SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2553-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAHMERE K. McKOY,

Defendant-Appellant.

Argued February 1, 2022 – Decided November 28, 2022

Before Judges Fisher, Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 19-04-0353.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Joseph J. Russo, Deputy Public Defender, of counsel and on the brief).

Lila B. Leonard, Deputy Attorney General, argued the cause for respondent (Andrew J. Bruck, Acting Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

PER CURIAM

Following his convictions for burglary and theft, defendant argues for the first time on appeal that testimony from the State's expert – to the effect that a latent palm print recovered from the crime scene "matched" defendant's known prints – was scientifically unreliable and that its admission deprived him of a fair trial. Without deciding defendant's newly-minted arguments, we find no plain error in the way in which the expert stated his opinions and affirm.

I

Defendant was indicted and charged with third-degree burglary, N.J.S.A. 2C:18-2(a)(1), and third-degree theft, N.J.S.A. 2C:20-3(a).

During a three-day trial, the jury heard testimony that, on July 4, 2018, Adrianna Rodriguez woke up in her Bridgeton home to discover that two smartphones had been taken from her ground-floor bedroom and that a window in the adjacent living room, which the family always left closed, was open. She called the police, who promptly responded and, during their investigation, recovered three palm prints from the open window as well as footage from three surveillance cameras – one on the front porch, one by the side door, and another in the back. Adrianna's husband activated the "Find My iPhone" application for

one of the missing devices and showed a police officer the result: a "ping" at 137 Atlantic Avenue.

The surveillance footage, which was displayed for the jury in a series of brief video recordings, showed someone approach the Rodriguez home at around 3:00 a.m. The individual first appeared in grainy, black-and-white footage of the backyard but clearer, color footage from the camera by the side door captured the individual walking toward a window, placing both palms against the pane, and sliding it open. The individual then looked toward the camera, revealing his face for about two seconds. Another recording from the same angle showed the individual walking by the house shortly after his entry into the home and ducking as a car passed on the street. The camera in front captured the individual walking onto the porch and then abruptly change course after apparently spotting the surveillance device. And a final recording showed the individual returning to the side of the house, approaching that camera with his head down, and turning the camera toward the ground.

At trial, the State called Detective Vince Cappoli, who testified about his examination of the palm prints taken from the window pane. He testified that he had analyzed hundreds of prints over eleven years but had never testified prior to this case. Detective Cappoli said that he had taken several fingerprinting

courses, including a one-week course offered by the International Association for Identification that had a specific focus on latent print examination. He had not sought national certification, which required further training. Defense counsel argued at an off-the-record sidebar, apparently about the detective's qualifications, see n.3 below; after the sidebar, the judge concluded the expert was qualified and so advised the jury.

Detective Cappoli determined that only one of the prints recovered from the crime scene was conducive to analysis. He scanned and magnified it, marked various minutiae – loci within the pattern of ridges that together make each print distinct – and compared it to known prints stored in the department's database (AFIX) without obtaining any results. Detective Cappoli explained that, while AFIX often proved a useful tool, the department did not ultimately depend on it and would routinely send any prints that failed to yield results for comparison to those in the statewide database (AIFS).

Before the print was sent to AIFS, a police officer familiar with defendant became aware of the "ping" result for the missing phone and noticed that the address, 137 Atlantic Street, corresponded to a unit in the same duplex where defendant lived, 139 Atlantic Street. Receiving this information, Detective

Cappoli compared the print taken from the window pane to defendant's prints in AFIX.

Although defendant's prints were in AFIX when the crime-scene prints were run through that system, Detective Cappoli explained that AFIX would often miss or sometimes misinterpret a scratch in the image as a ridge ending. He also found that defendant's print in AFIX had been "poorly marked by the computer" and the image quality was lacking. Consequently, Detective Cappoli "darken[ed]" the image and adjusted the contrast to make it more visible before again running the crime-scene print through the system.

Asked whether, at that point, he obtained a "match," Detective Cappoli responded:

> There was a match, a matched score. The computer gives the top ten most likely candidates for that, for the latent print and it gives a match score. And the top of the list is the most likely candidate for that print. And so that what we do is we look at the difference between the candidate, their score for the candidate on the top of the list, compared to the rest of them, and if we see a very big jump in numbers, then that's a good indication that that would be a good place to . . . start looking.

Defendant's print landed at the top of the list; there was also a "significant difference" between his score and the next highest. Detective Cappoli then visually compared the crime-scene print with defendant's, marking dozens of

minutiae in common until he was confident the two were consistent. When asked whether, based on his training and analysis, he could "make the conclusion that this lifted print [wa]s a match to the known print of [defendant]'s left palm[ ]print," the Detective responded in the affirmative.

Defense counsel vigorously cross-examined Detective Cappoli about the gap of over one month between his initial examination, which yielded no result, and his final determination. Detective Cappoli could not recall precisely when he resumed his analysis or the amount of time he spent enhancing the print and marking the appropriate minutiae before reaching his conclusion. He also acknowledged his analysis was reviewed by another trained examiner only at the final stage of the process, not while he was enhancing or marking the print. The defense offered no opposing expert.

