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NO. 68566-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRIS V. ORK,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here, the State presented evidence that Ork's fingerprints were on a living room window that was the entry point for a residential burglary. The prints were in a position consistent with someone placing their hands on the window and pushing the glass in and up in order to force the window open. That window was in the rear of the victims' home, the particular window pane had been inaccessible to the outside until shortly before the burglary due to the presence of an air-conditioning unit, and Ork had not been permitted to come to the victims' home for several years. Did the State produce sufficient evidence that Ork committed the residential burglary?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On June 30, 2011, the State of Washington charged Chris V. Ork with one count of Residential Burglary for his actions in entering the home of John and Barbara Duncan and stealing a television on January 27, 2011. CP 1-3. The case proceeded to a bench trial before the Honorable Bruce

Hilyer. CP 9; 1RP.<sup>1</sup> After a factfinding hearing held on February 14 and 21, 2012, the court found Ork guilty as charged. 1RP; 2RP; CP 9. The court signed written findings of fact and conclusions of law in support of its verdict on February 24, 2012. CP 10-14.

The trial court held a disposition hearing on March 7, 2012, and imposed nine months of supervision, 30 hours of community restitution, and 21 days in detention. CP 18-21. This appeal timely followed. CP 22.

## **2. SUBSTANTIVE FACTS**

Barbara Duncan and her husband John Duncan have lived at 1839 South 250<sup>th</sup> Place in Des Moines, Washington, for almost twenty years. 1RP 60; 2RP 12. During the last several years, their son Brandon, their daughter Jennifer, and Jennifer's children, Nathan and Curtis, have periodically lived there as well. 1RP 60-61; 2RP 12. When Nathan was small, in approximately second grade, he sometimes played with Ork – the grandson of the Duncans' neighbors – who was a year or two older. 1RP 83-84; 2RP 20. However, several years back when Ork was in the fourth grade, the Duncans told him he was no longer allowed in their house, and he had not been in the house since that time. 1RP 84-86, 170, 174; 2RP 20. Nathan was fifteen years old at the time of trial. 1RP 139.

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<sup>1</sup> The Verbatim Report of Proceedings is comprised of two volumes. The State uses the abbreviations 1RP to refer to the first volume, covering the proceedings of February 14, 2012, and 2RP to refer to the second volume, covering the proceedings of February 21 and March 7, 2012.

In the fall of 2010, Nathan had been living with the Duncans and attending Federal Way High School. 1RP 61, 134-36; 2RP 12-13. Ork had been living with his grandparents, but moved out on Halloween of 2010. 1RP 92, 159.

On January 27, 2011, Nathan was not staying with the Duncans. 1RP 137; 2RP 13. Barbara left for work at 6:00 a.m. that day; John left around 7:00 a.m. 1RP 62; 2RP 14. Before leaving for the day, John checked all the windows, including the living room window, to ensure that they were locked. 1RP 73; 2RP 19. Barbara returned home around 6:00 or 6:30 p.m. to an empty house. 1RP 62-63. She quickly noticed that the home had been burglarized. The television was missing from the living room. 1RP 63. The curtains on the living room window were displaced, as if someone had come into the house through the window. 1RP 97, 100, 103-04; Ex. 18. The sliding glass door in the rear of the house was open, and a wooden dowel placed in the door jamb to prevent the door from opening had been removed and was lying on the floor. 1RP 74, 89. Barbara called the police and her husband. 1RP 63.

Des Moines Police Department Officer Eddie Ochart responded to the call. 1RP 107. He observed muddy tire marks in the driveway along with two tire impressions in the grass. 1RP 109; Ex. 14. He walked around the side of the house, and discovered that the gate to the back yard

was unlatched. 1RP 111. Upon entering the gate, Officer Ochart noticed fresh shoeprints in the mud. 1RP 112-13; Ex. 15. He followed the shoeprints through the back yard, up the stairs to the back deck, and then to the living room window. 1RP 113-16, 127; Ex. 16.

The window to the living room was approximately one to two feet above the deck. 1RP 81, 117; Ex. 16. It consisted of a lower and upper pane; the window opened by sliding the lower pane up on the inside of the upper pane. 1RP 80; 2RP 18; Ex. 10, 20. For the five years leading up to September or October 2010, that window had housed an air-conditioning unit, which required the lower pane to remain open and thus unexposed to the outside. 1RP 79-81; 2RP 17-18. The Duncans could think of no reason that Ork would have touched that window at any time. 1RP 85; 2RP 25.

