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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

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SC Court of Appeals

Court of General Sessions

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001739

THE STATE,

Respondent,

v.

KENDALL JEROME TYUS, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly admitted the fingerprint identification evidence implicating Appellant in the crime because fingerprint identification evidence is extremely reliable and universally accepted.

II.

The trial judge did not abuse her broad discretion by qualifying Lisa Kubicsko as an expert in latent fingerprint analysis where she personally possessed the requisite knowledge, skill, training, and experience to qualify as an expert in latent fingerprint examination.

STATEMENT OF THE CASE

Appellant was indicted at the March 2013 term of the Charleston County Grand Jury for armed robbery (2013-GS-10-01496) and possession of a firearm during the commission of a violent crime (2013-GS-10-01497). Appellant proceeded to a trial by jury from July 13-15, 2015, in Charleston, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable Deadra L. Jefferson to imprisonment for a term of thirteen years for armed robbery and imprisonment for a term of five years for possession of a weapon during the commission of a violent crime, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Mr. Sunny Lee owned a restaurant on Dorchester Road in North Charleston. R. p. 87. On the evening of October 22, 2012, Mr. Lee was working in the kitchen area of the restaurant and Mrs. Lee was working at the front of the restaurant at the cash register. R. p. 86. While he was in the kitchen, Mr. Lee heard his wife cry out the word "gun" repeatedly. R. p. 86. Mr. and Mrs. Lee subsequently ran out of the back door of the kitchen. R. p. 89. They proceeded to run around the building, where they encountered a man walking out of the front door carrying the drawer from the cash register. R. p. 90. Mrs. Lee told Mr. Lee, "Oh, that's the man, that's the man." R. p. 90. It was dark outside, so Mr. Lee was unable to get a clear look at the robber's face. R. p. 91. Mr. Lee noticed the robber wearing a striped jacket, white sneakers, and jeans. R. p. 91. Mr. Lee stated that after the robber ran away, he and his wife returned to the restaurant and called 911. R. p. 92. Mr. Lee testified that he had a surveillance system in his restaurant, consisting of eight different cameras around the restaurant. R. p. 93. He obtained a copy of the video surveillance on the night of the robbery and showed the tape to police. R. p. 95. The video shows a man grabbing the cash register drawer out of the cash register. R. p. 99.

Sean Perkins is a patrolman with the City of North Charleston Police Department. R. p. 105. At 7:27 PM on October 22, 2012, Perkins was dispatched to a robbery that just occurred at Under the Sea Restaurant in North Charleston. R. p. 107. Perkins testified that when he arrived at the restaurant, the only people there were the victims, Mr. and Mrs. Lee. R. p. 107. Mr. and Mrs. Lee informed Officer Perkins they were robbed at gun point by an unknown black male. R. p. 108. Perkins subsequently viewed the video surveillance and confirmed the culprit was a black male. R. p. 108. Later, more officers and the crime scene unit arrived to investigate and process the scene. R. p. 109. It was brought to Officer Perkins' attention that there was a money tray

found just along the side of the building. R. p. 109. Officer Perkins stood by the cash drawer until the crime scene unit could process and collect it. R. p. 110.

Lisa Kubicsko is employed as a civilian crime scene technician by the North Charleston Police Department. R. p. 120. At the time of trial, Kubicsko had been employed by North Charleston Police Department for a little over four and a half years. R. p. 120. As a crime scene technician, Kubicsko responds to crime scenes and is responsible for documenting the scene by taking photographs and notes, locating and collecting evidence, packaging evidence, and preparing any kind of paperwork for further analysis. R. pp. 120-21. Kubiscko is also a latent examiner for the police department and had worked in that capacity for around four years at the time of trial. R. p. 121. On October 22, 2012, Kubicsko was working the evening shift when she received a call requesting a crime scene response. R. p. 160. Upon arriving at the scene, Kubickso made contact with the officers on the scene to ascertain what happened. R. p. 161. She then began taking photographs. R. p. 161. Kubicsko also reviewed the surveillance video of the robbery. R. p. 161. While watching the surveillance video, Kubicsko noted the culprit was not wearing gloves. R. p. 163. Kubicsko used the video as a blueprint for where she wanted to collect fingerprints and DNA. R. p. 163. In the video, Kubicsko observed Appellant touch the pull handle on the front door, the restaurant counter, the drawer of the cash register, and the push bar on the door as he exited. R. pp. 163-64. Kubiscko explained the collection technique for fingerprints:

> The main technique that we use is the black powder and the fiberglass brush, which is a very fine carbon-based powder. We dip the brush in and process the area. That powder adheres to the oil deposited in the pattern of your fingerprint. So then what we do is take a clear lifting tape and place it over that fingerprint. Lift the tape, which lifts the powder in that pattern and place that on the white backer card like you saw in the photograph. And that preserves it so that we can later do the latent examination on it.

R. p. 174-75. Kubicsko recovered four latent backer print cards from the interior front door, one latent backer card from the base of the cash register inside the business, and three latent backer cards from the cash register's money tray. R. p. 175. Kubicsko also collected DNA swabs from the counter, cash register, and cash drawer. R. p. 177. After she was finished photographing the scene and collecting DNA and fingerprints, the field investigation was complete and Kubicsko returned to the central police station. R. p. 177.

Kubicsko entered one of the fingerprints into the Automated Fingerprint Identification System (AFIS) to try and identify a suspect. R. p. 178. Kubicsko determined that fingerprint 1.1 was the clearest and most defined of all the fingerprints she took at the scene of the robbery. R. pp. 178-79. The AFIS system subsequently returned a match for the fingerprint. R. p. 181. Kubicsko looked up the identification number for the fingerprint that was a match for 1.1 and found that the print belonged to Appellant. R. p. 184. Kubicsko then wrote a report, gave it to another latent examiner to verify, and informed detectives once the match had been verified. R. p. 184. Kubicsko later went to Appellant's residence to assist with the search warrant. R. p. 184.

At Appellant's residence, Kubicsko was responsible for photographing the residence, assisting in searching for evidence, and collecting it from the residence. R. p. 185. As Kubicsko and the detectives walked into the house, they noticed some money underneath the couch. R. p. 218. Detectives also discovered coins and nine-millimeter bullets inside a drawer in Appellant's room. R. p. 220, 222. Detectives also located a pair of white sneakers consistent with the shoes the suspect was wearing in the video of the robbery. R. p. 224. Detectives found a jacket with a white stripe consistent with the jacket in the video. R. p. 226. Detectives also discovered money hidden under the seat cushion in a room adjacent to Appellant's bedroom. R. p. 229. When walking down the hallway towards the bedroom, Detectives noticed insulation from the attic on

the floor below the attic door. R. p. 237. Detectives surmised someone was recently in the attic. R. p. 238. Detectives went into the attic and found a 9 millimeter semi-automatic handgun. R. p. 238, 241.

On January 11, 2013, Kubicsko conducted a full analysis of the remaining fingerprints. R. pp. 196-97. Kubicsko explained that when there is a match, she is one hundred percent certain that the two fingerprints are the same. R. p. 204. Kubicsko further explained there are situations where someone can be excluded by comparing fingerprints, meaning the examiner is one hundred percent certain that the latent print is not a match for the individual. R. pp. 203-04. Kubicscko also explained some analyses result in an "insufficient" determination. A print is deemed to be insufficient when the fingerprint itself is insufficient for identification. R. p. 204. Another possible result is an "inconclusive" match. An inconclusive match simply means there may be some matching characteristics; however it is not enough to identify or exclude someone. R. p. 204.

The first latent backer card, labeled L1, contained prints collected from the money tray found outside the restaurant. R. p. 196. Specifically, L1 contained a series of four fingerprints (1.1, 1.2, 1.3, and 1.4) that Kubiscko opined were a "simultaneous impression." R. p. 186, 202. A simultaneous impression means multiple fingerprints were left at the same time by touching the surface. Tr. p. 186. L1 also contained print 1.5, which was a separate lift from the money tray. R. p. 202. As previously noted, print 1.1 was a match for Appellant's right ring finger. R. pp. 181-84. Kubiscko also determined 1.2 matched Appellant's right index finger, 1.3 matched Appellant's right ring finger, and 1.4 matched Appellant's right little finger. R. p. 186, 197.

The second latent backer card, labeled L2, contained two fingerprints 2.1 and 2.2, which were taken from the inside of the door. R. p. 205. Appellant was excluded as a match for 2.1 and

2.2 was insufficient for identification. The third latent backer card, labeled L3, contained a palm print from the cash register. R. pp. 205-06. The analysis of L3 resulted in an inconclusive match. R. p. 206. The fourth latent backer card, labeled L4, contained a joint print from the money tray found outside the restaurant. R. p. 206. The analysis of L4 also yielded an inconclusive result. R. p. 206. The analysis of the remaining latent backer cards, labeled L5, L6, L7, and L8, all resulted in the conclusion that the fingerprint was insufficient for identification. R. p. 206.

Kubicsko testified all of her fingerprint analyses are verified by a second technician R. p. 201. For the initial report prepared for fingerprint 1.1, Kubiscko's analysis was verified by Sergeant Andrew Coker. R. p. 201. For the remainder of the report where Kubicsko examined the rest of the fingerprints, her work was verified by Al Hallman. Hallman agreed with her assessment that Appellant's fingerprints were on the register tray. R. p. 208. Hallman also agreed with her assessment regarding the remaining fingerprint lifts, which were all found to be either inconclusive, insufficient, or that Appellant could be excluded as a match. R. p. 208.

ARGUMENT

I.

The trial judge properly admitted the fingerprint identification evidence implicating Appellant in the crime because fingerprint identification evidence is extremely reliable and universally accepted.

Relevant Facts

Prior to jury selection, Defense Counsel noted they had a written motion to suppress the fingerprint evidence. R. p. 3. Defense Counsel's written motion stated:

> The fingerprint evidence should be suppressed because it lacks reliability and the Crime Scene Investigator's investigation and proffered testimony fails to meet the Daubert[1] standard for the admissibility of scientific evidence. Defendant further argues that the search warrants should be suppressed under Delaware v. Franks[2] because the Magistrate's finding of probable cause rests entirely on the unreliable fingerprint evidence. In the alternative, under Delaware v. Franks, the Magistrate's determination of probable cause was based on the affiant's false statements.

R. p. 363 (Motion to Suppress Fingerprint Evidence and Search Warrants). The trial judge later noted, "Now, I've read your motion. Some of it goes to her expertise, not to suppression." R. p. 9. The trial judge asked Defense Counsel, "What is your offer of proof that - - and I think we know that the fingerprint evidence is reliable. Wouldn't you say that's really a moot issue? I think the US Supreme Court has addressed that many times." R. pp. 9-10. Defense Counsel responded, "Yes, Your Honor. It is generally accepted so it passes the Frye Standard, F-R-Y-E, but also since the Daubert Standard, D-A-U-B-E-R-T, it's now the five point standard as the court --." R. p. 10. The trial judge responded, "I think fingerprint evidence is more than reliable. I think it's more than accepted generally in our courts." R. p. 10. Appellant continued his assertions regarding the insufficiency of the fingerprint evidence, now focusing on his argument

[1] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
[2] Franks v. Delaware, 438 U.S. 154 (1978).

that, pursuant to Franks v. Delaware, there was not probable cause for the search warrant of Appellant's residence because of an alleged false statement contained in the affidavit. (R. p. 12).

Later, during the pre-trial hearing on Appellant's Franks v. Delaware motion, the trial judge stated:

> Now, the issues of whether the science was reliable and whether it meets the scientific standard, I think those are all foregone issues. The United States Supreme Court's already addressed all of those issues routinely around the United States. Whether she can be qualified as an expert or whether she did her job thoroughly or not, all of that is fair game, but that's not the basis for whether there was a lack of probable cause in the warrant.

R. p. 51. During the Franks v. Delaware hearing, where Appellant alleged the search warrant was based on a false statement by Kubicsko regarding the fingerprint match, the trial judge told Defense Counsel:

> What you would need to prove to me is that either she fabricated this print, she took it from somebody else's crime scene, or otherwise, to meet your burden of proof that she had a reckless disregard for the truth or it was completely false when she entered it into AFIS. It's not a situation where she lifted a print and she went through a bunch of cards and said, I compared the ridge details and patterns and, blah, blah, blah, and I think it's him. She ran it through AFIS, a totally objective process[3] that flags whose prints are in the system and whose DNA is in the system. That's the whole purpose of why we have that database, to aid law enforcement.

R. pp. 59-60.

At the conclusion of the suppression hearing, the trial judge found Appellant failed to meet his burden of proof and denied the motion to suppress. R. p. 73. The trial judge later reiterated, "There is no question regarding the science that is employed in latent print examination. It is the same that is employed by every latent print examiner and there is no

[3] Appellant misrepresents this quote as evidence the trial judge believed the entire process of fingerprinting was a "totally objective process." Rather, the trial judge was discussing the AFIS database and how the database itself objectively flags fingerprints and DNA that is a match for the sample provided. The trial judge demonstrated an understanding that there were some subjective elements to fingerprint examination when discussing the use of standards by fingerprint examiners. The trial judge stated, "They always use the same standard, **and to some extent**, it's objective." R. p. 132. (emphasis added).

contest regarding that." R. p. 151. Kubicsko was subsequently qualified as an expert in crime scene analysis and latent fingerprint examination. R. p. 160.

During her trial testimony, Kubicsko offered the following description of entering the first fingerprint (1.1) into AFIS:

> So with 1.1, to run the fingerprint in the system what we do is the system has a camera attached which takes a picture of that fingerprint. It then brings it up and I'm able to play with the contrast, the brightness, just to make it more visible. Then I will identify certain ridge characteristics or what we call minutiae, which are ending ridges and bifurcations. Ending ridge is a ridge that will end and a bifurcation is one ridge that would turn into two ridges. So those are the two characteristics that we use in the system to mark. So I searched the system - - I marked those system and I submitted the search for that print. I marked - -for the first search that I did, I marked 26 points of minutiae. And I ran this in the database as finger number nine, which would be your left ring finger. The finger number system that we use corresponds to how ten-print cards are made. Number one is the right thumb, two, three, four, five, six, left thumb and so forth. So we use this same numbering system when we do our work. So the first search I did, I didn't get a result and that's because I ran it as finger nine - - the finger nine. So after looking at the latent print, looking at 1.1 and 1.2, 1.3 and 1.4, I see these, as a latent examiner, as a simultaneous impression, meaning that they were deposited at the same time. They appear to be in the same pattern as a normal handprint on a surface. So based on the length of those fingers, I thought it was the number nine finger. At that point I determined, you know what, maybe it is the right hand instead of the left. Let me run it as the finger nine and the number three, as the middle finger. So I ran that with 46 points of minutiae this time and I got an AFIS hit, which identified it as finger number three, the middle finger.

R. pp. 179-81. Kubicsko further explained the AFIS system results as:

> So I set the parameters for the search to return ten respondents, ten known fingerprints that could possibly be a match. And it ranked it from number 1 to 10; 1 being scored with the best possible match. I then start with the number 1 and manually compare the latent print 1.1 to the first search response.

R. p. 181. Kubicsko continued:

> I then, one, reported it on an AFIS worksheet that we use to keep track of how many minutiae points we searched and the search parameters and all that. I then use a different part of the system to look up that SID number to determine the name associated with it.

R. pp. 183-84. When asked what the basic factors that are used to identify someone a fingerprint, Kubicsko testified:

> The two principles that we use that allow us to use fingerprints to identify one person and one person only is the fact that they are unique. Each person has their own fingerprints and they are persistent, meaning that they are the same throughout your life. Even if you cut through the skin deep and - - into, and that would create a scar which essentially further identifies you because now you have a scar on your finger.

R. pp. 195-96. She continued, "So once I got the database hit to the identification number and I looked up what name came to the identification number, I can then print their known standard, and that is what I would use to compare to the - - on the latent print." R. pp. 197-98. Finally, Kubicsko explained the process she followed in making a match in Appellant's case:

> What I have is the latent impression 1.1 that you saw on the latent backer card and this is the inked fingerprint of the middle finger or Kendall Tyus. This is the hit that was created in the database. So the first thing I want to do when I'm comparing the unknown latent to a possible known standard is look at the general pattern. We have several pattern types: Loop, right loop, left loop, whirls and arches. So in this case I determined I have the same pattern type, same ridge flow, so then I continue to look for specific characteristics a little more closely and that's when I marked the ending ridges or bifurcations that I have found. So here I have demonstrated ten specific matching characteristics between the two. There are many more. I've just marked two clearly so that you can see, and I'm sure if you look close enough you can even see one that are not marked that would be a match. So this is the same process that I went through with each individual print that I identified. Now, in addition to identifying some, we can also exclude. We could exclude someone if the patterns are actually different, if they don't have the same characteristics in both, and if they don't have the same spatial arrangement, meaning what I do is not only do I find the corresponding detail, they need to be in the same spatial arrangement. And we find that out by counting ridges. So I will count ridges form one point to the other and make sure that they all match in both, and that's how I make the identification.

R. pp. 199-201. Kubicsko also noted that her initial report she completed for print 1.1 was verified by Sergeant Coker. R. p. 201. The report she completed for the remaining prints was verified by Al Hallman. R. p. 208.

Discussion

Appellant contends the trial judge erred in allowing Kubicscko to testify regarding her analysis of fingerprints because the State failed to establish the reliability of the underlying science. Specifically, Appellant asserts, "Despite the trial judge's conclusion that fingerprint analysis is unassailable, its subjective nature leaves it quite vulnerable on multiple fronts to attack. At a minimum, the judge erred in failing to require the state to present evidence of the methodology employed by Kubicsko in conducting her analysis and the reliability of the methodology." Br. of Appellant. p. 15. Appellant uses language from a 2009 report from the National Research Council[4] to support his argument for the exclusion of fingerprint evidence. Contrary to Appellant's contention, the trial judge was not required to compel the state to present evidence of the reliability of fingerprint identification because fingerprint evidence is extremely reliable and universally accepted, thus the trial judge is not required to hold a hearing on reliability in every case where fingerprint identification evidence is at issue. The use of fingerprint evidence is one of the cornerstones of the investigative process used by law enforcement throughout the country. Tellingly, Appellant is unable to cite to any case where fingerprint evidence was found unreliable. Rather, every Court that has examined the issue has quickly dismissed the notion that fingerprint evidence is scientifically unreliable.

South Carolina Rule of Evidence 702 states:

> 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.

Rule 702, SCRE. In determining the admissibility of expert testimony, South Carolina courts make three inquiries. "First, the court must determine whether 'the subject matter is beyond the

[4] Committee on Identifying Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United Stated: A Path Forward (2009) (hereinafter "NRC Report").

ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.'" Graves v. CAS Medical Systems, Inc., 401 S.C 63, 74, 735 S.E.2d 650, 655 (2012) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). "Second, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field." Id. "Finally, the substance of the testimony must be reliable." Id.

If the evidence is scientific, South Carolina courts must consider "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). Under the standard set forth in Jones, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). (citing Jones, 273 S.C. at 731, 259 S.E.2d at 124). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

The trial judge was not required to hold a reliability hearing on the State's fingerprint identification evidence due to the universal acceptance of the reliability of the evidence by courts

across the country. Holding a hearing on the reliability of the evidence would have been a waste of the Court's time and resources. In State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990), the South Carolina Supreme Court examined the reliability of a new scientific technique known as DNA Print Identification or Restriction Fragment Link Polymorphism (RFLP). The Court ruled:

> The RFLP analysis and test results would be admissible under both the Frye standard and the standard set forth in State v. Jones, supra. Having found that RFLP analysis involves scientific techniques which have been generally accepted by the professional community, the initial test for admissibility has been met. In future cases, a Frye type hearing will not be necessary. This initial burden has been established and DNA analysis may be admitted in judicial proceedings in this state in the same manner as other scientific evidence which is routinely used in trial court proceedings such as **fingerprint analysis** and ABO blood tests.

Id. at 490 (emphasis added). The ruling in Ford has significance in the current case for two reasons. First, the Court recognizes that a Frye type hearing is not necessary in cases where the reliability of a given science is beyond dispute. Second, the Court's inclusion of fingerprint evidence as a shining example of the type of evidence that is routinely admitted without a Frye type hearing due to its previously established reliability serves as a recognition of the fact that fingerprint evidence is reliable to the point that a hearing on the reliability of that evidence is not required.

As mentioned above, Appellant's support for his assertion that fingerprint evidence is unreliable is based on a 2009 report from the National Research Council of the National Academy of Sciences entitled "Strengthening Forensic Science in the United States: A Path Forward." In the National Research Council report, multiple fields of forensic science were studied with the intent to engage in systematic and scientific improvement within the various disciplines. Appellant's reliance on the NRC Report is misplaced for three reasons.

