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No. 68566-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER O.,
(A minor child)

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. In the absence of sufficient evidence the trial court deprived Christopher O. of due process by entering a conviction.

2. In the absence of sufficient evidence to support it the trial court erred in entering CrR 6.1 [sic] Finding of Fact 38.¹

3. In the absence of sufficient evidence to support it the trial court erred in entering CrR 6.1 [sic] Finding of Fact 39.

4. In the absence of sufficient evidence to support it the trial court erred in entering CrR 6.1 [sic] Finding of Fact 40.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Fourteenth Amendment Due Process Clause requires the State prove the elements of a crime beyond a reasonable doubt. Where a fingerprint is the sole proof of a person's identity the trier of fact must find the print could only have been left on the date of the offense. Where the juvenile court did not, and could not, find Christopher's fingerprint could only have been left on the day of the offense is there sufficient evidence to support Christopher's conviction?

¹ Because this is a juvenile matter the rule governing findings is JuCR 7.11 not CrR 6.1

C. STATEMENT OF THE CASE

Nathan Duncan and Christopher had been friends for a number of years. Christopher lived a few houses away from Nathan's grandparents, where Nathan occasionally lived. 2/14/12 RP 83-84. Christopher moved from the neighborhood on October 31, 2012. *Id.*

On January 27, 2011, Barbara Duncan returned to her home and discovered her television had been taken while she was away. 2/14/12 RP 63. Police opined someone had entered a living-room window and exited through a nearby sliding door. Cp 11.

A fingerprint examiner lifted a print from the window and offered her opinion that it matches Christopher's fingerprints. 2/14/12 RP 29, 36-40.

The State charged Christopher with residential burglary. CP 1-3. The juvenile court convicted him. CP 18.

D. ARGUMENT

The State did not offer sufficient evidence to convict Christopher of burglary

1. The State must prove each element of the charge beyond reasonable doubt.

A criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely*

v. Washington, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process

“indisputably entitle a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

Additionally, the identity of a criminal defendant and his presence at the scene of a crime must be proven beyond a reasonable doubt. *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *review denied*, 123 Wn.2d 877 (1994).

Here the State did not prove each element of residential burglary.

2. The State did not prove Christopher committed the burglary of the Duncan’s home.

The State’s only evidence that Christopher committed the burglary was a fingerprint on the exterior of a window. CP 12. Those prints were examined by Cynthia Zeller. CP 12. Ms. Zeller candidly admitted that fingerprint evaluation is more subjective than science.

Specifically, in acknowledging there are no objective criteria governing when a “match” existed, she explained that is “because there is no scientific backing for it.” 2/14/12 RP 57. Based then on her subjective evaluation, she opined the prints lifted from the window matched Christopher’s. CP 12.

Fingerprint evidence is sufficient to support a conviction only if the juvenile court could find the prints “could only have been impressed at the time the crime was committed.” *State v. Lucca*, 56 Wn. App. 597, 599, 784 P.2d 572, 573 (1990).

In order to support a finding of guilt beyond a reasonable doubt in a “fingerprint-only” case, the State must make a showing, reflected in the record, that the object upon which the fingerprint was found was generally inaccessible to the defendant at a previous time. *Mikes v. Borg*, 947 F.2d 353, 357 n. 6 (9th Cir.1990) (citing *Borum v. United States*, 380 F.2d 595 (D.C.Cir.1967)), *cert. denied*, 505 U.S. 1229, 112 S.Ct. 3055, 120 L.Ed.2d 921 (1992). This showing by the State is essential. *Id.* at 356–57.

State v. Bridge, 91 Wn. App. 98, 100, 955 P.2d 418 (1998).

Recent research underscores the soundness of these cases’ reluctance to rely on fingerprint evidence. “[T]he accuracy of latent print identification has been subject to intense debate.” Simon Cole, *Criminology: More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 986

(Spring 2005). For example, a 2002 article points out a complete lack of testing in the field: “the reality is that the fingerprint community has *never* conducted any scientific testing to validate the premises upon which the field is based.” Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” Is Revealed*, 75 S. Cal. L. Rev. 605, 622 (March 2002). The article describes the only published study testing the premise that “fingerprint examiners can make reliable identifications from the type of small distorted latent fingerprint fragments that are typically detected at crime scenes.” *Id.* This study, commissioned by Scotland Yard, was “an utter embarrassment to the fingerprint community.” *Id.* The results showed wide variation among experienced fingerprint examiners, who disagreed on (a) how many points of comparison were necessary to match prints and (b) whether identifications could even be properly effectuated in the sample pairs used (examiners were almost evenly split on this issue on at least one sample pair). *Id.* at 623. As the Scotland Yard-commissioned researchers concluded, “[t]he variation [in the responses] confirms the subjective nature of points of comparison.” *Id.*

Other scholars have also criticized the science underlying fingerprint identifications. One wrote, “The field of forensic fingerprint

identification suffers from an appalling lack of basic foundational research.” Tara M. LaMorte, *Comment: Sleeping Gatekeepers, United States v. Llera Plaza and the Unreliability of Forensic Fingerprint Evidence Under Daubert*, 14 Alb. L.J. Sci. & Tech. 171, 179, 183 (2003) (calling for courts to thoroughly reexamine field of fingerprint analysis based on widely known lack of scientific reliability and standards). Another noted,

The reliability of fingerprint identification has never been comprehensively tested. The foundational premise on which fingerprint identification rests - that no two individuals have the same fingerprint - has never been proven. Nor has the fingerprint-identification process’s error rate been established or even estimated.

Katherine Schwinghammer, *Note: Fingerprint Identification: How the “Gold Standard of Evidence Could be Worth Its Weight*, 32 Am. J. Crim. L. 265, 266 (2005).

