

69003-5

69003-5

NO. 69003-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL T PIGOTT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE J. WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Has the defendant shown that the trial court abused its discretion in denying his request to hold a Frye hearing¹ based on his claim that after over 100 years of use in the United States, fingerprint identification analysis is no longer generally accepted as reliable in the relevant scientific community?

2. Has the defendant shown that the trial court abused its discretion in admitting fingerprint identification evidence pursuant to Evidence Rule 702?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant was charged with, and found guilty, in juvenile court of two counts of residential burglary. CP 1, 19-20, 67-69, 283-85. He received a standard range disposition on each count. CP 9-14, 63-66.

2. SUBSTANTIVE FACTS OF TRIAL.

Jennifer Pritchard lives at 6003 South Foxbury in Seattle — just down 51st Street from the defendant's residence. 2RP² 7; CP 720-22. On October 20, 2011, Pritchard returned home after

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

² The verbatim report of proceedings is cited as follows: 1RP – 5/21/12 & 6/4/12, 2RP – 6/5/12, 3RP – 6/11/12, and 4RP – 6/12/12 & 6/28/12.

lunch to find that someone had pried open her dining room window, broken into her home, and stolen some of her possessions. 2RP 7-13. Officers discovered fingerprints on the glass of the opened window. 3RP 203, 205. After the glass was dusted with fingerprint powder, latent fingerprints were lifted from the glass with the use of fingerprint tape. 3RP 205. The fingerprint tape was then placed on a fingerprint card, and the card was logged into evidence so that the print could be sent to the Seattle Police Department Latent Print Unit for examination. 3RP 205-06.

Just four days later, on October 24, 2011, officers responded to a residential burglary at David Brunelle's home located at 9426 49th Avenue South in Seattle -- approximately ten blocks from Pritchard's house. 1RP 116; 3RP 36-27, 37. Jewelry, money, computer equipment and a camera had been taken from the home. 1RP 119. Entry appeared to have been made through a back window that had been broken out. 1RP 119. Shards of glass were found on the ground, including some large pieces that appeared to have been pulled from the window frame and placed on the ground as the burglar gained entry into the home. 3RP 33-34, 36; 4RP 38-39. "Good quality" latent fingerprints were obtained from both sides of a piece of the glass where someone had taken a hold of

the piece of glass to pull it from the window frame and place it on the ground. 3RP 36-37, 46-48. The prints, lifted using fingerprint tape and powder as describe above, were placed into evidence and sent to the Seattle Police Department Latent Print Unit for examination. 3RP 48-50; 4RP 40.

Both cases were initially listed as inactive because there were no suspects to the two burglaries. 3RP 115; 4RP 44. However, as discussed below, when the latent fingerprints were run through AFIS³ – separately – and were examined separately and by different examiners, the latent prints from both cases were matched to the defendant's known prints on file. 4RP 44.

Officer Michael Fields of the King County Sheriff's Office is tasked with taking ten-print cards of persons booked into the King County Jail. 2RP 15-16. Fields takes the prints by using a special scanning machine – a method that produces higher quality prints than the old ink-pad method. 2RP 17-18. Once a person's prints are taken, the prints are sent to the department's Ten-Print Unit where they are entered into AFIS. 2RP 17-18. On a prior occasion, Officer Fields had taken a ten-print card of the defendant and submitted the card to the Ten-Print Unit. 2RP 18-19, 23, 28.

³ Automated Fingerprint Identification System.

The ten-print card of the defendant was considered of "good quality." 2RP 40.

Elizabeth Brown takes prints for the King County Sheriff's Office AFIS Unit. 2RP 41-42. Brown also had previously taken a ten-print card of the defendant and submitted the prints to the Ten-Print Unit. 2RP 46-47; Exhibit 2. The prints were considered of "good quality," in that they were dark enough to read clearly, showed all the ridge patterns and shapes and had good "square roll" which shows more of the surface area of the fingerprint. 2RP 51.

The latent prints obtained in the Pritchard burglary were assigned to Latent Print Examiner Kelly Anderson for analysis. 3RP 61, 91, 115. Anderson has over 16 years of experience as a crime scene investigator and latent print examiner. 3RP 62. She has analyzed over 10,000 fingerprints during her career. 3RP 81.

Having no known suspect or suspects, Anderson scanned the latent prints into AFIS. 3RP 102-05, 115. AFIS does not actually make an identification, rather, the system generates a list of potential matches based similarities with the imputed latent print data. 1RP 84; 3RP 105-06. In this case, AFIS came back with a list of 50 candidates. 3RP 106.

After viewing each of the 50 candidates on the AFIS computer screen, Anderson pulled the ten-print card of two candidates (the two ten-print cards of the defendant) to conduct a further examination with the actual latent print. 3RP 107, 110-11, 114, 143. Anderson then did a side-by-side print comparison and analyzed the prints using the ACE-V method (described more in detail *infra*). Anderson concluded that the latent print was consistent with the left thumb print from the ten-print card of the defendant. 3RP 117, 123, 131. In testifying, Anderson gave a full description of the characteristics and print details she used in making the comparison. 3RP 125-28. Anderson's work was verified by Latent Print Examiner Connie Toto. 3RP 117, 134.

The latent prints obtained in the Brunelle burglary were assigned to Latent Print Examiner Betty Newlin and Latent Print Examiner Amanda Post. 3RP 176, 190-91, 193-94.⁴ With no known suspect or suspects, the latent prints of comparison value were entered into AFIS. 3RP 225-27. Upon receiving a candidate list, a ten-print card of one of the candidates was pulled (the

⁴ Both Newlin and Post are experienced latent print examiners. Newlin, with 23 years of experience in the field, was training Post, who, having worked at another agency before starting her job with the Latent Print Unit, was unfamiliar with the office's electronic reporting system. 3RP 177, 193-94. As Newlin testified, essentially, they each did a full analysis of the prints. 3RP 221-22.

defendant) and it was compared to the actual latent prints using the ACE-V side-by-side comparison method. 3RP 227-29. Newlin and Post concluded that one of the latent prints was consistent with the right index finger of the defendant. 3RP 230. A second latent print was consistent with the left thumb of the defendant. 3RP 231. The latent prints were described as of good quality and easy prints to analyze. 3RP 234.

The defendant declined to testify at trial. 4RP 54. The Honorable Judge Wesley Saint Clair found the defendant “guilty beyond any doubt.” 4RP 112. The court imposed a sentence of 30 days on each count of residential burglary. 4RP 115, 127.

3. THE DEFENDANT’S PRETRIAL MOTION.

Prior to trial, the defendant asked that the trial court hold a Frye hearing regarding the admissibility of the fingerprint evidence. Specifically, the defendant claimed that there is substantial disagreement within the relevant scientific community regarding fingerprints. 1RP 51-52.

4. THE ACE-V METHOD OF FINGERPRINT IDENTIFICATION EXAMINATION.

The method employed by the four fingerprint examiners herein is a process known as “ACE-V,” an acronym that stands for

“Analysis, Comparison, Evaluation, and Verification.” In the analysis stage, the examiner views the latent print and makes a determination as to whether there is sufficient quantity and quality of information present in the print in order to conduct a comparison. In the comparison stage, the examiner compares the latent print to a known print, looking at whether the two prints have the same type of characteristics, in the same location, and have the same direction and unit relationship. The examiner uses three levels of detail, known as Level 1 (general ridge flow and pattern), Level 2 (individual ridge characteristics, position, direction, and relationship to other characteristics), and Level 3 (ridge attributes such as ridge edges and pores) during the comparison. In the evaluation stage, the examiner utilizes the information gathered in the analysis and comparison stages to come to a decision about whether it appears that the latent print and known print were made by the same individual. This includes making a conclusion of individualization, exclusion or inconclusive results. In the verification stage, a second examiner conducts an analysis, comparison, and evaluation of the prints.

5. THE DEFENDANT'S REQUEST FOR A FRYE HEARING.

Prior to trial and relying on written materials only, the defendant made a motion wherein he claimed that fingerprint identification evidence was no longer generally accepted in the relevant scientific community and therefore the trial court was required to hold a Frye hearing. 1RP 3-11. The trial court reviewed the written materials and found that the defendant had not met its burden of showing that there is new evidence that seriously questions the continued general acceptance of the theory behind fingerprint identification analysis within the relevant scientific community that a court must conduct a Frye hearing. 1RP 45-53; CP 3-6. The court also rejected the defendant's motion under ER 702. 1RP 52-53.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE DEFENDANT'S REQUEST TO HOLD A FRYE HEARING REGARDING FINGERPRINT IDENTIFICATION EVIDENCE.

In 2009, the National Research Council of the National Academy of Sciences issued a report entitled "Strengthening Forensic Science in the United States: A Path Forward," hereinafter

the “NAS report.”⁵ In the NAS report, multiple fields of forensic science were studied with an eye towards systemic and scientific advancement within the various forensic science disciplines. Subsequently, across the nation, and multiple times in King County,⁶ the defense bar has unsuccessfully used language from the NAS report to argue for the wholesale exclusion of fingerprint evidence from courts of law. In the case at bar, relying exclusively on the NAS report and a hired defense expert, the defendant claimed that the trial court was required to hold a Frye hearing because, he asserted, fingerprint evidence is no longer considered reliable within the relevant scientific community. Finding that the defendant had not proven that this assert was true, the trial court correctly denied the defendant’s request to hold a Frye hearing.

In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the “general acceptance” standard set forth in Frye v. United States, supra. State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996).

⁵ The report can be viewed at: <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

⁶ The parties below cited at least four King County cases in which the trial court had refused to hold a Frye hearing. See CP 291-719, State’s Response to Defense Motion, appendices I, J, K and L, cases State v. Moshofksy, 07-1-02628-9; State v. Le, 09-1-06802-6; State v. Hunter, 11-1-06219-4, and State v. Keodara, 11-8-02353-4.

The Frye standard provides that evidence deriving from a scientific theory or principle is admissible if that theory or principle has achieved general acceptance in the relevant scientific community. State v. Baity, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000) (citing State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)). “Unanimity” as to general acceptance “is not required.” State v. Gore 143 Wn.2d 288, 302-03, 21 P.3d 262 (2001). It is only where a party can prove that “there is a **significant dispute** among qualified scientists in the relevant scientific community” that the evidence will not be admitted under Frye. Gore, 143 Wn.2d at 302 (emphasis added).

It has never been held that a trial court must undergo the substantial burden of holding a Frye hearing every time scientific evidence is sought to be admitted at trial, every time a defendant raises an objection to such evidence, or even if a particular person or persons in the scientific community may have a differing opinion. To the contrary, “[o]nce a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” State v. Gregory,

158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). And when an appellate court has previously determined that the Frye standard has been met as to a specific scientific theory, a trial court may rely upon the prior ruling to govern admissibility of the same theory in subsequent cases. State v. Cauthron, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993); Baity, 140 Wn.2d at 10 (citing State v. Ortiz, 190 Wn.2d 294, 831 P.2d 1060 (1992)). It is only when a party produces “new evidence” which “seriously questions” the continued general acceptance or lack of acceptance as to the theory within the relevant scientific community that a court must conduct a Frye hearing anew. Id. In making this determination, a court may consider, among other things, decisions from this and other jurisdictions. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

Here, the trial court did not abuse its discretion in finding that the defendant had provided insufficient “new evidence” calling into question the century plus long use of fingerprint evidence in courts of law. While the defendant may argue that reasonable persons could disagree, that is not the standard. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). An abuse of discretion is shown only when this Court is satisfied that “no reasonable judge

would have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

American courts have allowed for the admission of fingerprint identification evidence in trials for more than a century. In 1911, one court, after reviewing the then available scientific literature stated that:

[T]here is a scientific basis for the system of fingerprint identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it.

People v. Jennings, 252 Ill. 534, 549, 96 N. E. 1077 (1911).

Washington too has a long history of admitting fingerprint identification evidence. In upholding the conviction of a defendant as a habitual offender, a conviction that was based on fingerprint identification evidence, the Supreme Court, in finding the evidence was properly admitted, noted that “Identification of individuals by means of comparison of fingerprints is generally accepted in this and other states.” State v. Johnson, 194 Wash. 438, 442, 78 P.2d 561 (1938) (citations omitted). Most recently, this Court considered the propriety of admitting digitally enhanced latent fingerprints and

palm prints at trial, finding the evidence admissible under Frye.

State v. Hayden, 90 Wn. App. 100, 950 P.2d 1024 (1998).

The overwhelming and long history of acceptance of fingerprint identification evidence faced its first significant – and unsuccessful – modern challenge in 1999. In United States v. Mitchell,⁷ the defense attacked the admissibility of the fingerprint evidence under the Daubert⁸ admissibility standard. The court found the fingerprint evidence admissible at trial.

The Mitchell case spawned a rash of unsuccessful challenges to the long-standing precedents of admitting fingerprint identification evidence. One observer, Professor Jennifer Mnookin, noted that:

The years after Mitchell saw many challenges of a similar type to the admissibility of fingerprints. Since 1999, nearly 40 judges have considered whether fingerprint evidence meets the Daubert test, the Supreme Court's standard for the admissibility of expert evidence in federal court, or the equivalent state standard. [E]very single judge who has considered the issue has determined that fingerprinting passes the test.

⁷ 178 F.3d 904 (7th Cir.), cert. denied, 528 U.S. 946 (1999).

⁸ Referring to Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Daubert sets forth the federal test for admissibility of scientific evidence. The distinctions between the Frye standard and the Daubert standard are not particularly relevant to the issue raised herein. See e.g., Baity, 140 Wn.2d at 15 n.12. Most states have adopted the Frye standard, the Daubert standard, or a similar facsimile.

Mnookin, "Fingerprints: Not A Gold Standard," *Issues in Science and Technology*, Fall 2003.

The challenges raised across the nation are similar, if not identical, to the challenge the defendant raises here. There is not a single published case in which the defense has prevailed. In short, the defendant can cite to no published case that has ever held that fingerprint identification evidence—if done properly, is not generally accepted within the relevant scientific community. As a result, there is no jurisdiction in the United States that does not admit properly conducted fingerprint identification evidence—including Washington.

The following is a review of the recent state cases from across the nation that have all rejected similar defense challenges:⁹

Barber v. State, 952 So.2d 393, 418-19 (Ala.Crim.App. 2005) (rejecting the same claims as raised here — that there is no general acceptance in the relevant scientific community, that the underlying principles of fingerprint identification have not been adequately tested, that there are no proven error rates, and that there is no uniformity among examiners in regards to making positive identifications), cert. denied, 549 U.S. 1306 (2007).

People v. Farnam, 28 Cal.4th 107, 160 (Cal. 2002) (upholding California's use of an automated fingerprint identification system (CAL-ID) because the system does not make

⁹ While addressing the same issues as raised herein, this first group of cases does not specifically cite to the NAS report. In other words, the issues raised by the NAS report are not new issues, the report simply provided the defense with a platform to raise the same arguments anew.

identifications, the system only provides a list of candidates — like AFIS — that are then subject to “long-established technique-fingerprint comparison performed by fingerprint experts”), cert. denied, 537 U.S. 1124 (2003).

State v. Cooke, 914 A.2d 1078, 1095 (Del.Super. 2007) (“Fingerprint comparison testimony...has been tested and proven to be a reliable science over decades for judicial purposes with established principles and scientific methods approved in the field”).

State v. Escobido-Ortiz, 109 Hawai'i 359, 370, 126 P.3d 402 (Hawai'i App. 2005) (“We take judicial notice, based on the overwhelming case law from other jurisdictions, that the theory underlying latent fingerprint identification is valid and that the procedures used in identifying latent fingerprints, if performed properly, have been widely accepted as reliable...the proper means of attacking an expert's positive fingerprint identification is through rigorous cross-examination or presentation of an opposing expert to challenge the positive identification, not the wholesale exclusion of a reliable methodology”).

Burnett v. State, 815 N.E.2d 201, 208 (Ind.App. 2004) (the court holds that the ACE-V methodology of fingerprint identification is generally accepted within the relevant scientific community).

Markham v. State, 189 Md.App. 140, 163, 984 A.2d 262 (Md.App. 2009) (Appellate court upholds trial court's rejection of Markham's motion to hold a Frye hearing regarding the ACE-V method of fingerprint identification — raising similar claims as raised in the case at bar).

Commonwealth v. Patterson, 445 Mass. 626, 644, 840 N.E.2d 12 (Mass. 2005) (in rejecting Patterson's request for a Daubert hearing, the court held that the ACE-V method of fingerprint identification is generally accepted in the relevant community), overruled on other grounds by Commonwealth v. Britt, 465 Mass. 87, 987 N.E.2d 558 (Mass. 2013).

State v. Langill, 157 N.H. 77, 90, 945 A.2d 1 (N.H. 2008) (while acknowledging that the defense can point to “a small number of misidentifications cases,” the court stated that “it is undisputed

that ACE-V methodology has been reliably applied in countless cases” and the fact that blind verifications are not used does not affect admissibility of the reliable evidence. The court added that “[w]here errors do not rise to the level of negating the basis for the reliability of the principle itself, the adversary process is available to highlight the errors and permit the fact-finder to assess the weight and credibility of the expert’s conclusions”), internal citations omitted, conviction subsequently reversed on other grounds, State v. Langill, 161 N.H. 218, 13 A.3d 171 (N.H. 2010).

People v. Burnell, 89 A.D.3d 1118, 1122, 931 N.Y.S.2d 776 (N.Y.A.D. 3 Dept. 2011) (no need for a Frye hearing where examiner conducted standard side-by-side fingerprint examination), rev. denied, 18 N.Y.3d 922 (2012).

State v. Davis, 116 Ohio St.3d 404, 424-25, 880 N.E.2d 31 (Ohio) (a Daubert hearing is not required for admission of fingerprint identification evidence as the “reliability of fingerprint evidence is well established.”), cert. denied, 555 U.S. 861 (2008).

State v. Maestas, 2012 UT 46, 299 P.3d 892, 935 (Utah 2012) (in rejecting recent articles criticizing fingerprint identification evidence, the court held that “fingerprint identification evidence has been widely accepted” and that there are no reported decisions finding otherwise), cert. denied, 133 S.Ct. 1634 (2013).

Earnest v. Commonwealth of Virginia, 61 Va.App. 223, 226, 734 S.E.2d 680 (Va.App. 2012) (trial court properly excluded testimony of academic who intended to testify “that there was no statistical or clinical basis for the claim that a partial latent fingerprint can be matched to a known fingerprint using the methods” employed. “The accuracy of fingerprint identification is a matter of common knowledge and no case has been cited, and we have found none, where identification so established has been rejected.”) (internal citations omitted).

Dowdy v. Commonwealth of Virginia, 278 Va. 577, 601, 686 S.E.2d 710 (Va. 2009) (rejecting challenge to admissibility of fingerprint identification, including claim that no error rate can be attached to ACE-V fingerprint identifications).

After the NAS report came out in 2009, the defense bar continued – unsuccessfully -- its attack on fingerprint identification evidence. Although the report specifically stated that it was not questioning the admissibility of fingerprint identification evidence, the defense would rely on certain quotations from the report to claim that there was no general acceptance of fingerprint identification evidence. In reality, the report merely suggested that more scientific research should be conducted regarding the science of fingerprint identification, and the report contained certain criticisms regarding the lack of uniform training and standards in the various jurisdictions. Importantly, the issues raised in the report are similar, if not identical, to the issues raised in the above cited state cases, and the case at bar. The following is a review of the state cases from across the nation that have rejected the defense challenge based on the NAS report:

People v. Luna, 989 N.E.2d 655, 671, 371 Ill.Dec. 65 (Ill.App. 1 Dist. 2013) (in a detailed and comprehensive analysis, the court upheld the trial court's rejection of Luna's request to hold a Frye hearing based on the NAS report. The court noted that "wholesale objections to the ACE-V methodology have been uniformly rejected by state appellate courts (under Frye, Daubert, or some hybrid standard of admissibility) and by federal appellate courts (under Daubert)").

Commonwealth v. Gambora, 457 Mass. 715, 724, 727, 933 N.E.2d 50 (Mass. 2010) (Gambora argued that the NAS report

called into serious question the reliability of both the latent print identification theory and the ACE-V methodology specifically. The court rejected Gambora's claim, finding that the report did not question the underlying theory that "there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person's life." The court also "recognize[d]" that there were issues raised by the NAS report, but the court also noted that the report accepted the theory that "a careful comparison of two impressions can accurately discern whether or not they had a common source. NAS report at 142.").

Johnston v. State, 27 So.3d 11, 21-22 (Fla.) ("Nothing in the report renders the forensic techniques used in this case unreliable." In fact, the court noted, the NAS report committee specifically stated that the report was not able to or intended to address admissibility questions in criminal and civil cases), cert. denied, 131 S. Ct. 459 (2010).

State v. Dixon, 822 N.W.2d 664, 674 (Minn.App. 2012) (finding that there was not a single case wherein a court had relied on the NAS report to exclude fingerprint evidence, the court of appeals affirmed the trial court's finding that "experts in the relevant scientific field widely accept the ACE-V methodology and individualization and believe that the ACE-V methodology produces scientifically reliable results admissible at trial." The court also stated that "the fact that there is a subjective component to print analysis does not mean that the analysis is not reliable or accurate, but only means that testimony about the conclusions should be related to an examiner's experience and knowledge.").

Webster v. State, 252 P.3d 259, 277-78 (Okla.Crim.App. 2011) (based on the NAS Report, Webster asserted at trial that fingerprint identification evidence should not have been admitted. In declining to address the issue, the appellate court noted that "fingerprint evidence has long been recognized, in this State and around the world, as a remarkably powerful tool of identification," and that Webster had "fail[ed] to cite any jurisdiction" that had held that the evidence was "so scientifically unreliable as to be inadmissible").

The state courts were not alone in fighting these repeated attempts to have fingerprint identification evidence held inadmissible. The following is a review of the federal cases from across the nation that have rejected this same defense challenge:

United States v. Herrera, 704 F.3d 480, 487 (7th Cir. 2013) (in addressing the NAS Report, the court holds that if properly done, fingerprint identification evidence by the ACE-V method, a method that does contain a partly subjective component, "is admissible evidence, in general and in this case.").

United States v. Mitchell, 365 F.3d 215, 235-36 (3rd Cir. 2004) (the premise that human friction ridge arrangements are unique and permanent has been tested, methods of "estimating the error rate [of fingerprint identification] all suggest that it is very low," and a Daubert hearing is not required), cert. denied, 543 U.S. 974 (2004).

United States v. Stone, 848 F.Supp.2d 714, 717-18 (E.D.Mich. 2012) (the court is "unpersuaded that the NAS Report provides a sufficient basis to exclude [the fingerprint] ... testimony." The court notes that "[w]holesale objections to latent fingerprint identification evidence have been uniformly rejected by courts across the country").

United States v. John, 597 F.3d 263, 274-76 (5th Cir. 2010) (rejecting the claim that a Daubert hearing needed to be held, the court stated that "the reliability of the technique [fingerprint examination method] has been tested in the adversarial system for over a century and has been routinely subject to peer review... [and]...as a number of courts have noted, the error rate is low." The court rejected arguments based on a claim that (1) there exists no error rate and (2) blind verifications must be used).

United States v. Pena, 586 F.3d 105 (1st Cir. 2009) (while acknowledging that there may be shortcomings of the ACE-V method, the court holds that fingerprint identification testimony is

sufficiently reliable under Daubert and is admissible), cert. denied, 559 U.S. 1021 (2010).

United States v. Gutierrez-Castro, 805 F.Supp.2d 1218, 1234 (D.N.M. 2011) (ACE-V method of fingerprint examination is sufficiently reliable to be admissible).

United States v. Aman, 748 F.Supp.2d 531, 542 (E.D.Va. 2010) (“[I]t can hardly be questioned that the ACE–V method has achieved widespread acceptance in the fingerprint examination community.”), cert. denied, 133 S. Ct. 366 (2012).

United States v. Baines, 573 F.3d 979, 992 (10th Cir. 2009) (finding that while more scientific research may be useful in this area, utilization of this “bedrock forensic identifier” is not affected by the current challenges to the ACE-V method).

United States v. Llera Plaza, 188 F.Supp.2d 549, 575-76 (E.D.Pa. 2002) (the judge, after educating himself on the ACE-V method, rules fingerprint identification evidence admissible).

United States v. Crisp, 324 F.3d 261, 268-70 (4th Cir.) (fingerprint identification evidence satisfies Daubert), cert. denied, 540 U.S. 888 (2003); United States v. Janis, 387 F.3d 682, 690 (8th Cir.2004) (same); United States v. Havvard, 260 F.3d 597, 601-02 (7th Cir.2001) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir.1996) (same); United States v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (same); United States v. George, 363 F.3d 666, 673 (7th Cir. 2004) (same); United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (same).

The defendant cited but a single case to the trial court below, and to this court -- an *unpublished* outlier case State v. Bryan Rose, K06-545 (Balt. County Cir. Ct. Oct. 19, 2007). See Def. br. at 40; and 1RP 7. In Rose, a murder/carjacking case, a Baltimore County circuit court judge held that the prosecution had failed to establish a

sufficient foundation for the testimony of the forensic fingerprint examiner. As the defendant touts, his “expert” here, “Dr. Ralph Haber was the lead defense expert” in the Rose case. Def. br at 40.¹⁰ Along with the impropriety of citing to an unpublished case, the defendant fails to mention a couple of pertinent facts in regards to the Rose case.

After the Baltimore County circuit court judge’s ruling in the state trial court, the United States Attorney’s Office brought charges against Rose in federal court for the same murder and carjacking. See United States v. Rose, 672 F.Supp.2d 723 (D.Md. 2009). Relying on the NAS report and the expertise of Dr. Haber, Rose again sought to have excluded from trial fingerprint identification examination results obtained using the ACE-V method. The federal court rejected Rose’s request to even hold a Daubert hearing.

In ruling the prints admissible, the court reviewed a substantial amount of information, including materials that do not appear to have been before the circuit court judge. See Rose, 672 F.Supp.2d at 725. The court also specifically addressed criticisms

¹⁰ Dr. Haber also touted the case in his testimony here, and the fact that he was “the lead defense expert” in the case. 1RP 145-46.

leveled by the husband and wife team of Drs. Lyn and Ralph

Haber:

[T]he Habers' criticism of fingerprint methodology from their perspective as **human factors consultants** does not outweigh the contrary conclusions from experts within the field as evidenced by caselaw and the *amicus* brief in this case. Significantly, on the critical issue of erroneous positive identifications (as opposed to erroneous exclusions or "inconclusive" findings, which do not prejudice the defendant), the Habers surveyed the literature and pointed to erroneous identifications ranging from zero to 0.4% to 1% to a high of only 3% as to one set of "more difficult" latents. (See Def.'s Mem. Ex. 3 at 12-13.) While it may not be possible to calculate an overall "error rate," as the Habers explain, there is nothing to contradict the conclusion reached by many courts and other experts that the incidence of error in the sense of erroneous misidentification, as occurred in the Mayfield case, is extremely rare.

Rose, 672 F.Supp.2d at 726 (emphasis added). The court concluded that "fingerprint identification evidence based on the ACE-V methodology 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 generally and specifically in this case." Id. at 726. Thus, with more information at hand, the exact same print identification evidence held inadmissible by a circuit court judge,

was held admissible in federal court -- as was the method of analysis used.¹¹

In addition, subsequent to the circuit court judge's ruling in the Rose case, Maryland's appellate court, in a *published* decision, ruled that fingerprint identification evidence is reliable and admissible in courts in Maryland. Markham, 189 Md.App. at 163. In Markham, the defense was making similar challenges to the case at bar. The Court rejected the defense arguments and held that in the State of Maryland, a trial court need not even hold a Frye hearing on the admissibility of the ACE-V method of fingerprint identification. Markham, 189 Md.App. at 163.¹²

Despite the problems noted directly above, before this Court, the defendant still relies extensively on Dr. Haber to make his case—including drawing out quotations from him extracted from the NAS report, and from his testimony at trial in this case. However, the trial court's pretrial ruling that the defendant had not proven that it was required to hold a Frye hearing occurred *prior* to Dr. Haber

¹¹ While the defendant relies on the testimony, writings, and "expertise" of Dr. Haber, it should not go unnoticed that in testifying here, Dr. Haber failed to mention the fact that in a subsequent case, the exact same prints were found admissible and his criticisms rejected.

¹² Dr. Haber also failed to mention this point to the trial court. Additionally, there are at least three other published cases in which Dr. Haber propounded these same arguments, arguments that were soundly rejected. See Llera Plaza, *supra*; Luna, *supra*; Patterson, *supra*.

testifying. Dr. Haber testified as a trial witness, not a witness for the pretrial motion.¹³ The defendant contends that this Court can still consider his trial testimony for determining whether the trial court abused its discretion. For this proposition, the defendant cites to State v. Jones, 130 Wn.2d 302, 307, 922 P.2d 806 (1996). Def. br. at 29 n.6. The defendant is incorrect on this point.

Jones was a case where the trial court *held* a Frye hearing, specifically, the court held a pretrial Frye hearing to determine the admissibility of DNA identification testimony. Jones, 130 Wn.2d at 305-06. As the Court stated in Jones, a higher court may review materials from outside the record when the court is reviewing *de novo* the “ultimate issue” of whether a specific science meets the Frye standard. State v. Cauthron, 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993), overruled in part by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). However, whether fingerprint identification evidence meets the Frye standard is not what is at issue here. Rather, the question before this Court is whether, based on the evidence presented to the trial court, did the court err in finding that the defendant had not met his burden of showing that

¹³ Dr. Haber was properly allowed to testify at trial because his testimony went to the weight to be given the fingerprint identification evidence, not the admissibility of the evidence.

the court was required to hold a Frye hearing. If this Court could review materials that were not provided to the trial court, then a defendant could simply ask for a Frye hearing before the trial court, provide little to no evidence, but then on appeal, he could provide a plethora of other materials to the reviewing court and claim that the trial court abused its discretion and his conviction reversed. That is not what Jones stands for. Nonetheless, because the defendant relies so heavily on Dr. Haber's work, a brief view of some of his incredulous testimony is enlightening.

Haber and his partner run the private consulting firm, "Human Factors Consultants." 1RP 63. While he labeled himself here as a "forensic research scientist," he is "trained as a visual scientist and memory scientist," and his educational background is in psychology. 1RP 63, 66, 160. He has been a full-time paid private consultant for over 15 years -- having never been retained by the prosecution in any case -- he makes approximately half his substantial income from testifying and consulting for the defense. 1RP 63, 66, 147, 152. He was paid \$250 per hour in this case, expected to total \$6500, plus expenses that included flying him up here from California. 1RP 148. He admitted to having seven or eight other pending cases. 1RP 148.

Haber has never been employed by a fingerprint lab, has absolutely no academic education in fetal development, friction ridge development or fingerprint identification, and “not a lot” of training in comparison of fingerprints. 1RP 152, 166. At the same time, he disclaims other books written about fingerprint identification with a broad statement that none of the authors were trained as scientists (presumably implying that he is the only one and presumably that he knows the educational background of every other author), and that none of them dealt with the issues of science as he has. 1RP 68-69.

After his lengthy condemnation of fingerprint identification in general, Haber admitted that he knew of only 40 fingerprint misidentification cases that had occurred since 1910. 1RP 176. He also admitted that he did not know the reason for the misidentifications in all of the 40 cases, for example, whether it was the methodology used, human error or even intentional malfeasance. 1RP 180. Still, despite this exceedingly low number of known errors over the course of 100 years, Haber professed that there is no way of knowing if fingerprint identification methods are accurate because there is no way of knowing how many fingerprint cases there are or how many errors have occurred. 1RP 131-32,

140, 176. Thus, Haber claims, nobody can claim that error rates are low or that errors rarely occur. 1RP 141.

When asked if he was aware of Dr. Babler's research on fetal development of fingerprints, Haber said that he was. 1RP 153; 3RP 10. Asked, "so you would agree then that the fingerprints are unique to each individual?" Haber answered, "No." He claimed this is only "assumed." "There is substantial evidence," he said, "that fingerprints are not unique." 1RP 153-54. Asked then, "Is your testimony right now that fingerprint ridges are non-unique to each individual?" Haber responded, "That is my testimony." 1RP 55.¹⁴

Haber also sharply criticized the ACE-V fingerprint identification methodology because the process includes a certain level of subjectivity, however, he admitted that the only forensic science that does not contain a certain level of subjectivity is DNA analysis. 1RP 157. "For a science to work and claim to be a science, it has to take measurements, if the measurements are reliable and then apply standards to those measurements." 1RP 164. He added, "[a]nd my testimony is that fingerprint examiners don't measure anything." 1RP 64. He claimed this is

¹⁴ The NAS report indicates that there is scientific evidence that fingerprints are unique and do not change over a person's lifetime. NAS report at 143-44.

true of firearm analysis, handwriting analysis, hair analysis, but he stopped short when talking about the admissibility of psychiatric evaluations in regards to determining a person's competency and raising mental defenses. 1RP 64-65. These, Haber claimed, are not scientific endeavors. 1RP 65. Rather, experts in these fields merely testify based on their "experience like a doctor." 1RP 65. A doctor, he claims, testifies to "experimental information," after all, a doctor "knows whether he's right or not." 1RP 166-67. "But with the fingerprint profession claiming it's using science, then I object because it isn't using scientific procedures, it isn't taking measurements." 1RP 166.

In short, Haber summed up his position by asserting that the fingerprint profession is claiming:

We have a scientific method that produces accurate results. If they're going to opt for a science, then they've got to use a scientific method and they've got to meet scientific criteria, and they don't. They don't have error rates, they don't have a written procedure that's the same every time, a written method. And that's what's lacking... ***That's why I object to all of these forensic sciences*** -- forensic disciplines. They're not sciences where they're not applying principles of science.

Q: So all of those forensics –

A: ***Yeah, every one.***

1RP 168 (emphasis added).

When asked again about the ACE-V fingerprint examination method, “your testimony is that there cannot be a scientific method unless there is a statistical probability attached to it?” Haber responded, “Yes ...[because] when an examiner makes an opinion that this is a match, they're dealing with a statistical probability that they're right or they're wrong. And that's not available in the fingerprint science. It is available in the DNA.” 1RP 188.

As to specifics regarding this case, the procedures used, and the accuracy of the results, Haber provided the following:

Haber did not do a comparison of the prints in this case, nor did he read or review all of the evidence available. 1RP 146, 149. “I looked at the fingerprint report,” Haber testified, “but I didn't attempt to replicate it, I didn't attempt to second guess the examiner because I wasn't interested in that. My testimony is about the underlying science that the examiners use, and not about whether the examiner was right or wrong.” 1RP 86. He did admit that the latent prints obtained in the case were of comparison value, and also that the ten-print cards used for comparison were

“reasonably good quality prints.” 1RP 151, 184-85. He also admitted that in fingerprint cases, the fingerprint is preserved and can be independently evaluated if anyone so desired. 1RP 189.

Although criticizing AFIS type systems in general, Haber admitted that in this case the AFIS system provided a list of candidates and that he could have looked at the candidates but he chose not to, “I wasn’t interested” he said. 1RP 182. Haber claimed to have “no idea” what method of examination the four examiners used in this case. 1RP 73. He said that he did not speak to any of the four examiners and that he was not shown the defense interview notes of the examiners. 1RP 187.

In criticizing the profession’s general lack of proficiency examinations and lack of written standard operating procedures (SOP’s), Haber admitted that the latent print lab did have a written standard operating procedure and it did have proficiency testing, but he asserted it was flawed because the proficiency testing was done internally, not externally. 1RP 93, 97, 109, 147. Haber said that bias is always a factor in fingerprint testing, that labs should be separate from police departments and that examiners should not know that there is a suspect in a case or if the person had confessed. 1RP 105, 108. However, in this case, there was no

suspect in the case prior to the fingerprint identification, and Haber admitted he had no idea whether the lab was directly connected to the police department. 1RP 150. As for the verification process, he testified that he “believes” the verifying examiners knew the results of the initial finding. 1RP 110. Haber then stated that in his opinion there is no point in even doing a verification if it is not a blind verification, something he admitted no lab in the entire United States does. 1RP 111, 190.

Of equal import is what is missing from Haber’s testimony and the defendant’s analysis. While Haber expressed his personal opinions, he never testified that the ACE-V method of fingerprint examination is not generally accepted in the relevant scientific community. Further, the NAS report, while making certain criticisms and recommendations of the field overall, it too never purported to stand for the proposition that the ACE-V method of fingerprint examination is not generally accepted in the relevant scientific community.

As stated above, the “Frye test is not implicated if the theory and the methodology relied upon and used by the expert to reach an opinion ... is generally accepted by the relevant scientific community.” Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d

593, 597, 260 P.3d 857 (2011). It is only where a party can prove that "there is a **significant dispute** among qualified scientists in the relevant scientific community" that the evidence will not be admitted under Frye. Gore, 302 (emphasis added). Lack of certainty in scientific tests (that are generally accepted by the scientific community) goes to the weight to be given the testimony, not to its admissibility. State v. Lord, 117 Wn.2d 829, 854-55, 822 P.2d 177 (1991). The same is true in regards to the possibility of a mistake or human error in a particular case. Cauthron, 120 Wn.2d at 890.

The NAS report recognized that "a careful comparison of two impressions can accurately discern whether or not they have a common source." NAS report at 142. This is the bedrock principle at issue here. This Court is not reviewing a Frye hearing. Rather, this Court must determine whether the defendant has proven that within the relevant scientific community, there is a significant disagreement that fingerprint identification evidence can be done in a manner that shows the results are reliable. Here, the defendant has done nothing more than reiterate the same attack that has been raised across the nation – and rejected every single time. Thus, he has failed to prove that the trial court abused its discretion in rejecting his claim that it was required to hold a Frye hearing.

2. THE TRIAL COURT DID NOT ERR IN ADMITTING FINGERPRINT IDENTIFICATION EVIDENCE.

“Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” Gregory, 158 Wn.2d at 829-30. Thus, the evidence “is merely subject to meeting the two-part inquiry under ER 702 -- whether the witness qualifies as an expert, and whether the testimony would be helpful to the trier of fact.” Baity, 140 Wn.2d at 10, (citing Cauthron, 120 Wn.2d at 889-90).¹⁵

The trial court necessarily has broad discretion in determining whether expert testimony should be admitted under ER 702. State v. Rafay, 168 Wn. App. 734, 783-84, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023 (2013). A reviewing court will overturn a trial court’s decision to admit ER 702 evidence only if the defendant can prove that “no reasonable judge would have reached the same conclusion.” Hopson, 113 Wn.2d at 284.

¹⁵ ER 702 provides that “[i]f 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.”

A lack of certainty in scientific tests goes to the weight to be given the testimony, not to its admissibility. Lord, 117 Wn.2d at 854-55. Similarly, the credibility of experts offering conflicting testimony is for the trier of fact. State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993). The possibility of a mistake or human error in a particular case is also a matter left to the trial court as a matter of admissibility, not an issue under Frye. Cauthron, 120 Wn.2d at 890.

Here, the defendant does not attack the qualifications of the state fingerprint experts. He also does not assert that they made an error in their analysis. In fact, the defendant's expert specifically declined to make his own comparison of the latent print and ten-print card of the defendant, and he did not indicate that the state experts' analysis was flawed in any manner other than his general complaints that the entire field of fingerprint identification is flawed and no fingerprint evidence should be admitted in any court of law.

While the defendant asserts on appeal that the testimony was "misleading," to the trier of fact, that is an objection under

ER 403, not ER 702.¹⁶ He also asserts that the witnesses testified to absolute certainty in their conclusions, but this claim is not correct (nor is it a basis for inadmissibility). The witnesses here specifically testified that they do not testify as to absolute certainty. 3RP 148-49; 4RP 25. The witnesses testified that there is a component of subjectivity in fingerprint analysis, and that an “identification” is a conclusion that is based “on the deductions of the examiner, [it is] not fact.” 4RP 14, 25. The witnesses testified that the chance of error was low, not nonexistent, and that their determinations were based on their training and experience. 3RP 123, 130-33. As the trial court properly noted, the defendant’s objections went to the weight of the evidence, not the admissibility of the evidence. 3RP 130. The defendant has failed to prove that no reasonable person would have ruled as the trial court did here.

D. CONCLUSION

For the reasons cited above, this Court should reject the defendant’s claim that this case should be returned to the trial court to conduct a Frye hearing. This Court should also reject the

¹⁶ ER 403 provides that “relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” The defendant never raised an ER 403 objection, thus, a claim that the evidence was somehow misleading or prejudicial has not been preserved. State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

defendant's claim that the fingerprint evidence should not have been admitted, and therefore this Court should affirm the defendant's convictions.

DATED this 16 day of September, 2013.

Respectfully submitted,

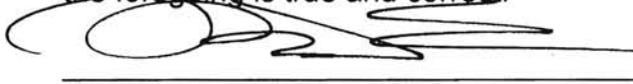
DANIEL T. SATTERBERG
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By: 
DENNIS J. McCURDY, WSBA #21975
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David 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. PIGOTT, Cause No. 69003-5-1, 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.~~



Name
Done in Seattle, Washington

09-16-13
Date