

71261-6

71261-6

No. 71261-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DeANTHONY FRANKS

Appellant.

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

BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on the lesser-included offense of criminal trespass.
2. The trial court erred by admitting the testimony of latent fingerprint examiner Kathleen Swihart identifying latent fingerprints at the crime scene as belonging to DeAnthony Franks.
3. The trial court erred by admitting testimony of latent fingerprint examiner Scott Verbonus verifying Ms. Swihart's identification of Mr. Franks.
4. The trial court erred by refusing to conduct a Frye hearing on the admissibility of fingerprint comparison evidence.
5. The trial court erred by admitted latent fingerprint examiner Swihart's hearsay testimony that she had been certified as an expert by the court in 40 to 50 cases.
6. The trial court erred by admitted latent fingerprint examiner Verbonus' hearsay testimony that he had been certified as an expert by the court in 20 to 25 cases.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the right to have the jury consider a lesser-included offense of the charged crime. RCW 10.61.006. Jury

instructions must be given if (1) each element of the lesser offense is a necessary element of the charged crime and (2) the evidence supports the inference that the lesser crime was committed. Mr. Franks was charged with residential burglary, which requires that the defendant unlawfully enter or remain in a dwelling with the intent to commit a crime against persons or property in the residence. RCW 9A.52.025. He requested that the jury be instructed on criminal trespass in the first degree, which is committed by unlawfully entering a dwelling. RCW 9A.52.070. Where a rational jury could find beyond a reasonable doubt that Mr. Franks entered the residence without the intent to commit a crime, must Mr. Franks' conviction be reversed because the trial court refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree? (Assignment of Error 1).

2. Scientific testimony is admissible if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the relevant scientific community, and (3) the testimony will assist the trier of fact. Recent developments in forensic science, including the respected 2009 report of the National Academy of Sciences, show a significant dispute among forensic scientists regarding the scientific validity and reliability of latent fingerprint

analysis. Did the trial court err by denying Mr. Franks' request for a Frye hearing and admitting testimony that his fingerprints matched latent prints taken from the burglarized residence? (Assignments of Error 2-4)

3. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted, and it is inadmissible absent an exception to the hearsay rule. ER 801, 802. The two latent fingerprint examiners called by the State as expert witnesses each testified that he or she had been qualified as an expert by judges in numerous prior trials. Their testimony related out-of-court assertions by judges in prior cases and was inadmissible. Must Mr. Franks' conviction be reversed due to the prejudice caused by the hearsay testimony that unfairly bolstered the credibility of the two witnesses in a manner akin to a comment on their testimony by the prior courts? (Assignments of Error 5-6)

#### C. STATEMENT OF THE CASE

Spiros Sourelos was working in his yard when he noticed a side door to the house next door had been broken in, and he called 911. 2/27/13 RP 13-15. Several law enforcement officers quickly arrived. Id. at 16.

King County Sheriff's Deputies Martin Hodge and Kurt Lysen entered the two-bedroom single story house through the broken door. 2/26/13 RP 14, 26. Deputy Hodge testified that he heard a noise, went directly to a bedroom, and saw someone jump out of the bedroom window. Id. at 16. Deputy Lysen, however, did not hear any noises. Id. at 69-70. He said that the two officers went methodically through the house until they came to the back bedroom. Id. at 57-58.

When Deputy Hodge followed the person out the bedroom window, he saw him jumping over a backyard fence. 2/26/13 RP 16-17. Deputy Hodge described the person he saw as a black man, probably in his teens, with his hair in braids or deadlocks and wearing black clothing. Id. at 17. Deputy Hodge did not see the man's face, and Deputy Lysen did not see the man at all. Id. at 17, 58. Several patrol officers and a K9 officer unsuccessfully searched the neighborhood for possible suspects. Id. at 18, 60-62, 96-97.

Homeowner Starvos Tsitsis arrived, entered the house, and noticed that some closet doors and possibly a desk drawer were open. 2/26/13 RP 31. A bag of beef jerky had been moved from the kitchen counter to his bed, and a wine bottle had been moved from a wine rack to the living room floor. Id. at 31-32. Mr. Tsitsis did not notice

anything missing from his home, but later he was unable to find the spare key to his car. Id. at 33, 46-47.

