

71261-6

71261-6

NO. 71261-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DEANTHONY FRANKS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BARBARA LINDE

---

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. 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.<sup>1</sup> Consistent with this Court’s recent decision in State v. Pigott,<sup>2</sup> the trial court properly declined to hold a Frye hearing before admitting fingerprint evidence.

2. The trial court correctly found that when a witness makes a statement of fact about himself or herself, this is not inadmissible hearsay evidence.

3. The trial court correctly declined to give a lesser included instruction of criminal trespass to the defendant’s burglary charge where the facts did not support the inference that only the lesser offense had been committed.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with two counts of Residential Burglary, with count I occurring on May 15, 2012, and count II occurring on May 7, 2012. CP 1-2. Both cases involved a door

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<sup>1</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>2</sup> 181 Wn. App. 247, 325 P.3d 247 (2014).

being kicked in and the defendant's fingerprints found at the scene.  
CP 4-5.

On February 25, 2013, the trial court severed the counts and ordered that count I proceed to trial first. 2/25/13 RP 3-5. A jury found the defendant guilty as charged. CP 154. The defendant then entered into a negotiated plea of guilty to a reduced charge of third degree theft on count II, with an agreed sentence recommendation on both counts, and with an agreement that the State would not file residential burglary charges stemming from yet another incident. CP 189-209, \_\_\_\_, sub # 79; 3/15/13 RP 77-90; 4/26/13 RP 93-94.

With three prior burglary related felony convictions, and an attempted first degree rape conviction, the defendant's offender score was a six, with a standard range of 33 to 43 months. CP \_\_\_\_, sub # 79; 4/26/13 RP 97. The court imposed a standard range sentence of 38 months on count I, concurrent with a 364 day sentence on count II. CP 210-20. Only count I is the subject of this appeal.

## **2. SUBSTANTIVE FACTS**

On May 15, 2012, at approximately 1:00 p.m., Spiros Sourelos was working in his yard when he heard a loud bang.

2/27/13 RP 14. He looked over and saw that the side door on his neighbor's garage had been busted in. 2/27/13 RP 15. Sourelos immediately called 911. 2/27/13 RP 15.

The house, owned by Starvos Tsitsis, is a two bedroom single-story residence with an attached garage. 2/26/13 RP 25-26. Tsitsis was at work at the time of the break-in and his house locked up. 2/26/13 RP 29-30.

Officers Hodge, Curet and Lysen responded. 2/26/13 RP 10-11, 14. As the officers arrived, Sourelos saw a Black male stick his head out the front door and then quickly retreat back inside. 2/27/13 RP 15.

Officers Hodge and Lysen then entered the home and announced their presence. 2/26/13 RP 15. Hearing a noise coming from the back master bedroom, Officer Hodge immediately proceeded to that room. 2/26/13 RP 15. Upon opening the bedroom door, Officer Hodge saw a Black male teenager with braids or dreadlocks, wearing black clothing – a sweatshirt and athletic pants with a white strip. 2/26/13 RP 16-17. Officer Hodge did not see the man's face. 2/26/13 RP 17. The man then jumped out the bedroom window and fled. 2/26/13 RP 17.

A fourth officer, while responding to the scene, came upon the defendant about 12 short blocks from the scene – a distance estimated to only be a few minutes from the burglary. 2/26/13 RP 101, 107-08. The defendant generally matched the description of the suspect with one difference – there was a question as to whether the suspect had a white strip on his pants. 2/26/13 RP 109. Not fully confident that he had the right person, the officer did not search or arrest the defendant. 2/26/13 RP 106, 109.

Officer Lysen, who dusted the window ledge, wine bottle and bag of jerky for prints, testified that most burglaries happen during the day when people are at work. 2/26/13 RP 43, 52, 61, 64-66. The burglars will pull out drawers and rummage through the house looking for things to steal. 2/26/13 RP 52, 55. They will take food, beer and wine if found. 2/26/13 RP 55.

The shoe print on the door and broken wood around the door frame was clear evidence of obvious forced entry into the side door of the garage. 2/26/13 RP 12, 87. When Tsitsis inspected his house, he noticed that some of his closet doors had been opened, as well as a desk drawer. 2/26/13 RP 31. A bag of beef jerky he had purchased and left on the kitchen counter was now laying open on his bed. 2/26/13 RP 32, 61. A bottle of wine that had been

sitting in his wine rack was now open and laying in the center of the living room. 2/26/13 RP 32. It appeared someone had drunk from the bottle. 2/26/13 RP 61. The one thing actually "taken" that Tsitsis could find was his spare car key that he had last seen on his desk after his nephew had been playing with it a week earlier. 2/26/13 RP 33, 37. A month or so later, Tsitsis received a phone call from the car dealership telling him that someone had found the key in a neighborhood yard and turned it in. 2/26/13 RP 47.

Latent print examiner, Kathleen Swihart, with over 30 years in the field, examined the 11 print card submitted from the burglary investigation using the ACE-V<sup>3</sup> scientific method of fingerprint analysis. 2/27/13 RP 25, 28, 42-43. Swihart determined that there were 7 prints of comparison value. 2/27/13 RP 44. She ran the prints through the AFIS database and received a list of 15 candidates. 2/27/13 RP 45. There are no names attached to the list of candidates. 2/27/13 RP 47. Swihart reviewed each of the candidates and then pulled the ten-print card of the candidate with the most commonality. 2/27/13 RP 46. That candidate was the defendant. 2/27/13 RP 54-56.

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<sup>3</sup> The acronym stands for the four steps in the process: analysis, comparison, evaluation and verification. 2/17/13 RP 28.

There was not just one match in this case. Rather, there were five separate matches. A latent print from the bag of beef jerky matched the defendant's right thumb. 2/27/13 RP 54-55. A second latent print from the bag of beef jerky matched the defendant's left palm. 2/27/13 RP 54-55. A third latent print from the bag of beef jerky matched the defendant's left little finger. 2/27/13 RP 54-55. A latent print from the window ledge in the bedroom matched the defendant's left palm. 2/27/13 RP 54-55. A second latent print from the window ledge in the bedroom matched the defendant's right palm. 2/27/13 RP 54-55. Latent print examiner, Scott Verbonus, with over 25 years of experience, testified that he reviewed all the prints and came to the same conclusions as Swihart, that the five latent prints recovered from the scene of the burglary matched the defendant. 2/27/13 RP 126-33.

The defendant did not testify. The defendant also did not put on any evidence. Additional facts are included in the sections below they pertain.

C. ARGUMENT

1. **FINGERPRINT EVIDENCE AND A FRYE HEARING  
-- THE DEFENDANT HAS FAILED TO SHOW THAT  
THIS COURT'S RULING IN STATE V. PIGOTT IS  
INCORRECT AND HARMFUL.**

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." 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 here in Washington, 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, 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.<sup>4</sup> Finding that the defendant had failed to provide

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<sup>4</sup> The defendant did not present any evidence or witness testimony, nor did he cite to a single case from anywhere wherein a court has bought into this same claim. Instead, the defendant relied solely on a brief he submitted to the court. See 2/25/13 RP 36; CP 365-413. He told the court that "the crux of the argument is this, your Honor. The latent fingerprint examination has been recently criticized by the scientific community, by a panel of experts under the National

sufficient evidence to show that fingerprint evidence was not generally accepted in the relevant community, the trial court denied the defendant's request to hold a Frye hearing.<sup>5</sup>

This is the exact same issue, based on the exact same "evidence," that was raised and rejected by this Court in State v. Pigott, 181 Wn. App. 247, 325 P.3d 247 (2014). The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because the defendant fails to show that this Court's decision in Pigott is

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Resource Council...there's a lack of validity and reliability...the court should deem that the methodology in this case is no longer generally accepted by the relevant scientific community." 2/25/13 RP 36. The defendant specifically stated that he was leveling any criticism at the methodology employed by the examiners in his case. 2/25/13 RP 48.

<sup>5</sup> In denying the defendant motion, the court stated that "I have a lot of experience with trials and cases that involve fingerprint evidence...I do not believe the court has been provided with evidence or sufficient evidence such that it would rise to the level of requiring or indicating the appropriateness of a Frye hearing." 2/25/13 RP 49-50. I do not feel that what the defense has presented in this case calls into question the acceptance, general acceptance, in the community of a process such as the one in this case." Id.

incorrect and harmful, this Court must adhere to the holding that a Frye hearing is not necessary for admission of fingerprint evidence.

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, 293 F. 1013 (D.C. Cir. 1923). State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996). 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 over 100 years of courts allowing for the use of fingerprint evidence in trials. 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)).<sup>6</sup>

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<sup>6</sup> While it ultimately would not change the result in this case, the State disagrees with the statement in Pigott that a trial court’s determination whether to hold a Frye hearing is reviewed *de novo*. Pigott, at 249 n.2 (citing Gregory, 158 Wn.2d at 830). Gregory involved a different procedural situation.

In Gregory, a case involving certain challenges to DNA testing, the Court made the following statement in deciding to review the trial court’s ruling *de novo*:

Appellate review of a Frye ruling (issued after a Frye hearing) is *de novo*. It is not clear what standard of review should be applied to a trial court’s decision not to conduct a Frye hearing at all. Yet the trial court here declined to conduct a Frye hearing ***because it found that the scientific evidence has been generally accepted in the scientific community, the same question ultimately addressed on appeal after a Frye hearing***. Thus, application of a *de novo* standard is appropriate.

Gregory, at 830 (emphasis added). That is a different situation than exists here.

It is without question that fingerprint evidence has been generally accepted in the scientific community for decades. Once a methodology has been generally accepted, a court does not need to conduct a Frye hearing; the application of the science is simply a matter of weight and admissibility under ER 702. Gregory, at 829-30. The question before the trial court here was whether the defendant had provided sufficient evidence to call the existing general acceptance into doubt. The trial court did not, and was not called upon to find, general acceptance – and neither is this Court. Thus, *de novo* review is not appropriate.

In addition, because this case is governed by existing precedence, the defendant must prove that the ruling in Pigott is both incorrect and harmful. In re Stranger Creek, supra.

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,<sup>7</sup> the defense attacked the admissibility of the fingerprint evidence under the Daubert<sup>8</sup> 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.

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

<sup>8</sup> 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. The defendant had not cited, and the State has not found, a single 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 that have all rejected similar defense challenges:<sup>9</sup>

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

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<sup>9</sup> 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.

identification system (CAL-ID) because the system does not make 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, the case at bar, and Pigott. 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.) (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)”, rev. denied, 996 N.E.2d 20 (2013).

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"), cert denied, 134 S. Ct. 2729 (2014).

In re O.D., 221 Cal.App.4th 1001, 1008 n.5, 164 Cal.Rptr.3d 578 (Cal.App. 1 Dist.2013) (“We are aware of no decision that has excluded fingerprint-comparison evidence on the basis that it is either unreliable or no longer generally accepted. Decisions from other jurisdictions have uniformly rejected the argument that the NAS Report warrants exclusion of fingerprint-comparison evidence.”).

Commonwealth v. Wadlington, 467 Mass. 192, 204-05, 4 N.E.3d 296 (Mass. 2014) (affirming that NAS report does not lead to conclusion that fingerprint evidence should be suppressed).

Commonwealth v. Joyner, 467 Mass. 176, 182 n.7, 4 N.E.3d 282, 289 (Mass. 2014) (noting that since publication of the NAS Report, preliminary statistical evidence has emerged showing error rates of below 1 percent with verification step).

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.) (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.”), cert. denied, 134 S. Ct. 175 (2013).

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).

United States v. Rose, 672 F.Supp.2d 723, 726 (D.Md. 2009) (Rejecting a challenge based on the NAS report and Dr. Ralph Haber, 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.”).

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, at 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, while making certain criticisms and recommendations of the field overall, was never purported to stand for the proposition that the ACE-V method of fingerprint examination is not generally accepted in the relevant scientific community. 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, including by this Court in Pigott. 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, and he has failed to show that the ruling in Pigott is incorrect and harmful.

## 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).<sup>10</sup>

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.

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<sup>10</sup> 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 did not attack the qualifications of the state fingerprint experts. He also did not assert that they made an error in their analysis. Thus, there is no basis to argue that the trial court erred in admitting the fingerprint evidence.

**3. WHEN A WITNESS TESTIFIES ABOUT A FACT PERTAINING TO HIMSELF OR HERSELF, THIS IS NOT INADMISSIBLE HEARSAY.**

In laying the foundation as expert witnesses, the State asked Latent Print Examiners Kathleen Swihart and Scott Verbonus if they have testified as an expert witness in the past. 2/27/13 RP 25-26, 123-25. Over a hearsay objection, Swihart testified that she had testified as an expert 40 to 50 times, Verbonus testified that he had testified as an expert 20 to 25 times. 2/27/13 RP 26-27, 125. The defendant contends that this testimony constituted inadmissible

hearsay and that its improper admission should result in his conviction being reversed. The defendant's argument is without merit.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. Id. An evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if, within reasonable probabilities, it materially affected the outcome of the trial. Id.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c); State v. McCarthy, 178 Wn. App. 90, 103, 312 P.3d 1027 (2013). Under ER 802, hearsay is not admissible unless provided by court rule or statute. Id. The hearsay prohibition serves to prevent the jury from hearing statements without giving the opposing party a chance to challenge the declarants' assertions. Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 451-52, 191 P.3d 879 (2008). A witness may only testify to matters to which they have personal

knowledge. ER 602; State v. Smith, 87 Wn. App. 345, 351-52, 941 P.2d 725 (1997).

