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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SAY S. KEODARA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DANIKA ADAMS  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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**A. ISSUE PRESENTED**

Pursuant to ER 702, a qualified expert witness may provide relevant, admissible testimony, if the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. Here, the court ruled that the latent fingerprint examination methodologies applied in this case were generally accepted within the relevant scientific community. As a result, the court also ruled that Keodara's purported expert witness, who would testify that latent fingerprint examination should not be generally accepted within the relevant scientific community, did not have relevant testimony to offer at trial and would not assist the court in determining a material fact in the trial. Was the exclusion of this testimony an abuse of discretion?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Juvenile respondent Say S. Keodara was charged by information with one count of residential burglary. CP 1. At a pre-trial hearing, Keodara's motion for a Frye<sup>1</sup> hearing to consider the admissibility of the latent fingerprint individualization evidence

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

was denied. CP 13, 19-21. The court found that the latent fingerprint examination methodologies used in this case were generally accepted within the relevant scientific community. CP 19-21.

The State moved to exclude from the subsequent fact-finding the testimony of Keodara's proposed expert witness, Dr. Simon Cole, as irrelevant. RP 50-51; Supp. CP \_\_\_\_ (sub no. 50, Trial Memorandum of State). The court excluded the witness's testimony. RP 51-56. The court found that the witness was not competent to testify as an expert in latent fingerprint analysis and that the witness had not conducted any analysis on the prints in this case himself. RP 54. The court ruled that any testimony the expert would offer would go only to the issue of whether the relevant scientific community accepted latent fingerprint examination – an issue on which the court had already ruled. RP 54-56. The court allowed Keodara to raise the issue of Dr. Cole's testimony again, if he could provide an offer of proof of relevant testimony the witness could provide. RP 55-56.

The court found Keodara guilty of the crime of residential burglary. CP 14.

## 2. SUBSTANTIVE FACTS

James Nguyen returned to his home to find that it had been burglarized. RP 68-69.<sup>2</sup> Nguyen immediately called 911 to report the burglary and King County Sheriff's Deputy Jeremy Davy arrived on scene. RP 83, 113.

Several rooms of the Nguyen home had been ransacked and rifled through, and Nguyen could see that a number of his family's possessions were missing. RP 71-80. In the basement, Nguyen and Deputy Davy found that the flat-screen television that was normally mounted on the wall had been removed and was left lying at an unusual angle on the floor. RP 79-80, 115.

Deputy Davy processed the flat-screen television for latent print evidence, following procedures based on his training and experience. RP 116-21. Deputy Davy observed several latent prints on the sides of the television that were visible to the naked eye. RP 121. Nguyen's flat-screen television had been hanging on the wall in his basement for at least five years, and had most recently been thoroughly cleaned approximately six months before the burglary. RP 80-83, 93-99.

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<sup>2</sup> "RP" refers to the verbatim report of proceedings for the Adjudication on March 5-6, 2012.

When Deputy Davy applied powder to develop those visible, and other less visible, latent prints on the television, they popped out immediately. RP 122. Based on his training and experience, this indicated that the latent prints on the television were left relatively recently. RP 122. Deputy Davy was able to lift six latent partial-palm print cards from the sides, front edges, screen and back of the television. RP 123-25.

The six latent print cards collected by Deputy Davy were examined by King County Regional AFIS Latent Print Examiner Cynthia Zeller. RP 155-58. Zeller analyzed the six print cards and found that three were of comparison value. RP 158-62. Zeller was able to individualize those latent prints to the left palm and right palm of known prints belonging to Keodara. RP 169-71. The latent prints presented no problems due to distortion, so Zeller's examinations in this case were fairly easy and straightforward. RP 181.

Zeller was later able to compare the known prints to a rolled print exemplar she took from Keodara, and found that they were made from the same source. RP 171-73. Nguyen does not know Keodara and did not give him permission to enter his home or remove his television from the wall. RP 84.

C. **ARGUMENT**

**THE TRIAL COURT PROPERLY EXCLUDED THE TRIAL TESTIMONY OF KEODARA'S PURPORTED EXPERT WITNESS.**

Keodara claims that the trial court improperly excluded the testimony of his purported expert witness, Dr. Simon Cole, and that the exclusion of the witness violated Keodara's right to present a defense. Keodara is incorrect. The court exercised appropriate discretion to exclude testimony that was not relevant and would not aid the court in determination of any material fact.

Keodara challenges the trial court's ruling on the State's motion in limine to exclude the witness's testimony under ER 401, 402, and 702. A ruling on a motion in limine or the admissibility of evidence is reviewed for abuse of the trial court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court's exercise of discretion will only be disturbed if it is "manifestly unreasonable or based upon untenable grounds or reasons." Id.