After driving through the neighborhood, Deputy Lysen dusted parts of the house for fingerprints. 2/26/13 RP 60-62. He collected several latent finger prints from the window in the back bedroom, the wine bottle in the living room, and the beef jerky bag. Id. at 64-65.

Latent fingerprint examiner Kathleen Swihart of the King County Sheriff's Office examined the latent fingerprint cards, determined that seven prints were of comparable value, and ran one through the Automatized Fingerprint Identification System (AFIS). 2/27/13 RP 24-25, 43-45, 75. DeAnthony Franks' prints were among those provided by the computer system as possible candidates. Id. at 45-47.

Using the ACE-V<sup>1</sup> method, Ms. Swihart compared the latent prints with those belonging to Mr. Franks. Id. at 46-47. She opined that four latent prints found on the beef jerky bag and two taken from

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<sup>1</sup> ACE-V is an acronym for the subjective method of comparing fingerprints using analysis, comparison, evaluation and verification. 2/27/13 RP 28, 88, 90.

the window ledge were “individuated” or “identified” to portions of Mr. Franks’ prints from the AFIS system.<sup>2</sup> Id. at 54-56.

The King County Prosecutor charged Mr. Franks with residential burglary.<sup>3</sup> CP 1. Prior to trial, Mr. Franks moved to exclude the latent fingerprint examiner’s testimony and requested that the court hold a Frye hearing to determine the scientific reliability of the fingerprint evidence. SuppCP 365-413. The motion was denied.

Ms. Swihart is not a certified latent print examiner. 2/27/13 RP 62-63. At trial she testified about the ACE-V method of latent fingerprint examination, which she asserted was both scientifically based and accepted in the scientific community. Id. at 28-36, 89. She also related her conclusions that Mr. Franks’ prints matched the latent print found in the home and that fingerprints she later took from Mr. Franks matched those in the AFIS system. Id. 54-57; CP 27-28.

Another latent fingerprint examiner in Ms. Swihart’s office, Scott Verbonus, testified that he verified her conclusions using the same method. 2/27/13 RP 123, 125-26, 130-32. Although the better practice would be to conduct a blind test, Mr. Verbonus was aware that

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<sup>2</sup> Ms. Swihart only testified about five latent fingerprints, but all six were documented in the exhibits and in the testimony of Mr. Verbonus. 2/27/13 RP 54, 131-32.

<sup>3</sup> A separate charge of residential burglary was resolved with a guilty plea to theft in the third degree. CP 1-2, 189-209.

Ms. Swihart was the examiner and he was aware of her conclusions.

Id. at 157.

The trial court refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree. 2/28/13 RP 14-15. Mr. Franks was convicted of residential burglary and received a 38-month sentence CP 154, 213. He appeals. CP 353-64.

D. ARGUMENT

1. **Mr. Franks' residential burglary conviction must be reversed because the trial court refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree.**

Mr. Franks was charged with residential burglary. One of his defenses was that he lacked the intent to commit a crime against property or persons inside the residence, and he submitted jury instructions on the lesser-included offense of criminal trespass in the first degree. The trial court, however, concluded there was no evidence or inference from the evidence to support a jury determination that Mr. Franks committed criminal trespass and not residential burglary. The trial court's analysis was incorrect, as a rational jury could easily conclude from the evidence that Mr. Franks was unlawfully in the residence. His conviction should be reversed.

- a. The defendant is entitled to have the jury instructed on a lesser-included offense.

A criminal defendant has the constitutional right to the meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The Washington Constitution also provides an “inviolable” right to a jury determination of a case. Const. art. I, § 21; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989); City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). As a result, the “defendant in a criminal case is entitled to have the jury instructed on the defense theory of the case.” State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)).

In addition to the constitutional right to present a defense, those accused of a crime in Washington have the statutory right to have the jury instructed on any lesser-included offenses.<sup>4</sup> RCW 10.61.006, .010; State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); State v.

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<sup>4</sup> The State has the same statutory right to lesser-included instructions. RCW 10.61.006; Berlin, 133 Wn.2d at 548.

Parker, 102 Wn.2d 161, 166, 683 P.2d 189 (1984). RCW 10.61.006

reads:

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he or she is charged in the indictment or information.<sup>5</sup>

Washington utilizes the two-part Workman test to determine whether the defendant is entitled to have the jury instructed on a lesser-included offense. State v. Nguyen, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” Workman, 447-48 (citations omitted). The first prong of the Workman test is referred to as the “legal prong,” and the second as the “factual prong.” Berlin, 133 Wn.2d at 546.

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<sup>5</sup> “Other cases” refers to lesser-degree offenses governed by RCW 10.61.003, which provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

- b. The trial court improperly refused to instruct the jury on first degree criminal trespass.

One of Mr. Franks' defenses to the charge of residential burglary was that he lacked the intent to commit a crime against property or persons inside the residence. See 2/28/13 RP 64-65. He therefore submitted jury instruction on the lesser-included offense of criminal trespass in the first degree. CP 156-59. The trial court did not address the legal prong of the Workman test, but held that Mr. Franks did not meet the factual prong. 2/28/13 RP 14-15. Both prongs of the test were met, and Mr. Franks was entitled to instructions on the lesser-included offense.

- i. Criminal trespass is a lesser-included offense of residential burglary.

The elements of residential burglary are that the defendant (1) entered or remained unlawfully in a dwelling and (2) intended to commit a crime against a person or property inside the dwelling. RCW 9A.52.025; State v. Devitt, 152 Wn. App. 907, 910-11, 218 P.3d 647 (2009); CP 179. A person commits first degree criminal trespass if he knowingly enters or remains unlawfully in a dwelling. RCW 9A.52.070. Criminal trespass in the first degree is a lesser-included offense of residential burglary. State v. J.P., 130 Wn. App. 887, 895,

125 P.3d 215 (2005); see State v. Pittman, 134 Wn. App. 376, 384-85, 166 P.3d 720 (2006) (attempted criminal trespass in the first degree is lesser-included offense of attempted residential burglary), abrogated on other grounds, State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011); State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986) (former first degree criminal trespass is lesser-included offense of former second degree burglary because the knowledge element of trespass is necessarily proved by the intent element of burglary; both statutes prohibited unlawful entry or remaining in building).

Every element of first degree criminal trespass is a necessary element of residential burglary. Mr. Franks' proposed instructions on first degree criminal trespass thus satisfies the legal prong of the Workman test. Workman, 90 Wn.2d at 447-48.

ii. *The evidence supports the inference that Mr. Franks committed first degree criminal trespass.*

Under Workman's factual prong, the evidence presented in the case must support an inference that only the lesser offense was committed.<sup>6</sup> Fernandez-Medina, 141 Wn.2d at 455; State v.

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<sup>6</sup> The factual prong of the Workman test is used for both lesser-included and lesser-degree offenses. Fernandez-Medina, 141 Wn.2d at 455 ("the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense only with respect to the legal

Henderson, 180 Wn. App. 138, 144, 321 P.3d 298, rev. granted, 180 Wn.2d 1022 (2014). “If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.” Berlin, 133 Wn.2d at 551; accord Fernandez-Medina, 141 Wn.2d at 461.

The trial court held that the facts of the case did not support the giving of instructions on criminal trespass. 2/28/13 RP 14-15. Looking at the homeowner’s testimony, the court found evidence of intent to commit a property crime based upon the movement of property and items, and decided there was no evidence that the person who entered the residence did not intend to commit a crime. Id. An independent review of the facts based upon the correct legal standard, however, demonstrates that the facts support an inference that the lesser crime was committed, thus satisfying the factual prong of Workman. Workman, 90 Wn.2d at 447-48.