Officer Ochart examined the window. He saw that it was a vinyl window. In his experience, such windows can flex and, if pushed upon, their locking mechanism can be defeated. 1RP 118. He noticed that there were handprints at the top of the lower window pane, consistent with someone putting their hands on the window to push the pane in and up. 1RP 118-19; Ex. 2. At the top of the handprints, which were somewhat smudged, Ochart could see fingerprint ridge detail. 1RP 118-19. On the living room windowsill inside the home, he found a muddy shoeprint like

those he had seen outside. 1RP 122; Ex. 19. There were also muddy shoeprints inside the house. 1RP 66, 71, 123-24; Ex. 8. Based on all that, Ochart determined that that window was the point of entry for the burglary of the Duncans' home. 1RP 126. He arranged for fingerprint analysts to come and collect any fingerprint evidence. 1RP 125.

Cynthia Zeller, a latent print examiner, processed the living room entertainment center and the living room window for fingerprints. 1RP 27-29. She located fingerprints on the outside of the lower pane of the living room window, and lifted eight cards of prints. 1RP 29-32; Ex. 2. Upon analyzing the prints, she found that three of the eight cards, containing five prints, had fingerprints of value, meaning they contained sufficient detail to make a comparison. 1RP 30 34-35; Ex. 2-7. Zeller determined that two of the prints matched Ork's left thumb, one matched Ork's right index finger, one matched Ork's right middle finger, and the fifth was inconclusive. 1RP 33-43, 57-59; Ex. 2-7.

Ork testified at trial. 2RP 47. He denied burglarizing the Duncans' residence on January 27, 2011, and said that he had not even been to the neighborhood since he moved out in October 2010. 2RP 51, 56. Ork explained his fingerprints' appearance on the Duncans' window by claiming that, in October 2010, Nathan came to his house asking for help getting into the Duncans' home because he was locked out. 2RP 52.

Ork agreed. 2RP 52. He said that they went to the house and each tried to open two windows. 2RP 53, 59. One of the windows was the rear living room window. 2RP 53-54, 59. Nathan first tried to open it but could not. 2RP 60. Ork then opened it; it was unlocked. 2RP 53-55; 59-60. When Nathan testified, he denied that that incident had ever occurred. 1RP 153.

**C. ARGUMENT**

Ork's sole claim on appeal is that the State's evidence was insufficient to support a conviction for Residential Burglary. Specifically, he argues that the evidence was insufficient to show that his fingerprints could have been left only at the time of the burglary. But the State's evidence showed that the fingerprints were left on a window that was the point of entry for the burglary, and that the positioning was consistent with someone attempting to force open the window. The window itself was at the rear of the house and inaccessible to the public, and although Ork had been to the house before, he had had no reason to touch that window, and had not been at the house for many years. Moreover, the State's fingerprint expert testified that fingerprints are fragile, especially on glass or when exposed to the weather, as these prints were. Ork's claim should be rejected.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted).

To convict Ork of Residential Burglary, the State had to prove beyond a reasonable doubt that he unlawfully entered the dwelling of Barbara Duncan with the intent to commit a crime against persons or property therein. RCW 9A.52.025; CP 1. Ork challenges the State's proof with respect to identity only; he does not dispute that the Duncans were the victims of a Residential Burglary on January 27, 2011, or that he was not permitted to enter their home.

**1. THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO PROVE THAT ORK COMMITTED THE RESIDENTIAL BURGLARY.**

At trial, the State presented evidence that Ork's fingerprints were found on the outside of the living room window. Officer Ochart determined that the window was the point of entry based on the muddy shoeprints leading up to the window; the presence of handprints on the lower window pane, consistent with someone pushing the pane in and up

in a way that Ochart knew could defeat the locking mechanism; and the muddy shoeprint on the windowsill. The fingerprints at the tip of those same handprints were Ork's.

Nonetheless, Ork claims that the fingerprint evidence in this case was insufficient to prove that he was the burglar. Specifically, relying on State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990), and State v. Bridge, 91 Wn. App. 98, 100, 955 P.2d 418 (1998), Ork argues that fingerprint evidence can sustain a conviction against a sufficiency of the evidence challenge only if the factfinder can determine that the prints must have been left at the time the crime was committed. The State proved exactly that.

