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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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NO. 38096-0-II

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

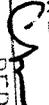
STATE OF WASHINGTON,

Respondent,

v.

DANIEL MAPLES,

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Thomas P. Larkin, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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A. ARGUMENT IN REPLY

THE COURT ERRED IN ADMITTING EXPERT TESTIMONY THAT HAIRS HAD BEEN STRETCHED OR FORCIBLY REMOVED WITHOUT FIRST HOLDING A FRYE¹ HEARING.

a. Evidence That Hairs Appear Stretched or Forcibly Removed Is Not Generally Accepted in the Scientific Community.

The State cites several cases for the proposition that microscopic hair analysis is not novel scientific testimony. But none of the cases cited by the State deals with the issue here: the scientific basis for a conclusion that hair has been stretched or forcibly removed. In each of these cases, the court discussed testimony comparing observable traits that were similar between two different hairs. Murray v. State, 3 So.3d 1178, 1117 (Fla. 2009) (comparison of similar traits of two hairs); State v. Brochu, 183 Vt. 269, 288, 949 A.2d (2008) (same); People v. Sutherland, 223 Ill.2d 187, 253, 860 N.E.2d 178 (2006) (hair characteristics used to screen suspects, no discussion of admissibility under Frye); State v. Reid, 254 Conn. 540, 548-49, 757 A.2d 482 (2000) (comparison of similarities between hairs); State v. Southern, 294 Mont. 225, 242, 980 P.2d 3 (1999) (same). The Annotation on admissibility of characteristics and identification of human hair makes no mention of the basis for conclusions that the hair has been stretched or forcibly removed. Gregory Sarnow, Admissibility and Weight, in Criminal

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

Cases, of Expert or Scientific Evidence Respecting Characteristics and Identification of Human Hair, 23 A.L.R.4th 1199 (1983). Thus, none of the authority cited by the State stands for the proposition that such testimony is based on scientific principle that has attained general acceptance in the scientific community under Frye.

The distinction between comparison analysis and the conclusion that hair has been stretched makes a difference because the mere comparison of traits is not really even scientifically based testimony. Reid, 254 Conn. at 547-48. The hair analyst in that case showed the jury the enlarged photograph of the hairs and the differences and similarities were observable to the untrained layperson. Id. In this case, whether the hair was forcibly removed or simply fell out is not observable by an untrained layperson. Nor is the conclusion that a hair was stretched, as opposed to having that consistency to begin with.

Even if hair analysis has been admitted in the past, when the defendant produces new evidence that casts serious doubt on the scientific validity of the evidence, a Frye hearing is required. State v. Cauthron, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Here, counsel pointed to the fact that the crime lab has recently stopped performing hair

analysis due to doubts about its usefulness. RP 3967-68, 4054-55. This was sufficient to cast doubt on this type of evidence and require a Frye hearing.

b. Counsel Was Not Required to Object Again.

After making a motion in limine to exclude the evidence under Frye, counsel was not required to object again to preserve the error. “[T]he purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial.” State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Thus, when a party loses a motion in limine, the party is deemed to have a standing objection unless the trial court indicates that further objections are required at trial. Id.

Defense counsel stated, “I would make a motion in limine that neither of those witnesses testify about stretched hair and what they have seen in rape cases.” RP 3970. She also specifically objected to conclusions drawn from hair analysis under Frye. RP 3968. The court’s ruling appeared to forbid conclusions of identity or connections to sexual assault but to permit the types of conclusions at issue here, that the hairs appeared stretched or forcibly removed. RP 3970-71. (The court had ruled in the first trial that Vaughan could testify about stretched hairs, but could not mention rape. RP 1959-61.) Because the defense essentially lost that aspect of the motion in limine, further objection was not required to preserve the error. Powell, 126 Wn.2d at 256.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Maples requests this court reverse his conviction and remand for a Frye hearing and a new trial.

DATED this 2d day of November, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert".

JENNIFER J. SWEIGERT
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF NOVEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF NOVEMBER 2009.

x  _____