In deciding whether to instruct the jury on a lesser-included offense, the court must look at all of the evidence in the light most favorable to the party requesting the instruction. Stevens, 158 Wn.2d at 311; Fernandez-Medina, 141 Wn.2d at 455-56. In Mr. Franks’ case,

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component of the test.”). Cases addressing lesser-degree offenses are therefore instructive in this portion of the analysis.

however, the court looked only at the evidence that favored the State. While the homeowner noticed minor changes in his home, a long-time King County Sheriff's deputy testified that burglars usually "tear up the house pretty good." 2/26/13 RP 55. In addition to broken doors or windows, he often observed drawers pulled out, mattresses taken off the bed, or empty spots in dust revealing the absence of a television. Id. at 54-44.

The trained law enforcement officers who entered the residence, however, did not mention observing signs that someone had rummaged through the house or opened drawers or closet doors. 2/26/13 RP 16-17, 20-21, 62, 69, 74, 96. Nor did they take any photographs to document the home's appearance. Id. at 87. The trial court did not consider the police officers' testimony, and instead made its decision based only upon the homeowner's testimony that "some" closet doors were open, a desk drawer might have been open, and a bag of beef jerky and wine bottle had been moved. Id. at 31-32.

In addition Mr. Tsitsis testified that he noticed a spare key to his car was missing several weeks after the burglary. 2/26/13 RP 33, 46-47. Mr. Tsitsis, however, thought the key could have been misplaced by a visiting young nephew who had been playing with the key. Id. at

38. Thus, looking at the evidence in the light most favorable to Mr. Franks, there is scant evidence of an intent to commit a crime against a person or property inside the residence.

Mr. Franks' case is similar to Henderson, where Division Two found a defendant who was charged with first degree murder based upon extreme indifference to human life was entitled to instructions on first degree manslaughter. Henderson, 180 Wn. App. at 141-42, 147-48. "Viewing the evidence in the light most favorable to Henderson, we hold that a rational jury could find that Henderson shot into a crowd but that he did so with a disregard for a substantial risk of homicide, rather than an extreme indifference that caused a grave risk of death." Id. at 148. Similarly in Hampton, this Court upheld lesser-degree instructions on third degree rape where there was affirmative evidence to show that the victim expressed her consent, not that she was asleep and thus incapable of consent as required for second degree rape. State v. Hampton, \_\_\_ Wn. App. \_\_\_, 332 P.3d 1020, 1033 (2014). Here, too, a rational jury could find that Mr. Franks unlawfully entered Mr. Tsitsis' home, but that he did not have the intent to commit a crime.

In Mr. Franks' case, the evidence established an unlawful entry into a dwelling, but it did not clearly establish the intent to commit a crime inside the residence. A rational jury could thus find that Mr. Franks lacked the necessary intent and criminal trespass in the first degree, not residential burglary, occurred. The second prong of the Workman test is thus met. Workman, 90 Wn.2d at 448.

c. Mr. Franks' conviction must be reversed.

“[T]he defendant had an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed.” Parker, 102 Wn.2d at 166. The trial court's erroneous refusal to instruct on the lesser-included offense of criminal trespass in the first degree requires reversal of Mr. Franks' conviction for residential burglary and remand for a new trial. Id; State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

**2. The trial court erred by admitting unreliable latent fingerprint evidence without a Frye hearing. .**

Mr. Franks moved to exclude latent fingerprint identification evidence provided by Kathleen Swihart of the King County Regional AFIS Program, and he requested a Frye hearing to address whether latent fingerprint analysis continues to be accepted in the scientific community. SuppCP 365-413; 2/25/13 RP 36-42, 46-49. Mr. Franks'

motion was based upon criticism of latent fingerprint analysis found in the 2009 report prepared by the prestigious National Research Council (NRC) of the National Academy of Science. In addressing latent fingerprint analysis, the NRC concluded that the ACE-V method utilized in this case has not been “rigorously shown to have the capacity to consistently and with a high degree of accuracy, demonstrate a connection between evidence and a specific individual or source.” National Research Council of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 7 (2009) (hereafter 2009 NRC Report).<sup>7</sup>

The court denied both motions. 2/25/13 RP 49-51. The court noted that fingerprint comparison had “been around for a very, very, very long [time],” and concluded that the information and argument in defense counsel’s motion had not called into question the general acceptance in the relevant community of the process used in Mr. Franks case. 2/25/13 RP 49, 50.

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<sup>7</sup> Available at [www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf) (last viewed 10/9/14).

- a. Admission of fingerprint evidence must satisfy reliability standards under *Frye v. United States*.

“Trial courts perform an important gate keeping function when determining the admissibility of evidence. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). The admissibility of expert testimony in Washington is generally governed by ER 702.<sup>8</sup> Id. Washington courts apply the *Frye* standard in determining the reliability and admissibility of scientific evidence. *Anderson*, 172 Wn.2d at 602; *State v. Copeland*, 130 Wn.2d 244, 255-60, 922 P.2d 1304 (1996); see *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *Frye* directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony. Evidence based on a scientific theory or principle must have “achieved general acceptance in the relevant scientific community” before it is admissible at trial. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); accord *Frye*, 293 F. at 1014. “[T]he core concern . . . is only whether the evidence being offered is

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<sup>8</sup> ER 702 provides:

If 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.

based on established scientific methodology.” State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). “Unreliable evidence is not helpful to the jury.” Anderson, 172 Wn.2d at 601.

The admissibility of evidence under Frye is subject to de novo review. Anderson, 172 Wn.2d at 600 (Copeland, 130 Wn.2d at 255-56).

b. Changes in scientific opinion may necessitate a *Frye* hearing despite past acceptance of the procedure.

Frye hearings are unnecessary when a scientific practice has been previously found to be generally accepted in the scientific community. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129(1995). However, general acceptance may change over time, and the Frye admissibility determination must take into account any recent changes in the perceived reliability of the instrument or theory in question. State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), rev. denied, 140 Wn.2d 1022 (2000); Blackwell v. Wyeth, 408 Md. 575, 971 A.2d 235, 243 (2009) (Maryland utilizes Frye test in determining if a theory which had met the Frye standard in the past continues to do so). General acceptability is not satisfied “if there is a significant dispute between qualified

experts as to the validity of scientific evidence.” Kunze, 97 Wn. App. at 853 (citing Cauthron, 120 Wn.2d at 887).

This Court recently upheld a trial court’s refusal to conduct a Frye hearing for fingerprint comparison evidence using the ACE-V method in State v. Pigott, 181 Wn. App. 247, 325 P.3d 247 (2014). According to the Pigott Court, “once the scientific community accepts a methodology, application of the methodology to a particular case is matter of weight and admissibility under ER 702.” Pigott, 181 Wn. App. at 249. The court also noted that “the reliability of fingerprint identification has been tested in our adversarial system for over a century and routinely subjected to peer review.” Id. at 251. Scientific opinion, however, is not static, and courts are capable of responding to fundamental shifts in what the scientific community generally accepts.

Fingerprint comparison evidence was introduced in the early 1900’s, when standards for admitting scientific evidence were considerably lower. Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 32 (Fall 2001). “Courts began admitting fingerprint evidence early last century with relatively little scrutiny, and later courts, relying on precedent, simply followed along.” United States v. Crisp, 324 F.3d 261, 277 (4<sup>th</sup> Cir. 2003)

(Michael, J., dissenting). As the 2009 NRC Report observed, “[o]ver the years, courts have admitted fingerprint evidence, even though the evidence has made its way into the courtroom without empirical validation of the underlying theory and/or its particular application.” 2009 NRC Report at 102 (quotation and citation omitted).

The 2009 NRC Report and the other authorities cited by Mr. Franks show that the scientific community’s faith in the scientific underpinnings and methodology of fingerprint comparison analysis has significantly changed. Mr. Franks demonstrated that acceptance of latent fingerprint identification as a science is crumbling and a Frye hearing was required.

c. The 2009 NRC Report is representative of the relevant scientific community for purposes of *Frye*.