The parties' summations focused on all three key pieces of evidence: the surveillance footage; the "ping" result locating the missing phone; and the palm print.

Approximately thirty minutes into its deliberations, the jury asked to have the surveillance footage replayed because some of the jurors "weren't able to see [it] clearly" on the first occasion. After viewing the footage, the jury resumed

its deliberations and reached a verdict about twenty minutes later, finding defendant guilty on both charges.

The trial judge later denied defendant's motion for a new trial and sentenced him to an aggregate three-year prison term.

II

Defendant appeals, arguing that "the latent palm print lifted from the window was the only physical evidence linking [him] to the crime scene and the testimony that this print 'matched' [him] violated his rights to due process and a fair trial." This argument was further broken down by defendant into five subparts, described by defendant in the following way:

> A. Fingerprint Comparison Methods Presently Lack The Data and Objectivity Necessary To Justify Definitive Conclusions Of Identification.
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> B. Scientific Authorities Have Repeatedly Pushed Fingerprint Examiners To Reform Their Testimonial Practices, Mostly Recently By Calling On Them To Abandon All Use Of The Term "Identification" Or "Match."
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> C. The Unsubstantiated Use of the Term "Match" Grossly Overstated the Probative Value of Fingerprint Evidence And Unduly Prejudiced [Defendant].
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> D. Alternatively, This Court Should Remand The Matter For A [N.J.R.E.] 104 Hearing As To The Scientific Reliability Of This Evidence And The

> Ability Of A Fingerprint Examiner To Make An Identification Or Match.
>
> E. The Analysis In This Case Was Contaminated By The Addition Of Another Officer's Subjective Opinion And Unduly Prejudiced [Defendant].

Defendant chiefly argues that Detective Cappoli's testimony – specifically his assertion that the palm print recovered from the crime scene was a "match" – lacked any legitimate scientific foundation. Putting this assertion into context, we note that our evidence rules provide that, "[i]f 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." N.J.R.E. 702. To qualify for admission

> (1) the subject matter of the testimony must be "beyond the ken of the average juror"; (2) the field of inquiry "must be at a state of the art such that an expert's testimony could be sufficiently reliable"; and (3) "the witness must have sufficient expertise to offer the" testimony.
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> [State v. J.L.G., 234 N.J. 265, 280 (2018) (quoting State v. Kelly, 97 N.J. 178, 208 (1984))].

Defendant's argument focuses on the second criterion, which is understood as allowing the admission of novel scientific evidence only on an appropriate showing, pursuant to the standard outlined in Frye v. United States,

293 F. 1013, 1014 (D.C. Cir. 1923), that it is "generally accepted, within the relevant scientific community, to be reliable," State v. Chun, 194 N.J. 54, 91 (2008).[1] There need not be "complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence" to meet that requirement. Id. at 91-92. Nor need the evidence exclude all possibility for error, so long as it possesses a "sufficient scientific basis to produce uniform and reasonably reliable results and [] contribute materially to the ascertainment of the truth." State v. Hurd, 86 N.J. 525, 536 (1981) (quoting State v. Cary, 49 N.J. 343, 352 (1967)).

The proponent of the evidence must show its admissibility and may demonstrate its general acceptance in any of three ways:

> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance.

[1] Defendant argues that we should adopt the factors announced in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993), for applicability to a reliability determination in the criminal context, as the Court has in the civil context. See In re Accutane Litig., 234 N.J. 340, 399 (2018). But the Supreme Court recently declined an invitation to take that step and made clear that Frye remains applicable, at least for the time being, in criminal matters. J.L.G., 234 N.J. at 280.

[Kelly, 97 N.J. at 210.]

A trial judge's decision to admit novel scientific evidence in a criminal proceeding is a legal determination occasioning de novo review on appeal, with the appellate court "scrutiniz[ing] the record and independently review[ing] the relevant authorities, including judicial opinions and scientific literature." State v. Harvey, 151 N.J. 117, 167 (1997). Otherwise, the decision to admit evidence is entrusted to the trial judge's broad discretion and subject to review on appeal only for a clear abuse of that discretion. State v. Cole, 229 N.J. 430, 449 (2017).

The evidence in question here, however, is hardly novel. Our courts have long permitted expert testimony about fingerprints, State v. Cierciello, 86 N.J.L. 309, 313-15 (E. & A. 1914), and defendant does not argue that allowing testimony about the palm-print evidence was inadmissible. He instead argues that an expert's testimony that a crime-scene print "matched" the accused – rather than an opinion that the former is "consistent" with the latter – was inappropriate. That is, there is – defendant argues – a lack of a scientific foundation to support a claim that the one thing "matches" the other, as if to say that defendant – and only defendant – could have left the crime-scene print.

To be sure, the fact that testimony like that given by Detective Cappoli represents how prosecutors have always presented evidence about fingerprints

does not necessarily end the inquiry. It would be a sad commentary on any institution that, having once crafted a particular methodology, will permit no variation or improvement of it.

