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February 3, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73162-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW RAYMOND WASHINGTON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

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A. ISSUES PRESENTED

1. Was there sufficient evidence to prove that Washington committed a residential burglary where two fingerprint analysts testified that his fingerprints were found on a jewelry box stolen in a residential burglary and then dropped – as witnessed by a neighbor – by the burglar leaving the crime scene, and where Washington did not call his own expert to rebut the testimony of the two analysts?

2. Should this court refuse to adopt a special rule for evaluating the sufficiency of the evidence in cases involving fingerprint evidence?

B. STATEMENT OF THE CASE

Karina and Andrew Bloom went to work early on the morning of August 12, 2013. RP 1/6/15 29, 138. There was a bedroom window in the second story of their house, above their garage, with some lattice leading up to the window. RP 1/6/15 54, 142. Because it was a hot day, they left the window open. RP 1/6/15 64.

That afternoon, their next door neighbor Christopher Caldwell was walking home when he noticed a man standing at the top of the stairs of the Bloom house as if waiting for someone to

come to the door; he was "ruffling" through his pockets. RP 1/6/15 61-62. The man was white, in his twenties, about five feet, nine inches tall, with a thin athletic build. RP 1/6/15 63.

After Caldwell passed the Bloom house he heard a window break, so he ran back and saw a man struggling to enter the window above the Blooms' garage; the man's feet were protruding from the window. RP 1/6/15 67-68. Caldwell called 911 but kept an eye on the house. RP 1/6/15 68-69. The man who had originally been standing at the door exited the house about ten minutes later, walking casually out the front door and down the steps to the street. RP 1/6/15 69-70. After reaching the sidewalk the man started to walk down the street, and a small white department store gift-type box dropped to the sidewalk, making a clanging sound as it hit the pavement. RP 1/6/15 70. The man continued walking and eventually disappeared into some bushes at the end of the block. RP 1/6/15 71. Caldwell did not see him after that. RP 1/6/15 71. Caldwell watched the box that had been dropped and he was certain that nobody touched it before police arrived. RP 1/6/15 73. He identified the box at trial. RP 1/6/15 74.

Karina Bloom testified that a number of boxes like the white box seen by Caldwell had been taken from the house in the

burglary. RP 1/6/15 31-33, 41. Police were able to lift a latent print from the box and they submitted it to the Seattle Police Department fingerprint examiners for analysis. RP 1/6/15 109-12. The latent print had been found on the bottom of the jewelry box. RP 1/7/15 19.

Washington was subsequently charged with residential burglary. CP 1; RCW 9A.52.025. The State moved to take fingerprints directly from Washington to compare with the fingerprint found on the jewelry box.<sup>1</sup> RP 7/17/14 3. The request was granted. RP 7/17/14 4. Washington's trial counsel then asked for a trial date continuance of one month because, "I need to get my own expert to take a look at this fingerprint issue and make sure that I am prepared for this trial." RP 7/17/14 4. The trial court granted that request. Id. at 51; Supp. CP \_\_\_\_ (Order Continuing Trial, Sub No. 33). Counsel subsequently applied for and received funding for an expert. Supp. CP \_\_\_\_ (Order Sealing Document, Sub No. 51); Supp. CP \_\_\_\_ (Motion and Certification for Expenditure / Sealed

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<sup>1</sup> There had been a rash of burglaries where women's jewelry was stolen in this area of Seattle. Washington was investigated in at least one such incident but police could not definitively connect him to the burglaries. However, based on that arrest, Washington's fingerprints were compared to the latent print lifted in this case. The trial court suppressed this information. See RP 1/5/15 5-25. The fresh set of fingerprints from the defendant were needed to confirm identification. RP 1/7/15 3.

per Sub No. 51); Supp. CP \_\_\_\_ (Order for Expert Services, Sub No. 57, sealed per Sub No. 51). Washington did not call an expert witness. CP 19.<sup>2</sup>

At trial, fingerprint examiner Ms. Aliya Moe testified that she examined the fingerprint and determined that it matched the known fingerprints of Washington. RP 1/6/15 87; 1/7/15 16-19. Moe described in great detail her training and experience. RP 1/6/15 85-95. She has degrees in criminal justice and sociology and a forensic certificate from the University of Washington. RP 1/6/15 86-87. She went through 18 months of fingerprint identification training involving classes, practice cases, and reviews of her work before starting work with Seattle and, even then, she assisted and trained for one full year before she was allowed to touch any real case. RP 1/6/15 88-90. She has a certificate in latent print examination and crime scene investigation from the International Association for Identification. RP 1/6/15 88. She noted that 10 percent of all cases in the Seattle lab are routinely reviewed for quality assurance and that each case is extensively documented. RP 1/6/15 91-92. She must be reassessed every four years by a

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<sup>2</sup> Defense counsel brought a "motion to exclude testimony regarding retention of Defense expert and speculation as to expert findings." CP 19; RP 1/5/15 5. The State did not oppose that motion.

private firm to ensure that her skills are up to date. RP 1/6/15 92.

She also described the process for laboratory accreditation.

RP 1/6/15 169. Moe has personally made thousands to tens-of-thousands of fingerprint comparisons.

Moe also testified in great detail about fingerprints and the processes for analyzing them. RP 1/6/15 173-79; 1/7/15 9-13. She described the ACE-V technique of fingerprint analysis, and how there are three levels of detail that an examiner focuses on and that different levels of detail are worth more or less depending on their rarity. RP 1/6/15 178. In the end, the examiner must make a judgment as to whether the print is of comparison value and, if it is, then the print is compared to the known sample and evaluated.

RP 1/6/15 178.

Moe testified about the analysis she conducted in this case and she led the jury through a step-by-step description of her work by referring to a series of substantive and illustrative exhibits that were projected in the courtroom so the jury could follow along.

RP 1/7/15 15-19, 22-26. In the end, Moe concluded that the latent fingerprint pattern from the jewelry box matched the patterns on the ring finger from Washington's right hand. RP 1/7/15 19-20, 26.

Moe testified that the fingerprint was "relatively clear" for a latent

print and that it was of "good quality." RP 1/7/15 21. She showed the jury some "minutiae" that were in agreement between the two prints and that those areas gave her "high confidence" in her decision. RP 1/7/15 23.

Moe acknowledged that there are not fixed standards for how many points of comparison must be found before an examiner can determine that two prints match. RP 1/6/15 178; 1/7/15 31-32, 37-38. She acknowledged that there are critics of fingerprint analysis who say more comprehensive study is needed and that more should be done to eliminate bias on the part of the examiner. RP 1/7/15 41. She confirmed that although her supervisor reviewed her work, the fingerprint was not sent to an outside laboratory for analysis. RP 1/7/15 41. She said it was not typical to seek outside verification. RP 1/7/15 61. She acknowledged, however, that it was possible for an examiner to make a mistake. RP 1/7/15 47. She answered numerous questions from both lawyers as to the extent and nature of the controversy over fingerprint analysis. RP 1/7/15 50-65.

Moe's supervisor, Katie Hosteny, also testified at trial. RP 1/7/15 70-89. She has five years' experience as a forensic fingerprint examiner and has compared tens of thousands of prints.

RP 1/7/15 70-73. She verified Moe's results by conducting a review of the entire case file and by doing an independent comparison between the latent print from the jewelry box with Washington's known prints. RP 1/7/15 73-75. She testified about the details of her examination and said that she concluded the latent print was from Matthew Washington. RP 1/7/15 77-82. She said that "it is not a very complex print. It is pretty clear." RP 1/7/15 88. She agreed it was possible for an examiner to err. Id. at 89.

C. ARGUMENT

Washington argues that insufficient evidence supported his conviction for residential burglary because the conviction depended on fingerprint evidence and that evidence is now understood to be unreliable. He is mistaken. Under the standard of review for sufficiency challenges, the evidence presented by the non-moving party is presumed true and all inferences from that evidence are drawn in favor of the non-moving party. Thus, the State's un rebutted fingerprint evidence must be presumed true. That evidence necessarily establishes Washington's guilt.

Washington argues, however, that this court must adopt a special rule when fingerprint evidence alone is the basis for

conviction, because fingerprint evidence is now recognized to be unreliable. This argument should be rejected. Washington was not convicted based on fingerprint evidence alone. Even if he was, a special rule should be rejected because fingerprint evidence remains a powerful and reliable form of evidence, there is no reason or authority for creating a special rule limiting its use at trial, and any concerns about the reliability of any given fingerprint comparison is best alleviated by providing the defendant with an independent expert who can assess the State's analysis and testify at trial, if needed. This court need not fashion a new standard of review for the sufficiency of fingerprint evidence.

1. SUFFICIENT EVIDENCE SUPPORTED  
WASHINGTON'S CONVICTION.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319. “The purpose of this standard of review is to ensure that the trial court fact finder ‘rationally appl[ie]d’ the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt.” State v. Rattana Keo Phuong, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (alteration in original) (quoting Jackson, 443 U.S. at 317-18), review denied, 182 Wn.2d 1022 (2015).