In evaluating the admissibility of expert testimony, courts considers whether the underlying scientific theory or methodology is “generally accepted in the scientific community.” State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006). The relevant scientific community includes “the community of scientists familiar with the challenged theory.” Russell, 125 Wn.2d at 41. The Michigan Supreme Court defined the relevant scientific community as “scientists not technicians . . . with direct empirical experience with the procedure in

question.” People v. Young, 425 Mich. 470, 481, 391 N.W. 2d 270 (1986); accord People v. Brown, 40 Cal.3d 512, 530, 726 P.2d 516 (1985) (“The witness must have academic and professional credential which equip him to understand both the scientific principles involved and any difference of view on their reliability.”), reversed on other grounds, 479 U.S. 538 (1987); Ramirez v. State, 810 So.2d 836, 851 (Fa. 2001) (“[G]eneral scientific recognition requires the testimony of impartial experts or scientists. It is this independent impartial proof of general scientific acceptability that provides the necessary Frye foundation.”). The testimony of technicians, like the witnesses in this case, is not sufficient to establish the technique’s validity. Paul C. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Col. L. Rev. 1197, 1214-15 (1980).

In preparing its report, the NRC convened the relevant scholars, forensic scientists, and experts who are qualified to evaluate latent fingerprint examinations. 2009 NRC Report at 2. Committee members included people with long careers in forensic science laboratories as well as academicians and authors. Id. The Committee reviewed published materials, studies and reports, engaged in independent

research, and heard testimony from experts. Id. Latent fingerprint examiners, representatives of the International Association for Identification (IAI), and representatives of major forensic science organizations and crime labs were among those providing testimony. Id. at xi-xii, 304, 305, 307. The report was also reviewed by a group of experts “chosen for their diverse perspective and technical expertise. Id. at xii-xiii.

The United State Supreme Court relied upon the 2009 NRC report for the point that serious deficiencies have been found in the forensic evidence used in criminal trials and “to refute any suggestion that this category of evidence is uniquely reliable.” Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318-20, 319 n.6, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The Melendez-Diaz Court also cited to the report’s discussion of “problems with subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis . . . ” Id. at 320-21. Washington has recognized the conclusions of the NRC regarding the reliability of other scientific methodologies. See Gregory, 158 Wn.2d at 833; Copeland, 130 Wn.2d at 262; Cauthron, 120 Wn.2d at 885. This Court should accept the NRC report’s conclusions as representative of the relevant forensic scientific

community for purposes of evaluating the reliability of fingerprint comparison analysis.

- d. Professionals substantially debate the validity of fingerprint comparisons and the ACE-V methodology.

“[T]he accuracy of latent print identification has been subject to intense debate.” Simon Cole, More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 986 (Spring 2005). In its summary assessment of fingerprint analysis, the NR report pointed out the “limited information about the accuracy and reliability of friction ridge analyses.” 2009 NRC Report at 142. 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 So. Cal. L. Rev. 605, 622 (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.” Epstein, at 622. 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.

The 2009 NRC Report also pointed out the ACE-V method used by fingerprint examiners lacks scientific validity:

ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper by Haber and Haber presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: “We have reviewed available scientific evidence of the validity of the ACE-V method and found none.”

2009 NRC Report at 142-43 (citing J.L. Mnookin, *The Validity of Latent Fingerprint Identification: Confession of a Fingerprinting*

Moderate, Law, Probability and Risk 7:127 (2008)). The report further quotes from researchers' findings that latent print examiners' conclusions differ at each stage of the ACE-V method, their descriptions of the method differ, and the profession has no accepted protocol.<sup>9</sup> Id. at 143. "As a consequence, at this time the validity of the ACE-V method cannot be tested." Id.

In addition, The NRC report found not scientific support for the underpinning of forensic fingerprint identification – the conclusion that all fingerprints are unique and permanent. 2009 NRC Report at 143-44; see 2/27/13 RP 83; 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); Epstein, *supra* n.2, at 623 ("no testing has been conducted to determine the probability of two different people having a number of fingerprint ridge characteristics in common").

The 2009 NRC report was also critical of fingerprint analysts' claims of a zero error rate. 2009 NRC Report at 142. The State's leading expert in this case, however, testified that the error rate in her

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<sup>9</sup> The subjectivity of the ACE-V method is apparent in this case. 2/27/13 RP 29-34, 87-92, 153-54.

field is zero. 2/27/13 RP 112. She was certain of her identification in this case, and related that the only reason she did not testify that she was 100 percent certain was “it’s just a phrase that no longer is used in the fingerprint community.” Id. at 115-16.

As one scholar wrote,

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). The relevant scientific community is not in agreement that latent fingerprint analysis using the ACE-V method is scientifically based or that its results are reliable. The trial court should have granted Mr. Franks’ request for a Frye hearing or excluded the latent fingerprint examiners’ testimony.

e. Mr. Franks’ conviction must be reversed because the court admitted unreliable latent fingerprint evidence.

The error in admitting unreliable evidence requires reversal of Mr. Franks’ conviction. In Sipin, this Court engaged in harmless error review subsequent to determining that simulation evidence using a

particular computer program, which was admitted at defendant's trial, was inadmissible under Frye. State v. Sipin, 130 Wn. App. 403, 420, 123 P.3d 862 (2005). Thus, that defendant had to show that "the outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence." Sipin, 130 Wn. App. at 421. Because absent the unreliable computer simulation, both the State and the defendant produced persuasive identity evidence, the outcome of the trial might reasonably have been different if the computer simulation evidence had been excluded. Id.

In Kunze, supra, on the other hand, Division Two of this Court did not engage in harmless error review. It found simply that the admission of evidence not generally accepted in the scientific community required reversal of defendant's conviction and remand for a new trial. 97 Wn. App. at 857.

Even under harmless error review, reversal is required in this case. Without the latent fingerprint evidence, the State could not place Mr. Franks in the dwelling and thus could not prove an essential element of residential burglary. Consequently, the admission of the unreliable evidence affected the jury verdict and was not harmless. Mr.

Franks' conviction must be reversed and remanded for a new trial because it was based on unreliable latent fingerprint evidence.

3. **The trial court erroneously admitted the latent fingerprint examiner's hearsay testimony that they had been qualified as experts in other cases.**

Two latent fingerprint examiners testified as expert witnesses, and each testified over objection that he or she had been qualified as expert witness in numerous prior trials. These statements were inadmissible hearsay, and the trial court abused its discretion in admitting them. Because the improperly hearsay bolstered the expert witnesses' credibility, Mr. Franks' conviction should be reversed.

a. Mr. Franks moved to prevent expert witnesses from testifying that they had been qualified as experts by other courts.

Prior to trial, Mr. Franks moved to prevent the latent fingerprint examiners from testifying that their testimony had been accepted in other courts or that they had been qualified as experts in the field by other courts on the grounds that such evidence was hearsay. 2/26/13 RP 4-6. The State countered that this testimony was not hearsay because it was not being offered for the truth of the matter asserted, but to show the witness's training and expertise. *Id.* at 5. The trial court opined that testimony that the experts had testified in other cases was

not an out-of-court assertion of a past fact, and therefore not hearsay.

Id. at 6. But the court held that testimony that the witness had been found to be an expert was an assertion of past facts. Id.

When the two later fingerprint examiners testified, however, the trial court overruled Mr. Franks' hearsay objections to their testimony about being qualified as experts in prior trials. 2/27/13 RP 26-27, 125. Ms. Swihart testified that she was accepted as an expert in 40 to 50 trials, and Mr. Verbonus said he had testified 20 to 25 times, and had been accepted as an expert "every single time." Id.

b. The court improperly admitted the hearsay testimony.

The trial court's admission of the experts' prior acceptance as experts was incorrect. By testifying that they had been found to be experts by many courts, the fingerprint examiners communicated the prior judges' opinions of their qualifications and expertise. Each examiner thus related out-of-court statements by prior judges that the witness was an expert in order to prove that he or she was an expert. The evidence was hearsay.

"Hearsay" is a statement, other than one made while testifying at trial, offered in evidence to prove the truth of the matter asserted.

ER 801(c). Unless a rule or statute provides otherwise, hearsay is not admissible at trial. ER 802.

The hearsay in this case is reminiscent of that addressed in In re Detention of Pouncey, 168 Wn.2d 382, 393-84, 229 P.3d 678 (2010). At Pouncey's RCW 71.09 commitment trial, the State was permitted to introduce a trial court opinion in an unrelated case finding that Pouncey's expert's methodologies were not generally accepted in the mental health community. Pouncey, 168 Wn.2d at 386-88. In addition to finding that the prior judge's opinion was irrelevant and unduly prejudicial, the Supreme Court concluded that the impeachment evidence was hearsay that was not admissible under the public records exception to the hearsay rule. Id. at 382-84. "There is no question that the Yakima judge's finding were out-of-court statements used to prove the truth of the matter asserted – that Dr. Wollert's methodologies lacked acceptance by his peers." Id. at 393.

The witnesses' testimony in Mr. Franks' case was similarly hearsay. And, like the judge's findings in Pouncey, it is was not admissible as a public record, which applies to documents that "contain facts and not conclusions involving the exercise of judgment or discretion or the expression of an opinion." Pouncey, 168 Wn.2d a

393-94 (quoting State v. Monson, 113 Wn.2d 833, 839, 784 P.2d 485 (1989), in turn quoting Steel v. Johnson, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)).

This Court reviews evidentiary rulings for an abuse of discretion. Pouncey, 168 Wn.2d at 394. A trial court abuses its discretion when it bases a ruling on an erroneous view of the law. Id. The trial court abused its discretion by admitting hearsay evidence in violation of the evidence rules.

c. Mr. Franks was prejudiced by the hearsay testimony, and his conviction should be reversed.

The State is not permitted to introduce evidence designed to bolster a witness's credibility. See State v. Ish, 170 Wn.2d 189, 199, 241 P.3d 389 (2010) (prosecutor committed misconduct by eliciting testimony that witness entered agreement to testify "truthfully" when credibility had not been first attacked by defense); State v. Bourgeois, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997) (improper for prosecutor to bolster testimony of three witnesses with testimony that they were afraid and reluctant to testify); State v. Smith, 67 Wn. App. 838, 840, 842-43, 841 P.2d 76 (1992) (testimony of law enforcement witness's awards and commendations, that he had been named police officer of the year, and his high class rankings upon graduation from

police academy was inadmissible). The prosecutor also may not improperly place the prestige of her office behind a witness. Ish, 170 Wn.2d at 196.

Here, the evidence improperly vouched for the credibility of the fingerprint examiners by putting the prestige of the courts behind their testimony. Judges are not allowed to comment on the evidence in Washington for fear that the jurors will be swayed by what they believe are the judge's opinions. Const. art. IV, § 16; State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 924 (1995) ("The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.") (citing State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)). Comments on the evidence are presumed prejudicial. Lane, 125 Wn.2d at 838.

Here, the jury was instructed to give any weight it saw fit to expert testimony. CP 170-72, 176. While the jury was told not to be swayed by any comments on the evidence by the trial court, CP 171, nothing prevented them from being swayed by the opinions of numerous other judges concerning the expertise of the two witnesses.

An evidentiary error requires reversal of a criminal conviction when, "within reasonable possibilities, the outcome of the trial would

have been materially affected had the error not occurred.” Bourgeois, 133 Wn.2d at 403. The outcome of Mr. Franks’ trial rested almost entirely on the jury’s belief in the conclusions reached by the latent fingerprint examiners. In turn, Mr. Franks’ defense centered on attempting to discredit the methods used by the experts. This Court cannot be convinced that the outcome of the case would have been different if the State had not been permitted to bolster their expertise with inadmissible hearsay. Mr. Franks’ conviction should be reversed and remanded for a new trial.

#### E. CONCLUSION

The trial court admitted unreliable fingerprint comparison evidence and denied Mr. Franks a Frye hearing to contest the evidence. The court also permitted the State to bolster the fingerprint comparison experts’ testimony with evidence that other courts had found them to be experts.

In addition, the trial court improperly refused to instruct the jury on a lesser-included offense as requested by Mr. Franks. His residential burglary conviction should be reversed and remanded for a new trial.

DATED this 13<sup>th</sup> day of October 2014.

Respectfully submitted,



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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71261-6-I
v.	)	
	)	
DEANTHONY FRANKS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF OCTOBER, 2014, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DEANTHONY FRANKS 345832 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF OCTOBER, 2014.

X \_\_\_\_\_ 

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