

No. 47890-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tyler Robb,

Appellant.

Clark County Superior Court Cause No. 14-1-00868-6

The Honorable Judge Gregory Gonzales

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. The trial court should not have admitted novel scientific evidence in violation of *Frye* and ER 702. 1

A. Respondent’s brief reflects a misunderstanding of Mr. Robb’s *Frye* argument. 1

B. The evidence should have been excluded under ER 702. 5

II. The court erred by allowing the introduction of inadmissible hearsay that prejudiced Mr. Robb..... 6

III. Prosecutorial misconduct denied Mr. Robb a fair trial. 6

IV. The state’s concession requires reversal of Mr. Robb’s conviction for child molestation..... 6

V. The state’s concession requires this court to strike Mr. Robb’s sentencing conditions..... 7

VI. This court should not impose appellate costs. 7

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Frye v. United States</i> , 293 F. 1013 (D.C.Cir.1923)	1, 2, 6
<i>United States v. Bonds</i> , 12 F.3d 540 (6th Cir. 1993)	7
<i>United States v. Kootswatewa</i> , --- F.Supp.3d ---, 2016 WL 808663 (D. Ariz. Mar. 2, 2016)	5

WASHINGTON STATE CASES

<i>In re Det. of Pettis</i> , 188 Wn. App. 198, 352 P.3d 841 (2015) <i>review denied</i> , 361 P.3d 748 (2015)	5
<i>State v. Bander</i> , 150 Wn. App. 690, 208 P.3d 1242 (2009)	2
<i>State v. Copeland</i> , 130 Wn.2d 244, 922 P.2d 1304 (1996)	2
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	6

OTHER AUTHORITIES

ER 702	1, 5
<i>People v. Stevey</i> , 209 Cal. App. 4th 1400, 148 Cal. Rptr. 3d 1 (2012) ..	4, 5
<i>People v. Zapata</i> , 8 N.E.3d 1188 (Ill. App. Ct. 2014)	3
<i>Shabazz v. State</i> , 265 Ga. App. 64, 592 S.E.2d 876 (2004)	3
<i>State v. Calleia</i> , 414 N.J. Super. 125, 997 A.2d 1051 (N.J. Super. Ct. App. Div. 2010) <i>rev'd</i> , 206 N.J. 274, 20 A.3d 402 (2011)	3
<i>State v. Freeman</i> , 253 Neb. 385, 571 N.W.2d 276 (1997)	2

ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE ADMITTED NOVEL SCIENTIFIC EVIDENCE IN VIOLATION OF *FRYE* AND ER 702.

A. Respondent's brief reflects a misunderstanding of Mr. Robb's *Frye* argument.

Mr. Robb does not claim that the procedures underlying Y-STR amplification and sequencing are subject to *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). Instead, the problem arises from the way the state used the DNA sequence at trial.

Mr. Robb specifically assigned error to the "statistical method" used, the lack of a "generally accepted method," and the state's use of the "count method" to report results. Appellant's Opening Brief, p. 1. He distinguished the "product rule," and outlined "[s]hortcomings of the 'count' method and the lack of general acceptance" for that method, especially when used in conjunction with a nonlocal database and limited loci on the Y chromosome. Appellant's Opening Brief, p. 16-19.

Although DNA sequencing technology is well-established and can be applied to short tandem repeats (STRs) on the Y chromosome, the state's reliance on the "count" method using a nonlocal database and only a 4-loci "match" is not generally accepted. Appellant's Opening Brief, pp. 16-20.

Respondent wholly fails to address this argument. *See* Brief of Respondent, pp. 18-29. Instead, the state’s brief addresses DNA sequencing. According to Respondent, “DNA testing in general has long been accepted by the scientific community and... Y-STR testing is similarly well accepted.” Brief of Respondent, pp. 19-20; *see also* Brief of Respondent, pp. 22-25 (citing cases). This is correct, but irrelevant. DNA sequencing is widely accepted. The state’s use of the DNA sequence here is not generally accepted.