Defendant has forcefully argued that the scientific community has come to understand that the subjectivity inherent in fingerprint comparison, and the lack of adequate data about the prevalence of particular minutiae in the broader population, preclude the legitimacy of a conclusion that a particular print "matches" a particular subject. Those in the fingerprint-examination field, he claims, have recognized these deficiencies, at least to some extent, and have responded with recommendations for the appropriate manner of communicating fingerprint opinions in criminal trials. The Scientific Working Group on Friction Ridge Analysis, Study and Technology (SWGFAST), for example, issued a position statement acknowledging that "[t]he ability of a latent print examiner to individualize a single latent impression, with the implication that they have definitely excluded all other humans in the world, is not supported by research." SWGFAST, Doc. No. 103, Individualization/Identification Position Statement 1 (2012). From this and other similar authorities,[2] defendant argues that examiners

[2] The American Association for the Advancement of Science (AAAS) has recommended:

should cease stating their conclusions with complete certainty or that the possibility for error is nonexistent or negligible. Defendant argues that terms such as "match" or "identification" are evocative of the same concept and equally problematic, and that the time has come to consider whether it is appropriate to allow fingerprint experts to utilize those terms in a way that suggests to factfinders that no one but the defendant could have left the print at the crime scene.

In short, defendant contends that an expert's overstating of such a conclusion carries an extraordinary potential for prejudice to a criminal

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> Examiners should be careful not to make statements in reports or testimony that exaggerate the certainty of their conclusions. They can indicate that the differences between a known and latent print are such that the donor of the known print can be excluded as the source of the latent print. They can also indicate that the similarity between a latent and a known print are such that the donor of the known print cannot be excluded as the source of the latent print. But they should avoid statements that claim or imply that the pool of possible sources is limited to a single person. Terms like "match," "identification," "individualization" and their synonyms, imply more than the science can sustain.
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> [William Thompson et al., AAAS, Forensic Science Assessments: A Quality and Gap Analysis 11 (2017) (emphasis added).]

defendant, creating a false impression of certainty that may not, as a practical matter, be amenable to correction, even through skillful cross-examination. Indeed, the President's Council of Advisors on Science and Technology (PCAST) has pointed out that "testimony based on forensic feature-comparison methods poses unique dangers of misleading jurors," both because "[t]he vast majority of jurors have no independent ability to interpret the probative value of results based on the detection, comparison, and frequency of scientific evidence," and because "jurors are likely to overestimate the probative value of a 'match' between samples." PCAST, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 45 (2016). Defendant notes that some courts have recognized this danger and even limited forensic expert testimony accordingly, and he urges that we follow suit, reasoning that the only way to ensure that juries accord the appropriate weight to evidence is to require examiners to clarify the limits of their analysis.

As persuasive as this argument may be in a general sense, defendant's failure to object at trial is fatal to his argument here. While defendant objected at a sidebar conference during the course of Detective Cappoli's testimony, there is nothing in the record to suggest that defendant argued the testimony should have been tailored or expressed in a way to avoid the problem now asserted for

the first time on appeal.[3] We thus examine the way in which the Detective rendered his opinion by applying the plain-error standard, State v. Funderburg, 225 N.J. 66, 79 (2016), which requires that we disregard the alleged error "unless it is of such a nature as to have been clearly capable of producing an unjust result," R. 2:10-2.

By failing to object at trial, defendant deprived the court of the opportunity to consider whether Detective Cappoli's testimony of a "match" was supported by the evidence or whether it could have been restated in a manner that would preclude a suggestion that defendant – and only defendant – could have left the print at the crime scene.

Even if we assume that the testimony was presented in an erroneous manner, we are satisfied that its admission does not warrant a new trial. As defendant recognizes, the fingerprint evidence was one of three items of evidence linking him to the crime. So, even if the admission of the unobjected-to fingerprint testimony was erroneous, its admission was not clearly capable of

[3] Defendant notes that the precise substance of counsel's objection at sidebar to admission of Detective Cappoli's testimony "remains unknown" because the sidebar occurred "off the record." That is true, but whatever objection was made occurred after the expert provided his qualifications but before he rendered his opinions. The only fair reading of the record is that defendant did not object to the way in which the Detective expressed his opinions.

producing an unjust result. The "ping" of the stolen phone at or about defendant's residence provided a strong link between these crimes and defendant. And, even more powerful, was the video evidence.

Indeed, the record reveals how the jury was particularly influenced by the video evidence. Contrary to defendant's characterization, most of the video recordings, especially the video that showed the suspected perpetrator placing his palms on the window and then looking toward the camera, were reasonably clear. In ruling on defendant's new trial motion, the judge recognized the impact on the jury of the replay of this video evidence during its deliberations and how jurors looked from the video to defendant during the replay – a comparison that led to a guilty verdict approximately twenty minutes later.

We are satisfied that notwithstanding the arguably overstated expert testimony about a "match" between the crime-scene print and defendant's known prints, there was considerable other evidence, such as the video evidence and the ping of a stolen phone at or very near defendant's residence, to preclude a conclusion that any defect in the presentation of the fingerprint evidence was clearly capable of producing an unjust result.

III

Defendant's other arguments are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION