70429-0 70429-0

No. 70429-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

Absent corroborating evidence of guilt, this Court should hold that fingerprint evidence alone is insufficient to support a criminal conviction for residential burglary.

Absent corroborating evidence of guilt, dog-tracking evidence, a confession, or mere possession of stolen property is not sufficient to sustain a conviction for burglary. Due to its questionable reliability and to ensure accurate determinations of guilt, latent fingerprint evidence should be added to this list. Accordingly, because the only evidence linking J.H. to the crime of residential burglary was the opinion of an analyst that two latent prints found at the burglarized residence belonged to him, this court should reverse the conviction.

1. The State fails to defend the common law rule that convictions based only on fingerprint evidence is sufficient without corroborating evidence.

J.H. argues that this Court should depart from its ruling in State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990) and adopt a rule requiring corroborative evidence in latent fingerprint identification cases. Br. of App. at 15-22. Rather than engage this argument, the State asserts that the argument is "misplaced," "entirely irrelevant," and should be "ignored" or "disregarded." Br. of Resp't at 8, 12. The State does not discuss the National Academy of Sciences Report or any scholarly authority on latent fingerprint evidence. The failure of the State to actually defend the

practice of convicting people based on latent print evidence alone is telling. The State apparently believes that because something is assumed to be reliable and accurate, no defense is necessary. See Br. of Resp't at 9. Civilization would still be in the dark ages if humanity had maintained this mindset.

The closest the State comes to defending the current practice is on page 9 of its brief. There, the State asserts that "the reliability of fingerprint identification has been tested in our adversarial system for over a century and routinely subject to peer review."[1] Br of Resp't at 9. The State cites four cases in support of this assertion: People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); State v. Johnson, 194 Wash. 438, 78 P.2d 562 (1938); United States v. John, 597 F.3d 263 (5th Cir. 2010); and United States v. Plaza, 188 F. Supp. 2d 549 (E.D. Pa. 2002). An examination of these cases shows the State's assertion does not survive scrutiny.

As explained in the opening brief, the Jennings court failed to rigorously analyze the reliability of latent fingerprint identification. Br. of

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[1] By peer review, the State means that another fingerprint examiner "verifies" the work of the previous examiner. See United States v. John, 597 F.3d 263, 275 (5th Cir. 2010) (citing United States v. Havvard, 260 F.3d 597, 601 (7th Cir. 2001) ("it is clear from the district court's thorough order that it properly considered the Daubert factors . . . and concluded that . . . individual results are routinely subjected to peer review for verification . . . .") (emphasis added)). This is not akin to the type of independent scholarly peer review that occurs in true sciences.

App. at 6-8. As for Johnson, that case did not involve latent fingerprints. There, in order to prove that the defendant's out of state prior convictions were valid, a fingerprint examiner compared the defendant's prints to fingerprint records maintained by penitentiaries in Oregon and California. Johnson, 194 Wash. at 440. Comparing a full set of prints that were purposefully made under controlled conditions is a far cry from comparing one or two latent fingerprints, which are unlikely to be of high quality. Conflating the two distinct scenarios is what led in part to the unquestioning judicial acceptance of latent fingerprint evidence. See Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 20 (2001) ("the important differences between using fingerprints as a criminal identification method and using fingerprints for forensic identification suggest that the legitimacy of the former should not have been sufficient to imply the legitimacy of the latter.").

Regarding the two federal cases, these cases concern the admissibility of fingerprints under rule 702 of the Federal Rules of Evidence and Daubert.[2] John, 597 F.3d at 274; Plaza, 188 F. Supp. 2d at 550. But J.H. is not challenging the admissibility of latent fingerprint evidence. As the dog-tracking and confession cases establish, evidence

[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

may be admissible because it is probative of guilt but insufficient to sustain a conviction due to concerns about the reliability of the evidence. See State v. Loucks, 98 Wn.2d 563, 566-69, 656 P.2d 480 (1983); State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). Latent fingerprint evidence fits into this category of evidence.

For this reason, this Court should disregard the State's straw man argument[3] concerning Frye.[4] See Br. of Resp't at 10-12. J.H. is not contesting the admissibility of the latent print evidence for the first time on appeal. He is disputing whether this evidence is sufficient to hold him guilty of the crime of residential burglary. Sufficiency of the evidence may always be raised for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

2. The State misrepresents the record and J.H.'s assignments of error.

The State misrepresents the court's findings of fact and J.H.'s assignments of error. The State incorrectly asserts that J.H. has not assigned error to the trial court's finding that the prints left on the Pasternaks' window belonged to J.H. Br. of Resp't at 8, 12, & n.7. J.H. challenges finding of fact 30, which states that J.H. burglarized the

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[3] "A tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it." Black's Law Dictionary (9th ed. 2009).

[4] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Pasternak home and left his prints behind. CP 25 (FF 30). As for finding of fact 27,[5] this finding simply recognizes that Anderson, the fingerprint examiner, testified that he determined the prints left at the residence belonged to J.H. That a witness testifies to something does not make it true.[6] Thus, that Anderson testified that he concluded that the prints belonged to J.H. does not mean that the prints actually were J.H.'s.

The State's account of the record is also inaccurate. In its statement of the facts, the State recounts that, "Anderson conducted an AFIS computer search with one of the latent prints, and the system matched the print to [J.H]." Br. of Resp't at 4. What Anderson actually testified was that J.H. was a "candidate" listed in the computer search. 1RP 109. Thus, there were other "candidates." It should be recalled that Brandon Mayfield was erroneously made a suspect through a computerized search as well. A Review of the FBI's Handling of the

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[5] Finding of fact 27 states: "Anderson determined that the prints left on the Pasternaks' window belonged to the fingerprints in AFIS reportedly collected from the respondent." CP 25.

[6] To illustrate, if a witness at the trial of Galileo Galilei testified that the Earth is at the center of the universe and that the Sun revolves around it, the witness would be wrong. A court, however, would not err by finding that the witness had, in fact, testified that the Earth is at the center of universe and that the Sun revolves around it. Finding that a witness has testified to X is not the equivalent to a court actually finding X.

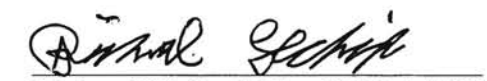
Brandon Mayfield Case, U.S. Department of Justice, Office of the Inspector General, 1 (March 2006).[7]

B. CONCLUSION

Times have changed since this court's decision nearly a quarter century ago in State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990). We now know that latent fingerprint evidence is not what it was assumed to be–infallible evidence of guilt. Rather, like dog-tracking evidence, confessions, and evidence of possession of stolen property, it is fallible. Because its reliability is dubious and to ensure accurate determinations of guilt, this Court should hold that absent corroborating evidence, latent fingerprint evidence by itself is insufficient to sustain a conviction for burglary. Accordingly, J.H.'s conviction should be reversed and dismissed with prejudice for lack of sufficient evidence.

DATED this 5th day of May, 2014.

Respectfully submitted,



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[7] Available at http://www.justice.gov/oig/special/s0601/PDF_list.htm.

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Respondent,	)	
	)	NO. 70429-0-I
v.	)	
	)	
J. H.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY 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 5TH DAY OF MAY, 2014.

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