Furthermore, substantial research demonstrates that despite the long-standing practice of admitting fingerprint testimony in court, very little research demonstrates the correctness of the assumption of uniqueness which underlies the fingerprint identification. *See, e.g.*, Jennifer F. Mnookin, et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 725 (Feb. 2011) (criticizing and evaluating lack of scientific basis for latent fingerprint identification,

among other pattern identification fields, and citing extensively to a 2009 report by the National Academy of Science finding the same); Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Science Identification*, 49 Hastings L. J. 1069, 1105-06 (1998) (finding basic premises of fingerprint science untested by conventional means); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1354 (1994) (“Considerable forensic evidence [including fingerprints] made its way into the courtroom without empirical validation of the underlying theory and/or its particular application.”); Epstein, at 623 (“no testing has been conducted to determine the probability of two different people having a number of fingerprint ridge characteristics in common”).² Several scholars have noted that historical judicial acceptance of latent fingerprint

² In one case, a federal district court judge barred fingerprint analysis testimony from a trial, but later changed his mind and admitted the testimony. See Simon Cole, *Grandfathering Evidence: Jennings to Llera Plaza and Back Again*, 41 Am. Crim. L. Rev. 1189, 1195 n.13 (Summer 2004) (discussing *United States v. Llera Plaza*, Nos. CR. 98-362-10, CR. 98-362-11, CR. 98-362-12, 2002 WL 27305, at * 19 (E.D. Pa. Jan. 7, 2002), *vacated and withdrawn by* 188 F. Supp. 549 (E.D. Pa 2002). However, the judge adhered to many of his factual findings, including the finding that fingerprint examiners do not represent a scientific community so that even if they agree among themselves that fingerprint analysis is a valid science, this agreement does not demonstrate the scientific community agrees with the science underlying fingerprint identification. 41 Am. Crim. L. Rev. at 1244, 1250.

identification resulted from entirely cursory judicial scrutiny of the methodology involved and therefore should not form a basis for modern acceptance. Epstein, at 615-17 (collecting articles and discussing cases).

Because of the unreliability of fingerprint evidence courts are correct to require more to sustain a conviction. Here, the evidence does not permit a finding that the print could only have been left on the date of the crime. Indeed, the juvenile court never made such a finding. Ms. Zeller testified it is impossible to “age prints.” RP 54. She acknowledged prior efforts and claims to do so have been discredited. RP 55. Thus, all Ms. Zeller’s subjective opinion establishes is that at some point prior to January 27, 2010, Christopher touched the exterior of the window.

Christopher himself testified he had touched that window several months prior, when Nathan Duncan had asked his help in entering the house when he was locked out. While the court found Christopher’s testimony not credible, CP 13, that does not establish Christopher left the prints on the window on January 27, 2010. Nor does any finding by the court.

The trial court found that four to six years prior to burglary the Duncans had told Christopher he was “no longer allowed to enter their house.” CP 13. However, Christopher continued to live a few houses away until October 2010. 2/14/12 RP 86. More importantly, Nathan Duncan continued to interact with Christopher on a regular basis, including talking with him in the neighborhood, texting and talking to Christopher on a phone Christopher had giving him. *Id.* at 150, 178. The State offered no evidence that the print could only have been left on January 27, 2010. Because the fingerprint evidence was the only evidence of Christopher’s identity the evidence is insufficient to support his conviction. *Lucca*, 56 Wn. App. 597, 599.

During trial the juvenile court permitted the State to offer testimony of allegations that Christopher had previously burglarized the Duncan’s home. 2/14/12 RP 148. While he had no personal recollection of when the event occurred, Nathan Duncan claimed that one afternoon he saw Christopher leaving the Duncan house with several laptops in hand. 2/14/12 RP 148-49; 157. Despite the allegations, apparently no police report was ever made.

In any event, the juvenile’s court’s findings of fact do not mention this evidence. Thus, that evidence may not be considered on

review of the sufficiency of the State's evidence to prove the crime charged. The review of the sufficiency of the evidence following a bench trial begins and ends with the courts written findings.

When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings and, if so, whether the findings support the trial court's conclusions of law.

Hegwine v. Longview Fibre CO., 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *affirmed*, 162 Wn.2d 340 (2007). Unlike a jury trial where the jury does not collectively nor individually identify those facts upon which the verdicts rest, a trial court's findings do precisely that. Indeed, where a court's findings omit a finding on a disputed fact a reviewing court must "must indulge every presumption" the party with the burden of proof failed to meet its burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 1280 (1997) (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986)). Because the juvenile court's findings do not include any information of prior allegations against Christopher, those prior allegations do not factor into the evaluation of the State's proof of the identity of Christopher as the person who committed this burglary.

Because the fingerprint evidence is the only evidence in the juvenile court's findings establishing Christopher committed the offense, the evidence is insufficient to support his conviction.

3. The court must reverse Christopher's conviction.

The Fifth Amendment's Double Jeopardy Clause bars retrial of a case where the State fails to prove the crime charged. *Green*, 94 Wn.2d at 221. Because the State failed to prove he committed the burglary, the Court must reverse Christopher's conviction and dismiss the charge.

E. CONCLUSION

Because there was insufficient evidence to support it the Court should reverse Christopher's conviction.

Respectfully submitted this 5th day of October, 2012.



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68566-0-I
v.)	
)	
CHRISTOPHER O.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING 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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[X] CHRISTOPHER O. 13409 MEADOW RD #14 EVERETT, WA 98204	(X) () ()	U.S. MAIL HAND DELIVERY _____

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OCT 5 2012
COURT OF APPEALS - DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF OCTOBER, 2012.

X _____ *Handwritten signature*

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