An expert’s “calculation of statistical probability [is] an essential part of the process used in determining the significance of a DNA match.” *State v. Freeman*, 253 Neb. 385, 405, 571 N.W.2d 276, 289 (1997). Because of this, “the underlying method of the calculation must also meet [*Frye*’s] general acceptance test.” *Id.*

Although Washington courts have approved the statistical methods underlying traditional DNA testimony,¹ no published Washington decision has approved the “count” method, the use of nonlocal databases, or the application of these techniques to samples containing matches at only four Y-chromosome loci. Indeed, the *Bander* court noted that the appellant in

¹ *See, e.g., State v. Copeland*, 130 Wn.2d 244, 269, 922 P.2d 1304, 1319 (1996) (noting that “significant challenges to use of the product rule have been sufficiently resolved” to allow admission of testimony based on that method of reporting DNA results); *State v. Bander*, 150 Wn. App. 690, 707, 208 P.3d 1242, 1249 (2009) (noting general acceptance of the probability of exclusion calculation (“PE calculation”) and the likelihood ratio (“LR”)).

that case failed to challenge the expert's use of "the counting method," and did not "cite to any authority indicating that this statistical calculation lacks general acceptance." *Id.*

Nor have other jurisdictions universally approved the methods at issue here. With one exception, the cases cited by Respondent have upheld the use of Y-STR DNA sequencing without approving the count method and without commenting on the use of nonlocal database comparisons to sequences describing only four loci on the Y chromosome. *See* Brief of Respondent, pp. 22-23 (citing *Shabazz v. State*, 265 Ga. App. 64, 65, 592 S.E.2d 876, 879 (2004); *People v. Zapata*, 8 N.E.3d 1188, 1191 (Ill. App. Ct. 2014); *State v. Calleia*, 414 N.J. Super. 125, 147, 997 A.2d 1051, 1064 (N.J. Super. Ct. App. Div. 2010) *rev'd*, 206 N.J. 274, 20 A.3d 402 (2011)).

Each of these three cases cited by the state involved a challenge only to the general methodology, common to all DNA cases. The testimony in these three cited cases involved only whether each defendant was excluded or not excluded. *See, e.g., Shabazz*, 265 Ga. App. at 65 ("The results of this test... showed that Shabazz could not be ruled out"); *Zapata*, 8 N.E. at 1191 ("Q. He was not excluded? A. That's correct"); *Calleia*, 414 N.J. Super. at 147 ("If the Y-STR DNA profiles do match, then all that can be said is that the individual *cannot be excluded* as the

DNA donor.”) None of these three cases involved a challenge to the count method or the use of nonlocal databases and four-loci matches.

The only case cited by Respondent which approves the count method should not control the outcome in this case. *See* Brief of Respondent, p. 23 (citing *People v. Stevey*, 209 Cal. App. 4th 1400, 1415-16, 148 Cal. Rptr. 3d 1, 12 (2012)). This is so for three reasons.

First, the appellant in *Stevy* apparently failed to apprise the court of the controversy surrounding the “count” method.² *Id.*, at 1415 (noting “the absence of any case or scientific authority” supporting appellant’s position). Mr. Robb, by contrast, has outlined the controversy. *See* Appellant’s Opening Brief, pp. 16-19.

Second, the *Stevy* court found that the defendant had forfeited his argument relating to database selection. *Id.* Respondent does not argue that Mr. Robb waived his argument regarding database selection. *See* Brief of Respondent, pp. 18-29. And, in fact, Mr. Robb argued that the state failed to use the correct database.³ RP 149, 202-215.

² Despite this, the court recognized that “Y-STR... testing is more a test of exclusion than of identification.” *Id.*, at 1415.

³ For a decision excluding testimony based on database selection, see *United States v. Kootswatewa*, --- F.Supp.3d ---, 2016 WL 808663, at *4 (D. Ariz. Mar. 2, 2016).

Third, the *Stevey* court did not address the problems associated with limited-match cases such as this case, where only four relevant loci were identified in the sample. *Id.*

The methods used here differ from the methods used in standard DNA analysis. The “count” method and the use of nonlocal databases and limited match samples are not generally accepted in the scientific community. Because these techniques are not generally accepted, and because there is no generally accepted way to apply them to produce reliable results, the trial judge erred by admitting the evidence. *In re Det. of Pettis*, 188 Wn. App. 198, 206, 352 P.3d 841 (2015) *review denied*, 361 P.3d 748 (2015) (citing *Frye*).

B. The evidence should have been excluded under ER 702.

The evidence should also have been excluded under ER 702, which prohibits admission of expert testimony unless helpful to the trier of fact. ER 702. The very small DNA sample obtained here did nothing except confirm that D.I.A. lived in the same house as Mr. Robb and his son (who shared his Y-STR profile). RP 178, 210, 232-235, 404-405. It did nothing to prove the offense, but left the jury with the incorrect impression that D.I.A.’s account had been “scientifically” confirmed.

Identity was not an issue. Instead, the state improperly used the evidence to “prove” that the improper touching actually happened. The

evidence should have been excluded because it was not helpful on that issue. ER 702.

The error prejudiced Mr. Robb. Because DNA evidence has an “aura of reliability,”⁴ it is likely that jurors used the inadmissible evidence as confirmation that D.I.A. told the truth and that Mr. Robb did not. Accordingly, the improper admission of the evidence likely affected the verdict. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

II. THE COURT ERRED BY ALLOWING THE INTRODUCTION OF INADMISSIBLE HEARSAY THAT PREJUDICED MR. ROBB.

Mr. Robb relies on the argument set forth in his Opening Brief.

III. PROSECUTORIAL MISCONDUCT DENIED MR. ROBB A FAIR TRIAL.

Mr. Robb relies on the argument set forth in his Opening Brief.

IV. THE STATE’S CONCESSION REQUIRES REVERSAL OF MR. ROBB’S CONVICTION FOR CHILD MOLESTATION.

Respondent agrees that Mr. Robb’s conviction for child molestation must be vacated. Brief of Respondent, p. 43. Accordingly, no additional argument is provided.

⁴ *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993).

V. THE STATE’S CONCESSION REQUIRES THIS COURT TO STRIKE MR. ROBB’S SENTENCING CONDITIONS.

Respondent concedes that the sentencing conditions pertaining to alcohol, controlled substances, and sexually explicit materials must be stricken. Brief of Respondent, p. 44.

Mr. Robb relies on his Opening Brief regarding the remaining sentencing condition. *See* Appellant’s Opening Brief, pp. 38-42.

VI. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS.

Contrary to Respondent’s assertion, Mr. Robb is not as employable now as he was before he was convicted of a sex offense and sentenced to prison. *See* Brief of Respondent, p. 50 (“There is no reason to believe Robb will not be able to continue his employment after release from prison”). Respondent’s argument reflects a fundamental lack of understanding regarding the problems facing convicted felons generally and convicted sex offenders in particular.

Mr. Robb is indigent, and will never be able to afford appellate costs. The Court of Appeals should exercise its discretion and decline to impose such costs if requested. *See* Appellant’s Supplemental Brief, pp. 3-4.

CONCLUSION

The state has conceded that Mr. Robb's child molestation conviction must be vacated, and that sentencing conditions relating to alcohol, controlled substances, and sexually explicit materials must be stricken.

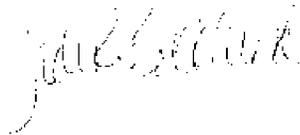
In addition, this court should reverse Mr. Robb's convictions for the reasons outlined above and in the opening brief.

In the alternative, this court should reverse the sentencing condition prohibiting Mr. Robb from having contact with his biological son.

If the state substantially prevails on review, the Court of Appeals should exercise its discretion and decline to impose appellate costs.

Respectfully submitted on May 9, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Tyler Robb, DOC #383965
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

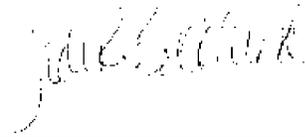
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 9, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

May 09, 2016 - 9:14 AM

Transmittal Letter

Document Uploaded: 1-478901-Reply Brief.pdf

Case Name: State v. Tyler Robb

Court of Appeals Case Number: 47890-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov