73162-9

FILED
October 27, 2015
Court of Appeals
Division I
State of Washington

No. 73162-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW RAYMOND WASHINGTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

When the probative value of evidence is weak or suspect, it is insufficient to sustain a criminal finding of guilt. Thus in burglary cases where the evidence of guilt consists solely of dog-tracking evidence, a confession, or possession of stolen property, appellate courts have concluded the evidence is insufficient absent corroborating evidence. Courts have, however, allowed findings of guilt for burglary based on latent fingerprint evidence alone. These holdings implicitly assume that fingerprint evidence is sufficiently reliable. Because this assumption is wrong and fingerprint evidence is not especially reliable, this Court should hold that fingerprint evidence, by itself, is insufficient to sustain a guilty verdict for burglary. Accordingly, because the only evidence of guilt was opinion testimony that latent prints found at the burglarized home belonged to the appellant, this Court should reverse.

B. ASSIGNMENT OF ERROR

The State did not present sufficient, reliable evidence of guilt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Courts have assumed that fingerprint analysis, the comparison of latent prints with known prints, is scientifically based and very reliable. This assumption is false. Fingerprint analysis has not been

scientifically validated and numerous cases of incorrect fingerprint attribution show it is not as reliable as once thought. With certain other categories of evidence, such as dog-tracking evidence, the courts have required corroborative evidence of guilt to sustain a guilty finding. In the absence of corroborative evidence of guilt, is fingerprint evidence insufficient to prove residential burglary beyond a reasonable doubt?

C. STATEMENT OF THE CASE

On the morning of August 12, 2013, Karina and Andrew Bloom left their house in the Wedgewood neighborhood of Seattle to go to work as usual. 1/06/15RP 29, 138. They left their bedroom window open because it was a hot day. 1/06/15RP 43, 142. The bedroom window was on the second floor, above the garage. 1/06/15RP 54, 142.

That afternoon, their neighbor Christopher Caldwell was walking home from Safeway, carrying a grocery bag. 1/06/15RP 61. He saw a man standing on the Blooms' front porch, as if waiting for someone to answer the door. 1/06/15RP 62. The man was wearing a jacket that was too heavy for such a warm day. 1/06/15RP 64. The man was not carrying anything and did not do anything to draw attention to himself. 1/06/15RP 64, 80.

After Mr. Caldwell had walked past the Blooms' house and almost reached his own house, he heard a window break. 1/06/15RP 67. He ran back down the street and saw a man struggling to get through the Blooms' second-story bedroom window, with his feet still hanging out of the window. 1/06/15RP 67-68. Mr. Caldwell called 911 while continuing to watch the Blooms' house. 1/06/15RP 68-69.

No more than 10 minutes later, Mr. Caldwell saw a man exit the Blooms' house through the front door. 1/06/15RP 69. The man was walking casually. 1/06/15RP 70. He dropped a small cardboard department store gift jewelry box on the ground as he walked away. 1/06/15RP 70. The man walked down the street and Mr. Caldwell lost sight of him. 1/06/15RP 71. When the police responded about 15 minutes later, officers and Mr. Caldwell searched for the man in the area. 1/06/15RP 71-72. He was never found. 1/06/15RP 71.

Mr. Caldwell said the man was white, thin, and about five foot nine inches tall. 1/06/15RP 63-64. But Mr. Caldwell did not get a good look at the man's face. 1/06/15RP 63. He was not able to identify the defendant Matthew Washington as the burglar.

The burglar had opened drawers in Ms. Bloom's bedroom dresser and rifled through her belongings. 1/06/15RP 31. Ms. Bloom

kept her jewelry in the dresser, with many of the pieces stored in department store cardboard gift boxes. 1/06/15RP 31-33, 41. Much of the jewelry and several of the small cardboard boxes were taken. 1/06/15RP 31, 34, 39.