Lucca and Bridge, and the cases they cite, distinguish between moveable and immovable objects on which fingerprints are found, and between objects that are accessible and inaccessible to the public. E.g., Bridge, 91 Wn. App. at 101. Fingerprints on fixed objects inaccessible to the public are more likely to support a conviction. Here, the State presented evidence that the fingerprints were on a fixed item inaccessible to the public. They were on a window at the rear of the house, which was enclosed by fences. Although Ork had been to the house as a child, he had not been there in years, and had had no reason to touch the outside of the living room window. The pane where the fingerprints were found had

itself not been exposed to the outside for approximately five years, until shortly before the crime. And, the fingerprints were found in a position consistent with someone attempting to force open the window.<sup>2</sup>

Although Ork claimed at trial that he had touched the window in October in order to help Nathan gain access to the house, the trial court rejected this testimony as not credible. CP 49; 2RP 78. Nathan explicitly denied that that had ever occurred. 1RP 153. Moreover, Ork could not explain why he was able to open the window, but Nathan could not. 2RP 59-60. And, no other fingerprints were recovered from the window. 1RP 30-43. It defies the evidence and basic logic that Ork's fingerprints would remain on a window for three months when that window was exposed to the weather<sup>3</sup>; that Ork would leave handprints trying to open the window but Nathan would not; or that those handprints would be plainly visible to Officer Ochart in the dark, but never noticed before.

The above evidence, taken in the light most favorable to the State, is adequate to prove beyond a reasonable doubt that Ork was the person

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<sup>2</sup> This case is in fact quite similar to Lucca; in that case, the court determined that evidence was sufficient to support a conviction where the defendant's fingerprints were on broken glass from a garage window (the point of entry), and the garage was in a fenced area inaccessible to the public. 56 Wn. App. at 598-99, 603.

<sup>3</sup> Zeller testified that, although fingerprints cannot be dated, they can be destroyed or degraded by rain, wind, or sun, and that prints left on glass are particularly fragile. 1RP 30-31.

who unlawfully entered the Duncans' home on January 27, 2011. His conviction for Residential Burglary should be affirmed.

**2. ORK'S DISCUSSION OF THE PURPORTEDLY UNSCIENTIFIC NATURE OF FINGERPRINT EVIDENCE IS IRRELEVANT AND SHOULD BE DISREGARDED.**

Ork devotes four pages of his ten-and-a-half page brief to denigrating the validity of fingerprint evidence. But Ork did not contest the validity of the fingerprint evidence at trial. He does not assign error on appeal to the court's factual finding that "[f]our of the latent fingerprints recovered from the window sill matched the fingerprints of the respondent." CP 12. And a challenge to the sufficiency of the evidence admits the truth of the State's evidence. His screed against the scientific basis of fingerprint evidence should be disregarded.

First, Ork attempts to make his discussion about the validity of fingerprint evidence relevant by claiming that "[r]ecent research underscores the soundness of these cases' [i.e., Lucca and Bridge] reluctance to rely on fingerprint evidence." Brief of Appellant at 4. But the State is not challenging the soundness of Lucca and Bridge. To the contrary, the State concedes that fingerprint evidence alone is insufficient to support a burglary conviction unless there is reason to believe that the prints could only have been left at the time of the burglary. Moreover,

Lucca and Bridge are not “reluctan[t] to rely on fingerprint evidence.”

They merely recognize that, because the presence of fingerprints alone does not establish when the fingerprints were left, additional evidence showing that the prints were left at the time of the crime is needed to prove the identity of the burglar.

Second, Ork did not contest the admissibility of Zeller’s testimony. He did not seek a Frye<sup>4</sup> hearing to contest the soundness of the scientific basis for fingerprint identification. He did not move to exclude the evidence as unreliable. He did not argue that the methodology underlying fingerprint evidence is not generally accepted within the scientific community. He did not proffer his own expert to undermine Zeller’s conclusions. As such, he cannot challenge the evidence or its accuracy now.

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<sup>4</sup> Frye v. United States, 293 F. 1013 (D.C. Cir.1923), provides the standard for admissibility of scientific evidence in Washington. E.g., State v. Russell, 125 Wn.2d 24, 40-41, 882 P.2d 747 (1994). Under this test, scientific evidence is admissible if it is generally accepted in the relevant scientific community. State v. Hayden, 90 Wn. App. 100, 103-04, 950 P.2d 1024 (1998) (citing State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996)). However, if the evidence does not involve new methods of proof or new scientific principles, then a Frye inquiry is not necessary. State v. Ortiz, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992).