First, the various critiques that are highlighted in Appellant's brief go to the weight of the evidence, not to its admissibility. For example, Appellant cites language from the NRC Report

stating there is a "general lack of validity testing for fingerprinting, the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified." Committee on Identifying Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United Stated: A Path Forward (2009) at 142. The appropriate forum for criticisms such as these is cross-examination, where Defense Counsel can vigorously examine the witness based on what he determines to be unreliable evidence or present evidence of an exclusionary or alternative fingerprint identification result.

Second, while the report certainly raises important criticisms of the ACE-V method, the report is not a proxy for the inadmissibility of latent print evidence under Frye, Daubert, Jones, or any other standard. The NRC Report noted, "The committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation." Id. a 7. Importantly, the report does not conclude that fingerprint evidence is so unreliable that courts should cease its admission. Tellingly, the Report does concede, "[b]ecause of the amount of detail available in friction ridges, it seems plausible that a careful comparison of two impressions can accurately discern whether or not they had a common source." Id. at 142. The NRC Report also acknowledges, "[h]istorically, friction ridge analysis has served as a valuable tool, both to identify the guilty and to exclude the innocent." Id.

Third, while the NRC Report highlights key areas of improvement, it does not affect the admissibility of fingerprint evidence whatsoever. In the years since the release of the NRC

Report in 2009, criminal defendants in many jurisdictions have used the report to argue for the wholesale exclusion of fingerprint evidence. Notably, these challenges have been uniformly rejected. See People v. Luna, 989 N.E.2d 655, 671, 371 Ill.Dec.65 (Ill. App. 1. Dist. 2013) (upholding trial court's rejection of Luna's request to hold a Frye hearing based on the NRC Report, noting "wholesale objections to ACE-V methodology have been uniformly rejected by state appellate courts (under Frye, Daubert, or some hybrid standard of admissibility and by federal appellate courts (under Daubert))"); Commonwealth v. Gambora, 457 Mass. 715, 724, 727, 933 N.E.2d 50 (Mass. 2010) (finding the NRC Report did not question the underlying theory that "there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person's life." The Court acknowledged there were issues raised by the NRC Report but noted the report accepted the theory that a "careful comparison of two impressions can accurately discern whether or not they had a common source."); Johnston v. State, 27 So.3d 11, 21 (Fla. 2010) ("Nothing in the report renders the forensic techniques used in this case unreliable. . ."); Webster v. State, 252 P.3d 259, 277-78 (Ok. App. 2011) ("As Webster acknowledges, fingerprint evidence has long been recognized, in this State and around the world, as a remarkably powerful tool of identification . . . And Webster fails to cite any jurisdiction that has actually held, as he suggests this Court should hold, that latent print individualization testimony, i. e., claims of a unique match to a particular individual, is so scientifically unreliable as to be admissible. The State acknowledges that Webster could have used the materials now put forward to cross examine Smith and Reznicek about the meaning and reliability of their 'match' conclusions-in particular, Reznicek's assertion that 'there is no doubt' about her conclusion that the bloody palm prints came from Webster.").

Interestingly, following the release of the 2009 National Research Council Report, the Proceedings of the National Academy of Sciences in the United States of America published a large-scale study by Federal Bureau of Investigation Agents on the reliability of forensic latent fingerprint decisions. BRADFORD T. ULERY ET AL., *ACCURACY AND RELIABILITY OF FORENSIC LATENT FINGERPRINT DECISIONS*, PROC. OF THE NAT'L. ACAD. OF SCI. IN THE U.S., vol. 108 no. 19, 7733-7738 (2011). The work in the study was funded in part under a contract awarded to Noblis Inc. from the FBI Biometric Center of Excellence and in part by the FBI Laboratory Division. Id, at 7738. The report of the study notes, "The National Research Council of the National Academies and the legal and forensic sciences communities have called for research to measure the accuracy and reliability of latent print examiners' decisions." Id. at 7733. In the study, 169 latent print examiners each examined 100 pairs of latent and exemplar fingerprints taken from a pool of 744 pairs. Id. at 7735. The report concluded:

> False positive errors (erroneous individualizations) were made at the rate of 0.1% and never by two examiners on the same comparison. Five of the six errors occurred on image pairs where a large majority of examiners made true negatives. These results indicate that blind verification should be highly effective at detecting this type of error. Five of the 169 examiners (3%) committed false positive errors, out of an average of 33 nonmated pairs per examiner. False negative errors (erroneous exclusions) were much more frequent (7.5% of mated comparisons). The majority of examiners (85%) committed at least one false negative error, with individual examiner error rates varying substantially, out of an average of 69 mated pairs per examiner. Blind verification would have detected the majority of the false negative errors; however, verification of exclusion decisions is not generally practiced in operational procedures, and blind verification is even less frequent. Policymakers will need to consider tradeoffs between the financial and societal costs and benefits of additional verifications.

Id. at 7738. The study took into consideration the concerns of the 2009 NRC Report and assessed the reliability of fingerprints methods. The study's conclusion reaffirms what courts have recognized for over a century: fingerprint identification evidence (especially positive identification evidence, with an error rate of 0.1%) is very reliable. The identification evidence is

especially reliable in light of the fact that they study concluded that all false positives and the majority of the false negatives would have been detected through blind verification. The report also acknowledges the ongoing research effort concerning fingerprint quality and quantity metrics and analyzing their relationship to value and comparison decisions. This ongoing research demonstrates that latent print research, like other areas of science, is continuing to be explored and improved.

In addition to the aforementioned cases, the State would like to note the substantial number of state courts and federal circuits that have rejected challenges to the reliability of fingerprint evidence. See United States v. Crisp, 324 F.3d 261, 261, 268-70 (4th Cir. 2003) (holding fingerprint identification evidence satisfies Daubert); United States v. Havvard, 260 F.3d 597, 601-02 (7th Cir. 2001) (latent fingerprint identification satisfied the standards of reliability for admissible expert testimony under Daubert); (United States v. John, 597 F.3d 263, 274-76 (5th Cir. 2005) (holding Court was not required to hold Daubert hearing prior to determining admissibility of expert witness testimony concerning fingerprints where "the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review."); State v. Escobido-Ortiz, 109 Hawaii 359, 370, 126 P.3d 402, 413 (Hawaii App. 2005) ("We take judicial notice, based on the overwhelming case law from other jurisdictions, that the theory underlying latent fingerprint identification is valid and that the procedures used in identifying latent fingerprints, if performed properly, have been widely accepted as reliable . . . the proper means of attacking an expert's positive fingerprint identification is through rigorous cross-examination or presentation of an opposing expert to challenge the positive identification, not the wholesale exclusion of a reliable methodology."); State v. Davis, 880 N.E.2d 31 (Ohio 2008) (holding a Daubert hearing is not required for

admission of fingerprint identification evidence as the "reliability of fingerprint evidence is well established."); State v. Maestas, 299 P.3d 892, 935 (Utah 2012) (where Maestas cited recent articles criticizing fingerprint identification evidence, the Court found, "although courts have considered such research, we do not find any case in which a court has relied on such academic articles to conclude that fingerprint evidence is unreliable or not generally accepted" and "although a number of defense attorneys have filed motions contesting the admissibility of fingerprint identification evidence, "[t]hus far, there is no reported decision granting such a motion."); Moore v. State, 109 S.W.3d 537 (Tex. App. 2001) (holding deputy's testimony that fingerprints on two pen packets matched fingerprints taken from defendant was sufficiently reliable, in light of deputy's testimony regarding his specialized training in identification of fingerprints, and in view of general recognition of validity of fingerprint identification evidence.) Florence v. Commonwealth, 120 S.W. 3d 699, 702 (Ky. 2003) (fingerprint analysis included among types of scientific evidence for which trial judges can take judicial notice that they "have achieved the status of scientific reliability").

The above cases demonstrate the universal acceptance of fingerprint identification evidence and its ability to either incriminate or exonerate an individual based on the analysis. Courts deem fingerprint evidence eminently reliable, routinely taking judicial notice of the reliability of the science or bypassing any need to hold a hearing on the reliability of the methods. The trial judge had undoubtedly heard testimony in dozens of proceedings regarding fingerprint evidence and correctly deemed it sufficiently reliable without the need for any hearing on the matter. The reliability of fingerprint identification evidence is such that it meets the standard of Frye, Jones, or any hybrid standard of admissibility. Due to its universal acceptance, the trial judge was not required to hold any sort of hearing on the reliability of the

science. The trial judge, thus, properly admitted Kubicsko's testimony concerning the fingerprint analysis done in the case. Appellant's convictions and sentences should be affirmed.

II.

The trial judge did not abuse her broad discretion by qualifying Lisa Kubicsko as an expert in latent fingerprint analysis where she personally possessed the requisite knowledge, skill, training, and experience to qualify as an expert in latent fingerprint examination.

Relevant Facts

Prior to trial, the trial judge noted a portion of Appellant's motion to suppress went to Kubicsko's expertise, not to suppression. R. p. 9. The trial judge stated, "The expert standard would have to be dealt with at the time the State seeks to use her as an expert. That would be the appropriate time to deal with that. I would not rule on that in advance. R. p. 9. At trial, the State moved to qualify Kubicsko as an expert in crime scene analysis and latent fingerprint examination. R. p. 123. Appellant objected under Rule 701, SCRE and Rule 702, SCRE. R. p. 123.

Kubicsko was subsequently questioned by Counsel and the Court regarding her qualifications. Kubicsko previously testified as an expert in crime scene analysis on three occasions. R. p. 125. Kubicsko testified this would be her first time testifying as an expert in latent print examination. R. p. 126. Kubicsko received her bachelor's degree in forensic investigative science from West Virginia University.[5] R. p. 121. Kubicsko elaborated:

> As part of that degree that I acquired, you begin - - the first two years are the basic coursework and the last two years are specialized in crime scene, whether it be bloodstain, firearms. And there was two courses on fingerprints, which were both taught by FBI employees. So that gives you a certificate of 30 hours for each course - - for completing that course.

[5] At the time of trial, Kubicsko was completing a master's degree in criminal justice from Charleston Southern University. R. p. 121.

R. p. 126. While at West Virginia University, Kubicsko worked for an FBI research project where she was responsible for obtaining latent prints, ten-print cards, palm print cards, and major case prints from test subjects. R. p. 136. In May of 2010, Kubicsko graduated from West Virginia. R. p. 136. Upon her graduation, Kubicsko obtained employment with the North Charleston Police Department as a crime scene technician. R. p. 127. Kubicsko also began working with the department's latent examiners and learning how North Charleston operates as far as completing latent print examinations. Sergeant Andrew Coker trained Kubicsko from the beginning of her employment with the North Charleston Police Department until she received her certification from the South Carolina Law Enforcement Division. On June 9, 2011, Kubicsko obtained her "Certificate for Successfully Demonstrating Competency in Automated Fingerprint Identification Systems Operations" from the South Carolina Law Enforcement Division. R. pp. 137-38. As part of that certificate, Kubicsko had to demonstrate competence in performing the manual print comparisons that are necessary to operate the system. R. p. 138.

Kubicsko subsequently began working on her own cases, running prints through AFIS and doing manual comparisons. R. pp. 127-28. In December of 2012, Kubicsko took latent print coursework through Ron Smith and Associates, which is a national group that conducts training for latent print examiners. R. p. 128. Ron Smith and Associates conducts themselves by a standard that is regularly accepted in the latent examination community. R. p. 128. Kubicsko has attended continuing education conferences put on by Stat Room and Morfo track, which are the companies that make the system used by the North Charleston Police Department. At the continuing education conferences, "they go over updates with the system, future technology that they plan to use. They go over the best practices for entering fingerprints and palm prints, and I

attended some of the actual courses that they put on that would give you a certificate for those classes." R. p. 129.

Kubicsko has trained other examiners in latent work. R. p. 129. At trial, Kubicsko noted she was in the process of training two people at the time; one individual was a certified officer and the other was a civilian crime scene technician. R. p. 129. Kubicsko also emphasized the department's use of a blind verification process:

> In 2012, we used a blind verification process whereas all my work would be given to another latent examiner who did not know my results, and they would blindly do their own examination of those prints. And then they would verify - - sign off, verifying that my report was correct and my findings were correct.

R. p. 139. The blind verification process was used with Appellant's prints. R. p. 139.

At the time of trial, Kubicsko estimated she worked at least one hundred crime scenes as a crime scene analyst. R. p. 122. Kubicsko testified she had examined thousands of palm prints and fingerprints. R. p. 122. Kubicsko later elaborated she conducted at least two hundred print evaluations every month. R. p. 138. Kubicsko testified she had successfully identified someone through their fingerprints found at the crime scene on over a hundred occasions. R. pp. 122-23. In the entire time she had been working with the North Charleston Police Department, Kubicsko had never incorrectly identified anyone through fingerprint analysis. R. pp. 138-39.

Kubicsko was also a member of the International Association of Identification. R. p. 130. Kubicsko explained, "They are actually the governing association that has been the organization from the beginning of fingerprints, the IAI. I couldn't tell you what year it begun, but that's always been the governing body pretty much for discussing the standards and procedures for that." R. p. 130. As a member of the International Association of Identification, Kubicsko adheres to their procedures and follows their principles in conducting latent examinations. R. pp. 130-31.

The trial judge found:

> The Defendant in this case argues the witness did not possess the knowledge, skill, training, experience, and education to be able to provide opinion testimony. The Court disagrees with that analysis and overrules the objection. The witness has testified regarding her education, training, and experience. Clearly, pursuant to Rule 702, the scientific, technical and - - I don't know whether latent fingerprint testimony would fall within scientific or technical, but it certainly would fall within some hybrid, and it certainly requires specialized knowledge. That knowledge certainly will assist the trier of fact to understand the evidence or to determine the facts at issue; determining prints, identifying prints or evaluating prints is beyond a layperson's knowledge, beyond the skill level of the jury. . . . The objections that have been propounded by the defense go to the weight of her testimony and not its admissibility. Clearly, she has acquired by study or practical experience the knowledge of the subject matter of her testimony such that it would enable her to give guidance and assistance to the jury in resolving the factual issue, which is beyond the scope of their good judgment and common knowledge. There is no question regarding the science that is employed in latent fingerprint examination. It is the same that is employed by every latent print examiner and there is no contest regarding that. Her experience as a crime scene investigator, as well as her education, her degree, the BA that she received, clearly encompassed fingerprint examination, as well as her participation in the FBI project while in school regarding latent fingerprint examination. In addition to that, she received her certification from the South Carolina Law Enforcement Division in June of 2011. She has maintained a professional association with an organization which provides standards and best practices regarding latent print examination. She has testifies that she also basically mentored or was under the supervision of a more experienced latent examiner who taught her from the time of her employment with the North Charleston Police Department and that her evaluations were also subject to peer review - - a blind peer review by that latent print examiner who also trained her, that being Sergeant Coker. She also testified that she has done thousands of examinations, that she does approximately over 200 per month - - or an estimated 200 per month, subject - - which are subject to the same quality control procedures, which also involve manual comparisons as well as use of the AFIs, A-F-I-S, System. . . . She is better qualified than the jury to form an opinion on such topics and she is competent to testify. The fact that she's not been qualified as an expert before is not the barometer. Everybody has to be qualified the first time to testify. She has been qualified as an expert in the area of crime scene analysis on three other occasions in court - - general sessions court of the state. Therefore, the motion to exclude as an expert is denied. That is based on State v. Anderson[6], State v. Price, State v. Koon, and State v. Weaver.

R. pp. 149-53.

[6] The trial judge noted, "In State v. Anderson, the latent fingerprint examiner had less experience than this witness and the Court of Appeals said that they had more than adequate experience to testify as an expert, and it's been cited as precedent and cert has been denied on both cases." R. p. 153.

Discussion

Appellant asserts the trial judge erred in qualifying Kubicsko as an expert in latent print examination, alleging she lacked the requisite knowledge, skill, experience, training, and education to analyze fingerprints and form an opinion. In support of this assertion, Appellant cites various perceived flaws in Kubicsko's education and experience. This argument lacks merit, as the evidence and testimony presented during trial demonstrated that Kubicsko was eminently qualified and personally possessed the requisite knowledge, skill, training, and experience to qualify as an expert in latent fingerprint examination.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

As mentioned in Respondent's Issue I, pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> 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.

Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual

predicate in the record"). Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where, "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-55, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one

that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

In State v. Anderson, 407 S.C. 278, 754 S.E.2d 905 (Ct. App. 2014), this Court dealt with a challenge to the qualification of Brad McClelland as an expert witness in fingerprint analysis. At the time of trial, McClelland was employed with the Federal Bureau of Prisons; however, at the time of the offense he worked as a crime scene investigator for the Myrtle Beach Police Department. Id. at 281. McClelland testified he had completed twelve hours of continuing education courses in forensic science and the law, forty hours of training in basic fingerprint analysis with the South Carolina Law Enforcement Division, forty hours of private training in advance palm print analysis in North Carolina, and an additional four hour advanced fingerprint class provided by the South Carolina Law Enforcement Division. Id. McClelland also achieved certification in AFIS by passing the test administered by the South Carolina Law Enforcement Division. Id. At the time of trial, McClelland had viewed somewhere between three hundred and five hundred unknown prints and managed to match around forty or fifty of those prints. Id. McClelland had not previously been qualified by any court as an expert in fingerprint identification. Id. at 282. Anderson objected to McClelland's qualification as an expert, asserting he lacked the requisite education and experience. Id. The trial judge overruled Anderson's objection and qualified McClelland as an expert witness, finding the sufficiency of his education and the validity of his conclusions were matters for the jury. Id. On appeal, Anderson argued the trial court erred by qualifying McClelland as an expert in fingerprint analysis because McClelland lacked the requisite knowledge, skill, experience, training, and education to form an opinion and testify accordingly. Id. at 285. This Court found:

> We hold the trial court properly qualified McClelland as an expert in fingerprint analysis pursuant to Rule 702. McClelland's experience as a crime scene investigator as well as his education and training demonstrate McClelland had acquired by "study or practical experience" the requisite knowledge to testify as an expert on the subject of fingerprint analysis and comparison. Through his experience and study, McClelland was better qualified than the jury to form an opinion on these topics.

Id. at 286.

As in Anderson, Kubicsko was properly qualified as an expert in fingerprint analysis. The trial judge correctly noted that Kubicsko was even more qualified than McClelland, who was found to be qualified due to the fact that his experience and his study made him better qualified than the jury to form an opinion on these topics. While it is not required that an expert hold a degree in the specialty field he or she is testifying about, Kubicsko held a bachelor's degree in investigative science from West Virginia University and was in the process of earning a master's degree in criminal justice from Charleston Southern University. While at West Virginia, Kubicsko took two courses on fingerprints that were taught by FBI employees and earned a certificate for the completion of each course. Kubicsko also worked for an FBI research project while enrolled at West Virginia and gained experience obtaining latent prints, ten-print cards, palm print cards, and major case prints.

Kubicsko was employed by the North Charleston Police Department since December of 2010 where she began training in latent print examinations almost immediately. Kubicsko was certified by SLED for demonstrating competency in AFIS operations and part of her certification required a demonstration of proficiency in performing manual print comparisons. Kubicsko gained further education and experience through complex latent coursework at Ron Smith and Associates. Kubicsko also maintained membership in the International Association of Identification, the governing body for discussing the standards and procedures for fingerprint

analysis. Kubicsko worked hundreds of crime scenes, examining thousands of fingerprints and palm prints in the process. Kubicsko testified she conducted at least two hundred print evaluations every month. Kubicsko successfully identified someone through their fingerprints found at the crime scene on over one hundred occasions and had never incorrectly identified a suspect.

All of the above demonstrates Kubicsko had more than adequate experience to testify as an expert in latent print examination. Kubicsko had impressive educational and occupational credentials, giving her knowledge far beyond the ken of the average lay juror. All of Appellant's criticisms of Kubicsko's education and experience go towards the weight of her testimony and not its admissibility. Cf. Henry, 329 S.C. at 277-278, 495 S.E.2d at 468-469 ("The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that **she is better qualified than the jury** to form an opinion on the particular subject of testimony." (emphasis added)); State v. Peer, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996) (finding no error in the trial judge's qualification of a witness as an expert in sound where the witness had over five years of law enforcement experience, was trained by another officer who was certified in the use of sound meter equipment, was capable of demonstrating how a sound level meter worked, and had handled approximately ten cases during the one-and-a-half years he had been conducting sound tests). Kubicsko thus possessed the requisite knowledge, skill, training, and experience to qualify as an expert in latent fingerprint examination.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 6, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001739

THE STATE, ...RESPONDENT

v.

KENDALL JEROME TYUS, JR, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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