A police officer lifted a fingerprint from the small cardboard box that the burglar had dropped on the ground outside the Blooms' house. 1/06/15RP 109-12. No other usable fingerprints were found at the scene. 1/06/15RP 115-17, 126, 129.

A Seattle Police latent fingerprint examiner compared the latent print found on the cardboard box to a known fingerprint of Mr. Washington's. 1/06/15RP 87; 1/07/15RP 16-19. She determined the latent print was of sufficient detail to make a useful comparison. 1/07/15RP 21. She concluded that both prints came from the same source and that Mr. Washington was therefore the person who had left the latent print on the box at the scene. 1/07/15RP 26.

Mr. Washington was charged with one count of residential burglary. CP 1; RCW 9A.52.025.

At trial, the latent print examiner acknowledged during her testimony that there are no objective standards regarding how many points of agreement or disagreement between known and latent prints

are necessary or acceptable before an identification can be made. 1/07/15RP 38, 67. Fingerprint identification analysis has been criticized by the scientific community due to the lack of objective standards and the lack of comprehensive studies showing the method's validity and reliability. 1/07/15RP 41, 54, 63-68.

Although the State presented no evidence of identification to corroborate the fingerprint evidence, the jury found Mr. Washington guilty of residential burglary as charged. CP 48.

D. ARGUMENT

Because latent fingerprint evidence is not as reliable as the courts have assumed it is and latent fingerprint analysis has not been scientifically validated, it should no longer be sufficient, by itself, to support a guilty verdict for burglary.

1. Background

In the United States, fingerprints have been used to identify people for more than a century. National Research Council, Strengthening Forensic Science in the United States: A Path Forward, at 136 (Feb. 2009) ("NAS Report").[1] 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

[1] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

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.

While not described in forensic literature until 1959, the technique used in friction ridge analysis is described by the acronym ACE-V: "Analysis, Comparison, Evaluation, and Verification." NAS Report at 137; 1/06/15RP 178. In the analysis phase, the examiner considers the quality and quantity of detail in the latent and known print for comparison and evaluation. NAS Report at 137-38; 1/07/15RP 9-14. Next, the examiner compares the prints, looking for details that correspond. NAS Report at 138; 1/07/15RP 21-25. After comparison, the examiner evaluates the agreement of friction ridge formations in the prints and makes a conclusion. NAS Report at 138; 1/07/15RP 26. The examiner may conclude that the prints come from the same 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; 1/07/15RP 26, 75.

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 real 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 the testimony of four witnesses, the court reasoned "there is a scientific basis for the system of finger print identification" and "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, our Supreme 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, the Clark court stated, "[c]ourts 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. For example, as formulated by the North Carolina Supreme Court in 1948, fingerprint evidence was not probative of guilt unless the evidence established the prints could have only been made at the time of crime:

> The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could only have been impressed at the time when the crime was perpetrated.

State v. Minton, 228 N.C. 518, 521, 46 S.E.2d 296 (1948). Citing a federal case and legal treatises, this Court formulated a similar rule, but stated that fingerprint evidence alone could support a conviction:

> 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) (emphasis added). This 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 this assumption wrong.

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

Despite its history, the unquestioning acceptance of fingerprint evidence has come to an end. The catalyst for wide-spread skepticism may stem from the infamous case of Brandon Mayfield.

In 2004, the Federal Bureau of Investigation (FBI) arrested Mayfield in connection with the terrorist attacks on commuter trains in Madrid, Spain. United States Department of Justice, Office of the Inspector General, A Review of the FBI's Handling of the Brandon Mayfield Case, at 1 (March 2006) ("OIG Report").[2] 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. Id. at 1. An examiner concluded that Mayfield was the source of the print. Id. Two other examiners concurred with the conclusion. Id. at 2. After arresting Mayfield, an independent expert agreed that the print was Mayfield's. Id. Spanish authorities, however, identified the print as belonging to an Algerian national. Id. Eventually, the FBI

[2] Available at https://oig.justice.gov/special/s0601/exec.pdf.

concluded it had erred in determining that the print belonged to Mayfield's. Id.