Ork, of course, never mentions Frye. Rather, he frames his argument in terms of the reliability of the evidence. This gets him nowhere, because reliability is simply a factor in the Frye test. Moreover, if he is trying to distance himself from a Frye claim because he did not raise it below, then that is even more reason why this issue is not properly before this Court. It is merely an evidentiary challenge that cannot be raised for the first time on appeal. See State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

“When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal.” In re Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006). “Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.” ER 103(a)(1). Further, a defendant may not attempt to transform an issue that should have been raised as an evidentiary challenge below into a question of constitutional significance on appeal. In re Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008) (rejecting attempts to sidestep the fact that the defendant did not seek a Frye hearing in the trial court), aff’d, 170 Wn.2d 302 (2010). Moreover, particularly where evidence is based upon a routinely used and “familiar forensic technique,”<sup>5</sup> an objection to that evidence must be sufficiently specific to inform the trial court that a Frye challenge is

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<sup>5</sup> Fingerprint evidence is plainly a familiar forensic technique. It has been accepted in Washington since the 1930s. State v. Johnson, 194 Wash. 438, 442, 78 P.2d 561 (1938). And, it has been admissible as reliable evidence in criminal cases in the United States since at least 1911. See United States v. Crisp, 324 F.3d 261, 266 (4<sup>th</sup> Cir. 2003). Ork does not cite to a single case in which fingerprint identification evidence has been found inadmissible. In fact, every federal case to examine the admissibility of expert fingerprint identification evidence after Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the federal standard for admissibility of expert evidence, has found such evidence admissible. See Crisp, 324 F.3d at 266 (citing cases).

intended. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006); see also State v. Newbern, 95 Wn. App. 277, 288-89, 975 P.2d 1041 (1999) (declining to review Frye issue on appeal where the defendant did not invoke Frye or otherwise argue that the methodology employed was not accepted within the relevant scientific community). Ork does not even attempt to argue how this issue can be raised for the first time on appeal; it cannot.

Third, Ork does not assign error to any of the trial court's findings of fact regarding Zeller's identification of Ork as the source of the fingerprints on the Duncans' living room window, the burglar's point of entry.<sup>6</sup> As such, they are verities on appeal. E.g. State v. Piatnitsky, 170 Wn. App. 195, 221, 282 P.3d 1184 (2012). Indeed, Ork himself testified that he touched the window and tried to force it open, but claimed that this occurred on a different date. Given that fact, it is unclear what purpose a discussion of the reliability of fingerprint evidence could have in this case.

Fourth, and similarly, Ork's appeal raises only a challenge to the sufficiency of the evidence. As discussed above, such a challenge "admits

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<sup>6</sup> See CP 12, findings 26-37.

the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201 (citation omitted). His lengthy discussion of the reliability of the fingerprint evidence underlying his conviction is thus misplaced and entirely irrelevant.

In short, Ork spends nearly half of his brief complaining about the reliability of fingerprint evidence. In so doing, he implicitly asks this Court to ignore the evidence that he himself left the fingerprints on the window. An appeal claiming insufficient evidence to support the conviction is not the correct vehicle to explore the validity of fingerprint evidence. Rather, a case that raised a Frye or other challenge to the admissibility of such evidence, or that involved testimony of defense experts, could perhaps provide this Court with an adequate factual record to address the issues Ork raises. But in the absence of such a record, and in the setting of a challenge to the sufficiency of the evidence, this Court must decline Ork's invitation to rethink fingerprint evidence that has been routinely admitted in Washington for nearly a century. His lengthy soliloquy on the allegedly unscientific nature of fingerprint evidence should be ignored.

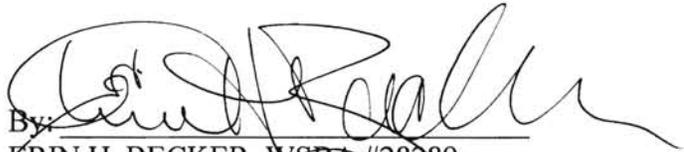
**D. CONCLUSION**

For all of the foregoing reasons, this Court should affirm Ork's conviction for Residential Burglary.

DATED this 20<sup>th</sup> day of November, 2012.

Respectfully submitted,

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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 Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CHRIS V. ORK, Cause No. 68566-0-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.

W Brame  
Name  
Done in Seattle, Washington

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