Filed 11/9/16 In re Rafael L. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re RAFAEL L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. RAFAEL L., Defendant and Appellant.	A145702 (Alameda County Super. Ct. No. SJ1502409601)

It is undisputed that palm and fingerprints were found on and around the exterior window that was the point of entry for a residential burglary. The anticipated testimony of two fingerprint experts was that the prints belonged to appellant Rafael L. The juvenile court overruled appellant's objection that the methodology employed by the experts was not scientifically reliable and sufficiently accepted to obviate the necessity of a *Kelly-Frye* foundational hearing. The court allowed the testimony and thereafter sustained the prosecuting attorney's allegation that appellant had committed the burglary, and made appellant a ward of the juvenile court.

Appellant renews his claim that the experts' testimony ought to have been excluded, and that without their testimony the evidence is constitutionally insufficient. Appellant's attack on the ACE-V fingerprint examination methodology is exhaustively developed in his brief, and ultimately founded upon *People v. Kelly* (1976) 17 Cal.3d 24.

As our colleagues in Division Four of this district summarized: "In *Kelly*, the California Supreme Court adopted the rule of *Frye v. U.S.* (D.C. Cir. 1923) 54 App.D.C. 46 governing the admissibility of expert testimony that relies on 'a new scientific technique.' [Citation.] When a party seeks to introduce evidence relying on a new scientific technique, *Kelly* requires the party to show 'general acceptance of the new technique in the relevant scientific community' as well as the witness's qualification as an expert and use of '[the] correct scientific procedures' in employing the technique." (*In re O.D.* (2013) 221 Cal.App.4th 1001, 1006, fn. omitted.) Appellant also invokes the court's "gatekeeping role" in ensuring reliability of the basis of expert testimony endorsed by our Supreme Court in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769–772 (*Sargon*), following *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (1993) 509 U.S. 579 (*Daubert*).

Appellant concedes that both approaches have been decisively rejected in *In re O.D.*, *supra*, 221 Cal.App.4th 1001, and then in *People v. Rivas* (2015) 238 Cal.App.4th 967. In *In re O.D.*, the court concluded "as a matter of law that the ACE-V method of fingerprint comparison is not the type of scientific technique governed by *Kelly*." (*In re O.D.*, *supra*, at p. 1006.) The *Rivas* court not only agreed with this conclusion, it quoted extensively from Judge Posner's opinion in *United States v. Herrera* (7th Cir. 2013) 704 F.3d 480, in which the federal court held that *Daubert* did not require exclusion of testimony based on the ACE-V method. Thus, if *Daubert* was satisfied, so was *Sargon*. (See *People v. Rivas*, *supra*, at pp. 978–980.)

Although appellant struggles heroically to dissuade us from following *In re O.D.* and *People v. Rivas*, we must decline that invitation. Both decisions are thorough and soundly reasoned. Moreover, in both *In re O.D.* and *People v. Rivas* the Supreme Court without dissent denied petitions for review in March 2014 and November 2015, respectively. Appellant presents no compelling reason we should unsettle the law on this point.

Appellant's sufficiency of the evidence challenge is premised on the success of his primary argument disqualifying the experts' testimony from consideration. But with that

premise defeated, the experts' testimony is on the table. In 1963, then-Justice Sullivan for Division One of this district noted the established rules that " 'Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient *alone* to identify the defendant,' " and "Palmprint evidence is of equal force and sufficiency." (*People v. Atwood* (1963) 223 Cal.App.2d 316, 326, italics added, fn. omitted; see *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1076 ["fingerprints . . . ordinarily are sufficient, without more"].) More than 30 years ago, one Court of Appeal summarized: "Several cases have held that evidence of a fingerprint, palm print, or footprint left . . . at a point of unusual access is alone sufficient to support a burglary conviction." (*People v. Bailes* (1982) 129 Cal.App.3d 265, 282.) This principle is still sound, (See *In re O.D.*, *supra*, 221 Cal.App.4th 1001, 1010.) Thus, we have no difficulty in concluding that the experts' testimony was sufficient to support the juvenile court concluding that it was appellant who burgled the house. (See, e.g., *People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1588 [palm print on window that was burglar's point of entry].)

The dispositional order is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Miller, J.

A145702; *P. v. R.L.*