Keodara cites to State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), asserting that the issue should be reviewed de novo because it is of constitutional magnitude. App. Br. at 11. However, the court based the elevated standard of review in Jones on the defendant being denied the constitutional right to testify himself, in

his own defense. Id. at 719-20. In cases like this, where the exclusion only limited the defendant's presentation of evidence by preventing his purported expert from testifying, "Washington courts have repeatedly followed an abuse of discretion standard," despite the invocation of the constitutional right to present a defense. State v. Lewis, 141 Wn. App. 367, 385, 166 P.3d 786 (2007); see also State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

The Rules of Evidence state plainly that irrelevant evidence is not admissible. ER 402. The trial court should exclude any evidence that does not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Although a defendant has a Sixth Amendment right to present a defense at trial, no defendant has a constitutional right to have irrelevant evidence admitted as a part of that defense. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004).

Opinion testimony by experts must also be (1) given by a witness with some specialized knowledge that qualifies the witness as an expert, and (2) helpful to the trier of fact in understanding the other evidence or determining a fact at issue in the trial. ER 702. Additionally, "the expert's opinion must be based upon a theory

generally accepted in the relevant scientific community.” Cheatam, at 645.

The trial court correctly noted during argument that Dr. Cole was incompetent to express any opinion that would directly rebut the opinion of the State’s expert, Zeller, about the individualization of the latent prints to Keodara. RP 54. Dr. Cole had no training, experience, or specialized knowledge that qualified him as an expert in the field and practice of latent print examination, and no testimony that would contradict the particular comparisons made in this case. Id.; see also CP 350-69. The only testimony that Keodara asserted Dr. Cole would give was to question whether latent print examination and the methodologies used in this case should be accepted within the scientific community, and thus as evidence by the courts. RP 53-55; CP 351. But, the court had already found that Dr. Cole’s “survey of the literature is not enough to qualify him to testify as to what the relevant scientific community is or what the relevant scientific community thinks.” CP 20.

Once the court ruled that latent fingerprint examination, and the methodologies used in this case were generally accepted within the relevant scientific community (see CP 21), Dr. Cole’s testimony on that point was rendered irrelevant to the issues remaining at the

trial. The court's ruling on the motion for a Frye hearing made Dr. Cole's proffered testimony irrelevant, since it was contrary to the court's ruling. In addition, Dr. Cole's testimony could not itself be accepted in the same scientific community, as required for an expert to testify under Cheatam.

Keodara offered Dr. Cole's testimony under the guise of questioning the credibility of Zeller's trial testimony, but it was really just another attempt at invalidating latent fingerprint examination in general. There was nothing unreasonable about the court excluding Dr. Cole's testimony, and the grounds for the exclusion were well-supported. In fact, the court left the door open for Keodara to raise the issue again if he had anything to supplement his offer of proof, or if anything developed during the State's case-in-chief that would cause Dr. Cole's already proffered testimony to become relevant. Keodara did not ask the court to address the issue again.

Keodara argues that Dr. Cole's testimony would have been relevant to the fallibility of some processes used in some print comparisons, and the lack of studies quantifying the accuracy of latent print examination. However, Dr. Cole had no testimony regarding any difficulties or failings in the print comparisons performed by Zeller in this case. Any testimony about a lack of

quantifiable accuracy goes only to question the validity of the field itself (which the court had already ruled on), and not to the credibility of Zeller.

If any error can be found here, it is surely harmless. Because Dr. Cole's testimony was so tangential to the issues at trial as to be easily recognizable as irrelevant, there is no reason to doubt that any reasonable court would have found Keodara guilty even after hearing Dr. Cole's testimony.

The latent prints preserved by Deputy Davy were so heavy they were visible to the naked eye, and they were so fresh that they were easy for him to develop and lift. The three latent prints that Zeller used during her individualization were easy for her to make comparisons on because of the amount of detail captured. And there were not one, not two, but no fewer than three separate latent prints left in the Nguyen home by Keodara. This case did not turn on a close-call.

Despite the exclusion of Dr. Cole, Keodara was able to confront Zeller's trial testimony on cross-examination. Keodara questioned Zeller on the lack of quantifiable accuracy and argued that the court should consider that deficit when determining what weight to give to Zeller's testimony and the individualization made

in this case. Although Keodara was precluded from putting Dr. Cole on the stand, the questions that Dr. Cole would have raised were adequately raised by Keodara.

The court prudently exercised its discretion to exclude the testimony of Keodara's purported expert witness because his testimony was irrelevant, and outside the scope of allowable opinion evidence. Dr. Cole was not an expert in the field of latent fingerprint examination and was not competent to give testimony in that field.

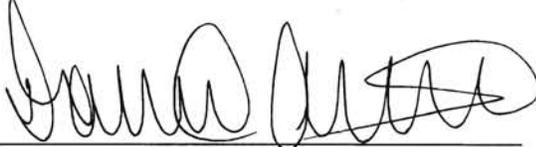
**D. CONCLUSION**

For all the foregoing reasons, the State asks this Court to affirm the trial court's exclusion of the testimony of this witness.

DATED this 3rd day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DANIKA ADAMS, WSBA #39265  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SAY S. KEODARA, Cause No. 68653-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston  
Name  
Done in Seattle, Washington

5/3/13  
Date