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 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; (6) and overconfidence despite disagreement by Spanish authorities, who had concluded the prints were not Mayfield's. Id. 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. Id. at 11.

While the Mayfield incident is likely the most famous case of fingerprint identification gone wrong, there are numerous other

accounts of erroneous latent fingerprint identification. In 2005, one author recounted 22 cases (including the Mayfield case) of known mistaken fingerprint misattributions. Simon A. Cole, More Than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1001-16 (2005). Plainly, 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. Thus, there are good reasons to believe that the known cases of fingerprint misattribution are likely the "tip of the iceberg." Cole, 95 J. Crim. L. & Criminology at 1017.

3. 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

("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." Id. at 141. Despite the obvious subjectivity involved, latent fingerprint analysts commonly fail to acknowledge any uncertainty in their opinion. Id. 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." Id. 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.

Id. 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."

Id. at 142-43 (footnotes and citation omitted).

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

4. 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.

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. Another example, particular to burglary cases, is evidence of possession of stolen property. Because fingerprint evidence lacks an adequate scientific foundation and is not as reliable as once assumed, this Court should hold that, absent corroborating evidence of guilt, fingerprint evidence alone is insufficient to sustain a guilty disposition for burglary.

Unlike the courts' unquestioning acceptance of the reliability of identification based on latent fingerprint analysis, courts have questioned the reliability of identifications based on dog-tracking evidence. In most jurisdictions, dog-tracking evidence is admissible because of its perceived accuracy. Evidence of trailing by dogs in criminal cases, 81 A.L.R.5th 563 (Originally published in 2000). However, courts allowing dog tracking evidence still "regard its probative value with some suspicion." State v. Loucks, 98 Wn.2d 563, 567, 656 P.2d 480 (1983). In all jurisdictions allowing dog-tracking

evidence, certain foundational requirements must be met first. 81 A.L.R.5th 563. Further, "[m]ost courts allowing dog tracking evidence restrict its use to corroborative purposes only." Loucks, 98 Wn.2d at 567. Adopting this rule, our Supreme Court held that dog tracking evidence by itself is insufficient to support a conviction absent corroborating evidence. Id. at 566. Applying the rule, the court reversed a burglary conviction because it was premised solely upon a tracking dog's identification of the defendant. Id. at 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. As further explained by the California Court of Appeals, the concern is that dog-tracking evidence is not infallible, and because of its fallibility, corroborative evidence is required to validate it:

> What we are concerned with is the possibility that the dog could have erred. Obviously, if we were convinced of the infallibility of the dog, the evidence would speak for itself and would not, as a matter of law, require

> corroboration. The circumstances of the dog tracking would determine the conclusiveness of the evidence on the question of the identification. . . . The difficulty is that we want to assure ourselves the dog did not err either in picking up the scent of the person who handled the [evidence] or in following that scent to the person found. It is not a question of trustworthiness, it is a question of substantiality—while the evidence might be trustworthy, we are not willing to rest our verdict on that evidence alone. We want other evidence that will validate its veracity.

People v. Gonzales, 218 Cal. App.3d 403, 412, 267 Cal. Rptr. 138, 143-44 (Cal. Ct. App. 1990).

As with dog-tracking evidence, there is a long history of judicial distrust of confessions. See City of Bremerton v. Corbett, 106 Wn.2d 569, 575-76, 723 P.2d 1135 (1986). Accordingly, 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." Id. "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).

Finally, in a rule generally applied in burglary cases, possession of stolen property, unless accompanied with other corroborative evidence of guilt, is insufficient to prove burglary. State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984); State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). In essence, possession of stolen property is insufficient by itself to sustain a guilty verdict for burglary because it does not firmly establish that the possessor unlawfully entered a building or dwelling. Thus, in Mace, our Supreme Court reversed a conviction for burglary for lack of sufficient evidence because the evidence proved only that the defendant might have recently possessed stolen bank cards. Mace, 97 Wn.2d at 842-43.

In summary, dog-tracking evidence, confessions, and evidence of possession of stolen property are three classes of evidence that, while probative of guilt, are alone insufficient to prove a person guilty of burglary beyond a reasonable doubt. Concerned with inaccurate

adjudications of guilt, the courts have required corroborative evidence. Thus, fashioning a rule requiring corroborative evidence of guilt in cases consisting solely of latent fingerprint evidence is consistent with Washington law.

Here, a rule requiring corroborative evidence of guilt in cases consisting only of latent fingerprint evidence is justified. The NAS Report and the instances of wrongful identifications prove that findings of guilt resting only on latent fingerprint analysis pose an unacceptable risk of erroneous identification. Latent fingerprint analysis is a subjective form of evidence that has not been scientifically validated. Requiring corroborative evidence of guilt would substantially mitigate the risk of finding the innocent guilty.

The dog-tracking evidence cases are particularly 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 fingerprint 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 . . . ."). Both dog-tracking evidence and fingerprint evidence present an unacceptable risk of misidentification. Thus, just as with dog-tracking evidence, this Court should require corroborative evidence of guilt in latent fingerprint cases.

It is true that a fingerprint analyst, unlike a dog, can be cross-examined. But this is only one rationale for requiring corroborative evidence in dog-tracking cases. Further, confrontation does not guarantee reliability. Confrontation is only "*one* means of assuring accurate forensic analysis." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (emphasis added). "In other words, cross-examination is a minimal constitutional safeguard that helps to test the reliability of forensic evidence that is offered in criminal trials. But it is far from adequate." The Honorable

Harry T. Edwards, The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar 10 (2010).[3]

This Court should hold that guilty verdicts cannot rest solely on latent fingerprint evidence. Absent corroborating evidence of guilt, fingerprint evidence should be deemed insufficient to find a person guilty of burglary.

This Court is free to adopt this holding. While this Court's 1990 decision in Lucca held that fingerprint evidence alone is sufficient to support a guilty finding, the Court did not address the reliability of fingerprint evidence or whether the Court should adopt a rule requiring corroborative evidence. Lucca, 56 Wn. App. at 599. If an earlier appellate opinion does not consider the issue raised in a current appeal, the opinion is not dispositive and may be reexamined without violating stare decisis:

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.

[3] Available at http://www.law.yale.edu/documents/pdf/Alumni_Affairs/Stith_Edwards_NAS_Report_Forensic_Science.pdf.

ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992); see also State v. K.N., 124 Wn. App. 875, 877, 103 P.3d 844 (2004) (reasoning that because earlier decision "did not consider the due process implications of its holding, its value as a precedent is minimal"). Lucca also preceded the NAS Report and other scholarly criticism of fingerprint evidence. Accordingly, Lucca is not dispositive.

Here, there was no corroborative evidence linking Mr. Washington to the burglary. Thus, under the rule proposed by Mr. Washington, the evidence was insufficient.[4] See Loucks, 98 Wn.2d at 569. His guilty verdict should be reversed and his conviction dismissed with prejudice. State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

E. CONCLUSION

Because latent fingerprint analysis has not been validated by science and rests on an unwarranted assumption of strong reliability,

[4] "Due process requires the State to prove beyond a reasonable doubt every essential element of a crime." State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025. In a sufficiency of the evidence challenge, the test is whether after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

this Court should hold latent fingerprint evidence, by itself, is insufficient to support a finding of guilt. Other corroborative evidence should be necessary. Because the guilty verdict rested entirely on fingerprint evidence, this Court should reverse and order the charge of residential burglary dismissed.

Respectfully submitted this 27th day of October, 2015.

s/ Maureen M. Cyr

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

STATE OF WASHINGTON, Respondent, v. MATTHEW WASHINGTON, Appellant.	)))))))))	NO. 73162-9-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF OCTOBER, 2015.

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