Here, the defendant claims that when Swihart and Verbonus each testified that they had testified in the past as an expert witness, this was hearsay. It is not. It is a statement made by the declarant while testifying at trial. It is also a statement to which they have personal knowledge. They certainly know whether they have been called to testify as an expert witness or not.

The defendant claims this situation is akin to In re Pouncey, wherein the trial court allowed into evidence another judge's finding as to whether an expert's methodologies were sufficient under the Frye test. 168 Wn.2d 382, 393-94, 229 P.3d 678 (2010). Clearly this would be hearsay as the judge's ruling was an out-of-court statement admitted to prove the truth of the matter asserted. The defendant asserts that the witnesses' testimony here communicated the prior judges' opinions that they were qualified experts. This is false. To be called as an expert witness does not require a judicial ruling of the court. A witness is either called as a fact or eyewitness, or as an expert witness. Thus, the declarant is not reciting a statement of the trial judge in a past case, the declarant is reciting what they have personal knowledge about,

whether they have been previously called and testified as an expert witness. In any event, merely testifying that they had testified as latent print examiners in the past, even if improper, was not prejudicial requiring reversal in this case, especially where the particular witnesses' qualifications were not challenged.

**4. THE TRIAL COURT PROPERLY DECLINED TO GIVE A LESSER INCLUDED INSTRUCTION ON CRIMINAL TRESPASS**

The defendant proposed a lesser included instruction of first degree criminal trespass. 2/26/13 RP 5; CP 156-57. The court declined to give the instruction, finding that there was no evidence to support the theory that only the lesser offense was committed. 2/26/13 RP 14. This was a correct ruling.

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(1). A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1).

A defendant is entitled to an instruction on a lesser included offense when the following two-part test is met: (1) each of the elements of the lesser offense is a necessary element of the

offense charged (the legal prong), and (2) the evidence in the case supports an inference that only the lesser crime was committed to the exclusion of the charged offense (factual prong). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

When the refusal to give a proposed instruction is based on a ruling of law, the matter is reviewed *de novo* for an error of law. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by Berlin, supra. In the case at bar, it is undisputed that the trial court's decision was based upon the facts of the case, not a ruling of law.<sup>11</sup>

Where the trial court declines to give a requested jury instruction based on its view of the facts, the trial court's decision is reviewed for abuse of discretion. Lucky, 128 Wn.2d at 731. A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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<sup>11</sup> First degree criminal trespass is a legal lesser of residential burglary. See State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Under the factual prong of the Workman test, the evidence must do more than merely cast doubt on the State's theory regarding the charged offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). It is also not enough that the jury might simply disbelieve the evidence indicating guilt on the greater offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). To meet the factual prong, the evidence must affirmatively establish the defendant's theory regarding the lesser offense and raise an inference that **only** the lesser included offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455.

The relevant distinction between residential burglary and criminal trespass is that the defendant must possess the intent to commit a crime against a person or property in a dwelling to be guilty of residential burglary. Here, beyond merely arguing that the State did not present sufficient evidence, the defendant does not explain how the evidence supported the inference that he committed first degree criminal trespass to the exclusion of residential burglary. He seems to focus on the fact that other than the spare car key, there was no evidence that the defendant

actually removed any property from the home. This argument, however, misses the point.

To be guilty of residential burglary, a defendant does not need to commit a crime inside a residence. Rather, the statute requires only that the defendant possess the intent to commit a crime inside. Here, the defendant made forced entry into a home, opened up closets, a desk drawer, took and opened up a bottle of wine and a bag of jerky (and the State contends, a spare car key). The defendant was then caught in the act and fled before he could do anything else. There is no evidence, circumstantial or otherwise, that the defendant possessed some other intent when he broke into the home. For example, the defendant did not have a backpack with his possessions and this was not a vacant home wherein the defendant could argue he intended to be a squatter. There is no conceivable explanation based on the evidence that the defendant did not possess an intent to commit a classic residential burglary – make forced entry into a home while the homeowner is away, quickly look for valuables or items of interest and then steal those items. The trial court did not abuse its discretion in declining to give a lesser included instruction of first degree criminal trespass.

D. CONCLUSION

For the reasons cited above, this court should affirm the defendant's conviction.

DATED this 9 day of January, 2015.

Respectfully submitted,

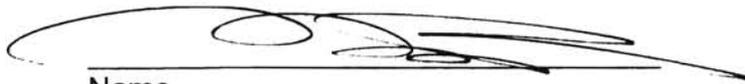
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Elaine Winters of Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE v. FRANKS, Cause No. 71261-6-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.



Name  
Done in Seattle, Washington

01-09-15  
Date