate conclusions. Moreover, even though Zeller found individualization, there are no data on the rarity of a particular print, without which it is impossible to determine the likelihood a print came from the defendant. Id.

In denying the defense motion for a Frye hearing, the court concluded that Dr. Cole was a social scientist and not part of the

relevant scientific community for purposes of determining whether the science of latent print examination was generally accepted. RP 38-41; CP 20. The defense argued, however, that he was still qualified to offer relevant expert trial testimony undermining Zeller's methods and conclusions. RP 51-55. But the court excluded Dr. Cole's testimony, reasoning that the defense was simply attempting to renew its Frye challenge and that Dr. Cole could not testify unless he had something to offer concerning a specific mistake made in S.K.'s case. General criticisms of latent print examination would not suffice. RP 55-56.

On cross-examination, defense counsel did the best he could without the benefit of Dr. Cole's testimony. He had Zeller discuss the various environmental factors that can affect friction ridge prints and the ability to do a comparison, including time, temperature, pressure, surface material, and "transfer medium," i.e. whether the print is left from oil on the skin or some other substance like blood. RP 184-196. He probed Zeller's methodology and criteria for determining whether a print is of sufficient quality to be placed in the AFIS system. RP 200-209. He also probed how the AFIS system produces a candidate list. RP 212. Zeller conceded that other analysts, including those with the

FBI, had made erroneous identifications in the past. RP 224-226. She testified that, because latent print analysis is a mental process, the procedures cannot be validated in the manner other scientific procedures are validated. RP 230-231.

In convicting S.K. of Residential Burglary, Judge Hilyer relied on Zeller's opinion that S.K.'s prints were found on Nguyen's television, finding that Zeller had applied friction ridge identification methodology "correctly and reasonably" and that her testimony was credible. CP 17 (findings 15-16, 20).

C. ARGUMENT

E.B. WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT PROHIBITED THE INTRODUCTION OF SIGNIFICANT DEFENSE EVIDENCE.

The Sixth and Fourteenth Amendments to the United States Constitution,³ and article 1, § 21 of the Washington Constitution,⁴

³ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

guarantee a defendant the right to defend against the State's allegations, including the right to present evidence in his defense. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Absent a valid justification, excluding relevant defense evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S. 683, 690-691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

⁴ Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). For evidence with high probative value, it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

Dr. Cole was offered as an expert witness. RP 51, 54-55.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The rule involves a two-step analysis. First, the witness must qualify as an expert. Second, the testimony must be helpful to the trier of fact. State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). Judge Hilyer did not rule that Dr. Cole was unqualified to testify as an expert witness. Indeed, his knowledge, experience, and education concerning latent print examinations are extensive. It is the second step that is at issue in this appeal –

whether his testimony would have been helpful in resolving an issue at trial.

This Court generally reviews decisions under ER 702 for an abuse of discretion and will reverse the trial court's decision if premised on untenable grounds or reasons. Kalakosky, 121 Wn.2d at 541. Where, however, the defendant claims denial of his constitutionally guaranteed right to present a defense, the issue is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Under either standard, reversal is required.

Judge Hilyer properly recognized that the seminal trial issue was identification. The other elements of burglary were clearly established. RP 251. Thus, any evidence capable of impeaching the State's evidence on identity was of crucial importance to S.K.

Dr. Cole's testimony was relevant in several regards. He would have testified regarding the fallibility of the process used to examine and compare latent prints. Moreover, based on his review of the materials *in S.K.'s case*, Dr. Cole would testify that Zeller's conclusions were not grounded in empirical studies demonstrating the accuracy of her methods. According to Cole, it was not possible for Zeller to convey confidence in her ultimate conclusion that there was an individualization identifying S.K. as the burglar.

Supp. CP ____ (sub no. 60, Summary of Expert Testimony and C.V., at 1-2).

The proposed defense evidence went to the heart of the defense case – demonstrating reason to doubt the State's evidence that S.K. left his fingerprints on Nguyen's television during the burglary. In contrast, there was no valid reason, much less a compelling one, to exclude this evidence from consideration. Under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, § 21 of the Washington Constitution, S.K. was entitled to present this evidence as part of his trial defense.

Reversal is required unless this Court is “convinced beyond a reasonable doubt that any reasonable [trier of fact] would have reached the same result without the error.” Jones, 168 Wn.2d at 724 (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). There were no eyewitnesses to the burglary, no evidence of the crime found in S.K.'s possession, and S.K. made no incriminating statements. In a case where the court's verdict turned on the fingerprint analysis, the excluded evidence was critical indeed. Because the State cannot show that exclusion of the

defense evidence was harmless beyond a reasonable doubt, S.K.
must receive a new trial.

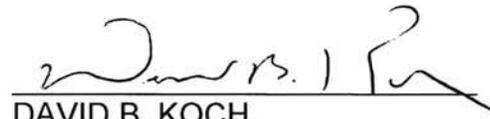
D. CONCLUSION

S.K. was denied his constitutional right to present a defense. His conviction should be reversed and his case remanded for a new trial – one in which the trier of fact considers all relevant defense evidence.

DATED this 25th day of January, 2013.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68653-4-I
)	
S.K.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] S.K.
NASELLE YOUTH CAMP
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SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JANUARY 2013.

X *Patrick Mayovsky*

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