A claim of evidentiary insufficiency admits the truth of the State’s evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Circumstantial evidence and direct evidence can be equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This court defers to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

Washington cannot prevail on a sufficiency challenge under this standard. The un rebutted testimony showed that Washington lived near the Bloom residence. A neighbor who saw the burglar emerge from the Blooms' house described a person similar to the defendant drop a small white box and the neighbor said nobody else touched that box before officers arrived. Two expert fingerprint analysts testified that the fingerprint from the jewelry box dropped by the burglar matched the fingerprint on Washington's right ring finger. A print at that location on the box was consistent with how a person would grip a small jewelry box. The fingerprint was not complex, the comparison was "quite clear," and the examiner had a high degree of confidence in her analysis. To the extent the State's expert confirmed on direct and on cross-examination that there was controversy over the topic of fingerprint analysis, Washington's critique was available for the jury to consider. Plainly, sufficient evidence supported this conviction under the ordinary standard of review.

2. NO NEW STANDARD OF REVIEW IS NEEDED FOR FINGERPRINT EVIDENCE.

Apparently recognizing that the evidence against him was strong, Washington argues that a different standard of review should be adopted for review of fingerprint evidence. He argues that fingerprint evidence "by itself" should not be sufficient to convict. This argument should be rejected. There is a long history of justified reliance on fingerprint evidence. Recent critiques simply establish that fingerprint analysis is, like most human endeavors, potentially fallible. The critiques do not show that fingerprint evidence is generally unreliable. In any event, flawed fingerprint analysis is best exposed through expert testimony. Washington exercised his rights under the Sixth Amendment to retain an expert. If his expert disagreed with the State's experts, Washington certainly could have exercised his rights under the Compulsory Process Clause to summon that expert to testify at trial.

a. There Is No Legal Or Logical Basis For A Different Standard.

Review for the sufficiency of the evidence is based on the federal constitution and ensures that a conviction meets certain minimum standards.

Sufficiency review essentially addresses whether “the government’s case was so lacking that it should not have even been submitted to the jury.” Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978) (emphasis deleted). On sufficiency review, a reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a “meaningful opportunity to defend” against the charge against him and a jury finding of guilt “beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 314-315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court considers only the “legal” question “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id., at 319, 99 S.Ct. 2781 (emphasis in original). That limited review does not intrude on the jury’s role “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” Ibid.

Musacchio v. United States, No. 14-1095, 2016 WL 280757, at \*5 (U.S. Jan. 25, 2016). Washington has cited no authority that would justify the creation of a new sufficiency standard.

Washington appears to rely, instead, on cases where appellate courts have refused to base a conviction solely on a certain category of evidence and he argues that those cases are analogous to a case built on fingerprints. The comparison is inapt.

This Court has recently reviewed and rejected a number of challenges to the admissibility of fingerprint testimony. For instance, in State v. Pigott, 181 Wn. App. 247, 325 P.3d 247 (2014), this Court rejected an argument that fingerprint evidence

must be subjected to a Frye<sup>3</sup> hearing. This Court noted that the ACE-V technique used in that case was not novel, that it "has been tested in our adversarial system for over a century and routinely subjected to peer review," and that it was generally accepted in the relevant scientific community. Pigott, 181 Wn. App. at 249-50. Critics of the ACE-V technique argue that fingerprinting is "not an exact science," that the Office of the Inspector General investigated a mistaken fingerprint match in a high-profile terrorist bombing investigation, and that the National Academy of Sciences has recommended further study of fingerprinting techniques. Pigott, at 250-51. Still, this Court held that these criticisms were not sufficient to undermine the general reliability of fingerprint analysis. Id. at 251. Objections to the analysis could be weighed by the jury. Id.

In State v. Lizarraga, No. 71532-1-I, 2015 WL 8112963 (Wash. Ct. App. Dec. 9, 2015), this Court again rejected an argument that a Frye hearing was required as to fingerprint evidence. Lizarraga, 2015 WL 8112963 at \*19. The Court also rejected an argument that restrictions should be placed on the testimony of the expert witnesses. Id.

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<sup>3</sup> Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

These decisions are consistent with the weight of authority. See Johnston v. State, 27 So.3d 11, 21 (Fla.2010) (NAS report “lacks the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty”); United States v. Rose, 672 F.Supp.2d 723, 726 (D.Md.2009) (despite NAS report, “fingerprint identification evidence ... 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”); Commonwealth v. Gambora, 457 Mass. 715, 933 N.E.2d 50, 55-61 & n.22 (2010) (“nothing in this opinion should be read to suggest that the existence of the NAS [r]eport alone will require the conduct of ... hearings as to the general reliability of expert opinions concerning fingerprint identifications”); Com. v. Joyner, 467 Mass. 176, 184-85, 4 N.E.3d 282, 291 (2014) (The weight and credibility to be accorded the identification evidence provided by Foley’s testimony was for the jury to determine”).

Washington does not cite a single case holding that the critiques of fingerprint evidence have undermined the reliability of the evidence in any general sense. Thus, there is no reason to create a special rule on review as to fingerprint cases.

Washington argues, however, that fingerprint analysis is like dog tracking, confessions, and possession of stolen property, and that since those types of evidence are not sufficient standing alone to support a conviction, fingerprint evidence should likewise be insufficient to support a conviction. This argument should be rejected.

First, it is incorrect to say that Washington was convicted based on fingerprint evidence, alone. It is certainly true that fingerprint analysis was significant in this case. But there was other evidence suggesting the defendant's guilt. For instance, the witness who saw the burglar described a man similar to the defendant in age, build, height, and race. The defendant also lived within one mile of the crime scene. The jury was certainly entitled to conclude that there was a very low logical probability that by chance the fingerprint from the jewelry box dropped by the burglar matched a person who looks a lot like the defendant, and who happens to live within a mile of the burglary. In other words, the match in description bolstered the match based on fingerprints.

Even assuming, *arguendo*, that Washington was convicted based on fingerprints alone, this Court should hold that his comparisons to other types of evidence are not apt. The court in

State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983) held that a conviction could not be based solely on dog track evidence, but this holding was based on the widespread belief that dog tracking evidence was not sufficiently reliable to support a conviction.<sup>4</sup> Courts nationwide had held that the evidence was unreliable. Loucks, 98 Wn.2d at 566-67. Moreover, the critics of fingerprint evidence still concede that fingerprint analysis is more reliable than eyewitness testimony, yet eyewitness testimony can establish identity. See State v. Delker, 35 Wn. App. 346, 351, 666 P.2d 896 (1983). And, even if confessions are to be received with caution, there is no showing that fingerprint evidence is questionable to the same degree. Finally, evidence that a person possessed recently stolen property is not sufficient to convict of burglary as a matter of simple logic, not because possessory evidence is comparable to fingerprint analysis. For these reasons, Washington's reliance on Loucks and similar cases is unpersuasive.

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<sup>4</sup> There were also several pieces of evidence in Loucks that were *inconsistent* with guilt, like the fact that blood at the scene did not match the defendant. There is nothing comparable in this case.

b. Washington's Rights Are Sufficiently Protected By The Sixth Amendment And The Compulsory Process Clause.

There is another reason to refrain from treating dog tracks or confessions the same as fingerprints: the former is not readily susceptible to replication and peer review, whereas the latter is easily reviewed and critiqued by an expert witness because it need not be replicated; the latent print *itself* exists for independent review.

The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial, and the Sixth Amendment right includes a "reasonable investigation" by defense counsel, including access to expert when needed. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The defendant is also guaranteed the right to compel witnesses to testify on his behalf. Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

A dog track occurs in the field and is not reproducible after-the-fact. Similarly, a confession once taken cannot be retaken and, unless recorded, an analysis of its reliability cannot be directly tested. This is not true for fingerprint analysis. Latent fingerprints lifted from a surface or an item of evidence can be independently

examined after the fact. And, of course, fingerprints can always be taken anew from a defendant.

Thus, any defendant who is charged with a crime based on a comparison of latent fingerprints to his fingerprints has a full opportunity to challenge that evidence simply by invoking his Sixth Amendment right to counsel, which includes the right to hire experts. The expert can compare the latent prints to his own fingerprints to see whether the State's expert has properly arrived at the conclusion that the questioned print belongs to him.

Washington took advantage of these rights in the instant prosecution. He hired an expert before trial and most certainly could have called that expert as a witness had the expert concluded that the State's analysis was flawed. These rights provide concrete protection against conviction of an innocent person based on flawed fingerprint analysis. That sort of protection is not available to the same degree with dog tracks and confessions, and it is not available as to inferences a juror might draw from evidence of possession of stolen property. Thus, the fact that defendant can hire an expert to critique fingerprint analysis makes the comparison to the other categories of case, and the rules those cases espouse, simply inapposite in this context.

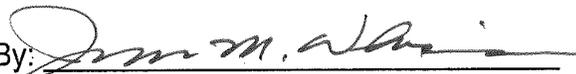
D. CONCLUSION

Fingerprint analysis is sufficiently reliable to support a conviction. There is no reason to believe that Washington's conviction was based on tainted evidence. His attacks on the sufficiency of the evidence and his request for a new rule of review should be rejected, and his conviction should be affirmed.

DATED this 3<sup>rd</sup> day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the Brief of Respondent, in State v. Matthew Raymond Washington, Cause No. 73162-9, 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.

Dated this 3<sup>rd</sup> day of February, 2016.

U Brame

Name:

Done in Seattle, Washington