

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2009-0373

The State Of New Hampshire

v.

Richard Langill

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
ROCKINGHAM COUNTY SUPERIOR COURT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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**ISSUES PRESENTED**

I. Whether the lower court properly admitted evidence that another fingerprint examiner verified the testifying fingerprint examiner's results, when the evidence was admitted with two limiting instructions that instructed the jury to consider only the opinion of the testifying examiner.

II. Whether the lower court properly found that the State established a sufficient chain of custody to admit a photograph made by fingerprint examiner of a single latent print along with a known print of the defendant where single latent print and five latent prints were taken separately from crime scene, fingerprint examiner testified that she examined one exhibit containing a single latent print and one exhibit containing five latent prints, fingerprint examiner affirmed that she received evidence with regard to case from the Derry Police Department, and evidence was sealed in tamper-proof Ziploc bags.

III. Whether the evidence at trial was sufficient to support the defendant's conviction where defendant's fingerprint was found on dresser containing lockbox from which money was stolen, defendant lived in the same apartment complex as victim and was in the complex at the time of the crime, master key to apartment complex had gone missing in the months prior to the crime, and defendant purchased a car shortly after the crime.

**STATEMENT OF THE CASE**

The defendant was indicted by a Rockingham County Grand Jury on one count of burglary, in violation of RSA 635:1 (2007). NOA. 6.<sup>1</sup> Following a jury trial in the Rockingham County Superior Court on February 3-5, 2009, the jury found the defendant guilty of burglary. On April 24, 2009, the defendant was sentenced to a two to four years in the New Hampshire State Prison, stand committed, plus restitution of \$1,205 to the victim. NOA. 7. The sentence was imposed concurrent to a State Prison sentence he was serving at the time of sentencing. *Id.* The defendant was also ordered to complete drug and alcohol treatment and counseling. *Id.* The defendant filed his notice of appeal in this Court on May 19, 2009, and this Court accepted the instant appeal on June 17, 2009.

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<sup>1</sup> References to the defendant's notice of appeal will be made as NOA \_\_\_\_.  
References to the transcript of the jury trial held on February 3-5, 2009 will be made as Tr. \_\_\_\_.  
References to the defendant's brief will be made as D.Br. \_\_\_\_.

**STATEMENT OF FACTS**

**A. The State's Case**

In 2004, Karen Katz lived in apartment 105 at 7 Railroad Avenue in Derry with her two children. Tr. 16. The building had three floors, with six apartments on each floor. Tr. 28. Katz lived on the first floor of the building, and all of the apartments had balconies. Tr. 29. At trial, Katz testified that someone could get onto her balcony and into her apartment from ground level. *Id.* During the summer of 2003, the property manager lost the master keys to Katz's building. Tr. 116. The last place the property manager remembered seeing the master keys was on the ledge of her porch of her apartment, which was number 103 in the building. Tr. 114, 116.

Katz shared her bedroom with her daughter. Tr. 17. In her bedroom, Katz kept a locked box in the top drawer of her dresser. *Id.* She had \$1200 in the lockbox, made up of ten one-hundred-dollar bills and ten twenty-dollar bills. Tr. 22. Katz was saving the \$1200 to buy a car. The lockbox also contained pictures, birth certificates and paperwork, along with some rolled coins underneath. Tr. 19, 23. Katz kept the key to the safe on top of her dresser. Tr. 17. No one else had access to the safe, and no one else knew where the lockbox was located. Tr. 18, 19.

On the morning of March 25, 2004, Katz left her apartment. Tr. 25. Before leaving, she took \$20 from the lockbox in her dresser to take her daughter to McDonald's. Tr. 16, 20. The two went to McDonald's, and then shopped for a car. Tr. 20. Katz found a car, and called her brother for his opinion. Tr. 21. Katz's

brother thought that she should buy the car, so at around 4:00 p.m. they went back to her apartment to get the \$1200 from the lockbox in her dresser. Tr. 21, 25. When she opened her dresser drawer, she noticed that the safe was not completely shut, and when she opened the lockbox she saw that her money was missing. Tr. 22. Katz did not observe that anything else was missing from the lockbox. Tr. 34. After discovering that her money was missing, Katz found that \$5 was missing from a red, clear plastic bottle that her daughter had been using as a bank. *Id.*

At the time of the burglary, the defendant lived on the third floor of Katz's building with his girlfriend Justine Decotis and her two children. Tr. 29-30, 61. Katz had previously seen him outside late at night or with the children, and noticed that the defendant "would like stare in" if the blinds to the apartment were open. Tr. 29. On March 26, 2004, Christina Piccirilli of Weber Auto and Truck Parts in Derry sold a 1992 Ford Taurus. 49, 53. She identified the individual to whom she sold the Taurus as Justine Decotis's boyfriend. Tr. 53. At trial, Piccirilli testified that the car was purchased with two one-hundred-dollar bills. Tr. 43, 51.

Shortly after Katz discovered that her money was missing, Officer James Belanger of the Derry Police Department went to her apartment. Tr. 59. Belanger spoke with several tenants, including the defendant. Tr. 61. The defendant first told Belanger that he was sick and had been inside the apartment all day, and then stated that he left the apartment to get his mail and that when he did so he had spoken with another tenant. Tr. 62. While Belanger was questioning the defendant, the defendant was nervous, responded to questions slowly, and appeared to be having a hard time

giving answers. Tr. 64. The other tenants Belanger interviewed were not slow or hesitant to answer his questions. Tr. 65.

While he was at Katz's apartment, Belanger seized the lockbox and the red bottle. Tr. 60. He brought the items to the evidence room at the police department and labeled them to be checked for fingerprints. *Id.* Detective Joseph Bennett processed the lockbox and the bottle for fingerprints. Tr. 81-86. Bennett found four sets of latent fingerprints on the lockbox and five on the bottle. Tr. 88. Bennett used lifters to lift the prints from the lockbox and the bottle. Tr. 86-88, 93. Bennett also fumed the key to the lockbox but did not see any latent fingerprints. Tr. 91-92. Once he retrieved the latent prints, he placed the lifters in sealed evidence bags that could not be opened without being cut. Tr. 93-94. The lifters were tagged and placed back into evidence to be brought to the state lab for further testing. Tr. 86, 88.

On April 1, 2004, Officer Mike Houle of the Derry Police Department went to Katz's apartment to process her bedroom dresser. Tr. 99. Houle found one latent fingerprint on top of the dresser close to the drawers, and lifted it with a two-by-four-inch clear lifter. Tr. 99-100, 103. The lifter was placed into evidence and a transmittal form was completed requesting further analysis from the state lab. Tr. 100. On cross-examination, Houle described placing the lifter in evidence:

You put it into an evidence bag and then into evidence. It gets sealed more than likely, you know, in a four by six plastic bag that's self-adhesive. You just shut the top. It sticks to the bag and then you put a property label on it. And if you look at the transmittal, the property numbers are on the left hand side.

Tr. 104.

**B. Relevant Events During Trial**

Lisa Corson, a criminalist at the State of New Hampshire, Department of Safety Forensic Laboratory (the state lab), was qualified, without objection, as an expert in latent fingerprint analysis. Tr. 118, 124. She explained the basics of fingerprint analysis, and the “ACE-V”—analysis, comparison, evaluation, and verification—methodology. Tr. 129-32. In particular, she explained that once she identified a latent fingerprint as a match with the known print of a particular person, the results had to be verified by another qualified examiner who conducted his or her own analysis, comparison, and evaluation. Tr. 132.

Corson testified that she received evidence with regard to this case from the Derry Police Department. Tr. 134, 136. Corson testified that the evidence was received at the lab on May 27, 2004. Tr. 190. She specified that she received two separate exhibits, one containing five fingerprint lifts and one containing a single fingerprint lift. Tr. 136, 138, 193. Corson testified that the lab only accepts items sealed with tamper-proof tape or in special evidence bags that have a tamper-proof adhesive strip on them. Tr. 136. Corson stated that exhibits must be marked with the agency and the agency’s case number and an exhibit number, and if evidence failed to meet any of these requirements, was sent back to the requesting agency. *Id.* Once accepted, evidence was placed into a secure vault at the lab. Tr. 136-137. Corson testified that she removed the items sent by the Derry Police Department from the vault before beginning her examination. Tr. 137. Corson testified that the exhibit

containing one lift came in a clear plastic Ziploc bag sealed with red evidence tape. Tr. 193.

With regard to the exhibit of five lifts, Corson stated that she stopped during the analysis phase because she could not find any identifiable latent prints. Tr. 139. The jury was then shown State's Exhibit 1, a chart Corson prepared comparing a photograph of the single latent print and a known print. Tr. 140. When the prosecutor asked whom the known print belonged to, the defendant objected and argued that Corson could not offer her conclusions without any testimony regarding the verification step of the ACE-V analysis. *Id.* The judge allowed Corson to continue testifying, but instructed the prosecutor to rephrase the question to ensure that she would not be testifying to the result of her tests. Tr. 141. Corson then testified that the known print belonged to the defendant. Tr. 142. After a brief conference at sidebar, defense counsel agreed to allow the prosecutor to use State's Exhibit 1 to demonstrate how she did the analysis, comparison, and evaluation part of her examination. *Id.*

Corson went on to testify in detail about the steps she took and the conclusions she reached during the analysis, comparison, and evaluation phases of her analysis of the single latent print. Tr. 143-449. She testified in detail about the specific features on the single latent print and the known print of the defendant that matched, using State's Exhibit 1. Tr. 147-449. She then testified that she was able to make an identification between the latent print and the known print of the defendant. Tr. 149.

When the prosecutor asked Corson if her work was verified, the defendant objected, arguing that the statement was hearsay and that it was a violation of the defendant's right to cross-examine witnesses against him. Tr. 149-50. The State said that it could ask her what methodology her lab followed. Tr. 152. The court found that Corson was allowed to testify: "[S]he doesn't have to testify to the—how well the verification was performed, does she, for her to be able to say that she believes, looking at the business records and looking at what she understands, that her conclusion was okay under the methodology." Tr. 153. The court instructed the prosecutor to rephrase her questions to "deal ... with the business record exception." Tr. 154.

After finding that the prosecutor established a proper foundation under the business records exception, the court admitted State's Exhibit 5, which consisted of Corson's laboratory worksheets with her analysis of the latent print, and a column with the initials of Timothy Jackson, the fingerprint examiner who verified her work. Tr. 154-157, 160, 162. Corson then testified, "[M]y work was verified by Timothy Jackson." Tr. 160.

At that point, the court took a lunch break. After lunch, the court went on record regarding a conference in chambers about State's Exhibit 5. The court stated:

[I]t was allowed to be introduced as a business record through the foundation that it was regularly maintained in the course of business, et cetera. And it was introduced for the purpose of showing that a verification occurred. How good it was, whatever was not the point here, but the business [sic] reflects that a verification occurred ... the only disturbing aspect I have here is that .... telling the jury there is a kind of [sub silentio] (phonetic) implication that the verification is

consistent with what Ms. Corson said ... I would entertain arguments as to whether I should be giving them some sort of limited [sic] instruction regarding that later on .... It's only being introduced for the fact that someone reputable, in a position to do so marked on this paper verification which triggers the ability of Ms. Corson to give her opinion under this methodology.

Tr. 164, 165-67.

On cross-examination, Corson agreed that she had no idea what Jackson did in terms of his examination and that she should not speak to the quality of his verification. Tr. 174. At the close of evidence, the defendant moved to dismiss. Tr. 226. In support of his motion, the defendant moved to strike Corson's testimony, arguing that she could not testify to her conclusion that the latent print was the defendant's without Jackson, the verifier, also testifying. Tr. 227. The court found:

Ms. Corson could not present her work, her opinion based on what I've read before and listening to the methodology, until she had gone through a verification procedure .... I think it might be well appropriate at this point to just tell the jury .... the only opinion that's present regarding fingerprint [sic] relates to Ms. Corson.

Tr. 233. The court then denied the motion to dismiss, and stated that it would give a limiting instruction regarding Corson's testimony and Jackson's verification. Tr. 236.

When the jury was brought in, the court gave them limiting instruction to the jury. Tr. 242-43. The next day, following closing arguments, the court read the full set of jury instructions, and issued the limiting instruction again. The first limiting instruction was:

You have heard testimony about Timothy Jackson. Lisa Corson identified initials of "TAJ" closed quote, as those of Timothy Jackson, a criminalist at the laboratory. However Mr. Jackson did not testify in this case. You are instructed that the opinion before you with regard to

fingerprint identification is that of Ms. Corson and not that of the verifier, Mr. Jackson. You are not to consider the verifier's work in this case as an additional opinion or as any way a supplement to Ms. Corson's opinion. You must consider Ms. Corson's opinion on its own merits without regard to the verifier's actions as to this matter.

Tr. 242-243. The second limiting instruction was:

Now, please be reminded that the only expert opinion before you with regard to fingerprint identification is that of Ms. Corson and not Mr. Jackson. You are not to consider any other examiner's work in this case as an additional opinion or any way as a supplement of Ms. Corson's opinion. You must consider Ms. Corson's opinion on its own merits without regard to any other examiner's actions in this matter.

Tr. 282.

At the close of evidence, the defendant also objected to State's Exhibit 1 being admitted into evidence. Tr. 229. The defendant argued, "[T]here has to be some sort of clear chain of custody showing that the latent print that he supposedly removed was the same latent print that she examined." *Id.* The State argued that chain of custody went to the weight of the evidence. Tr. 230. The court admitted the exhibit, finding that it was "more probative than anything" and that the jury had, "a right to look at it in conjunction with the testimony they [had] to consider." Tr. 236.

**SUMMARY OF THE ARGUMENT**

I. The lower court properly admitted Corson's testimony that another fingerprint examiner verified her conclusion that the single latent fingerprint belonged to the defendant where the testimony was given for the nonhearsay purpose of establishing a foundation for her testimony and the court issued two limiting instructions to ensure that Corson's opinion was the only opinion before the jury. The limiting instructions ensured that the jury did not consider the verifier's opinion as substantive evidence, and because the verification evidence was not offered for the truth of the matter asserted, the defendant's right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution was not violated.

II. The lower court properly found that the State established sufficient chain of custody to admit State's Exhibit 1, photographs of the single latent print analyzed by Corson and a known print of the defendant, where single latent print and five latent prints were taken separately from crime scene, Corson testified that she examined one exhibit containing a single latent print and one exhibit containing five latent prints, Corson affirmed that she received evidence with regard to case from the Derry Police Department, and evidence was sealed in tamper-proof Ziploc bags.

III. Evidence at trial, which included the defendant's fingerprint on the dresser where lockbox was kept, defendant living in the same apartment complex as victim and being in the complex at the time of the crime, testimony that master key to apartment had gone missing in the months prior to the crime, and defendant's

purchase of a car shortly after the crime, was sufficient to prove the defendant guilty of burglary beyond a reasonable doubt.

**ARGUMENT**

**I. THE TRIAL COURT PROPERLY ADMITTED CORSON'S TESTIMONY THAT ANOTHER FINGERPRINT EXAMINER HAD VERIFIED HER CONCLUSION THAT THE SINGLE LATENT FINGERPRINT BELONGED TO THE DEFENDANT WHERE THE TESTIMONY WAS OFFERED AND ADMITTED FOR THE NONHEARSAY PURPOSE OF ESTABLISHING A FOUNDATION FOR HER TESTIMONY, AND THE COURT ISSUED TWO LIMITING INSTRUCTIONS TO ENSURE THAT CORSON'S OPINION WAS THE ONLY OPINION BEFORE THE JURY.**

The defendant argues that the trial court erred in admitting Corson's expert testimony that Jackson verified her conclusion that the single latent fingerprint was the defendant's because it was inadmissible testimonial hearsay, the admission of which violated his right to confrontation. D. Br. 10-14, 18-25. "The decision to admit expert testimony rests within the sound discretion of the trial court." *State v. Fleetwood*, 149 N.H. 396, 408 (2003). This Court "accord[s] the trial court considerable deference in determining the admissibility of evidence, and [it] will not disturb its decision absent an unsustainable exercise of discretion." *State v. Yates*, 152 N.H. 245, 249 (2005) (citing *State v. Jordan*, 148 N.H. 115, 117 (2002)). Trial court decisions on whether evidence is offered for the truth of the matter asserted are also reviewed under an unsustainable exercise of discretion standard. *State v. Pelletier*, 149 N.H. 243, 253 (2003). "To meet this standard, the defendant must demonstrate that the trial court's rulings were clearly untenable or unreasonable to his prejudice." *State v. Sawtell*, 152 N.H. 177, 179 (2005). He cannot do so here.

**A. Corson’s Verification Testimony Was Not Offered For The Truth Of The Matter Asserted Because It Was Offered Solely To Establish The Foundation That Allowed Corson To Issue Her Opinion.**

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial . . . , *offered* . . . to prove the truth of the matter asserted.” *N.H. R. Ev. 801(c)* (emphasis added). “Such a statement is not inadmissible, however, when it is *offered* for purposes other than its truth.” *Pelletier*, 149 N.H. at 253 (emphasis added). Therefore, the only relevant consideration is whether the testimony was “offered . . . to prove the truth of the matter asserted,” rather than for a nonhearsay purpose. *N.H. R. Ev. 801(c)*. It is clear from the record that the evidence was not offered or admitted for its truth.

Corson was qualified, without objection, as an expert in the field of latent fingerprint analysis. Tr. 118, 124. She testified that the ACE-V methodology was used by the state lab, and that verification was the last step in the methodology. Tr. 129, 183. *See United States v. Mitchell*, 365 F.3d 215, 221-22 (3d Cir.) (the ACE-V methodology requires the examiner’s match to be independently verified by another examiner), *cert. denied*, 543 U.S. 974 (2004). Therefore, the verification of Corson’s conclusion was part of Corson’s methodology. The lower court precisely articulated its reasoning for admitting the verification evidence:

What we have here in essence, is a methodology which encompasses two separate opinions as the testimonies come into play and which allows the issuance of Ms. Corson’s opinion only upon the laboratory coming to the conclusion that a “verification” has occurred. That doesn’t mean that the second opinion comes in. It only means that the first opinion is issuable and is of—it’s appropriate for this—Ms. Corson

to give it. To accomplish that purpose a limiting instruction is necessary.

Tr. 239. Accordingly, Corson's testimony about the verification was not hearsay, but rather, a confirmation that she fulfilled a specific methodology that allowed her to issue her opinion.

The court went on to issue two limiting instructions to ensure that the jury did not consider Corson's testimony that her work had been verified as additional substantive evidence identifying the single latent print as that of the defendant. This Court will presume that jurors follow limiting instructions. *State v. Thibedau*, 142 N.H. 325, 329 (1997). In this case, the court gave the limiting instruction directly after Corson's testimony, and again the next day during jury instructions. Both times, the court emphasized that the jury was only to consider Corson's opinion, and not the verifier's. As such, the testimony regarding verification was not admitted for the substantive purpose of establishing that the latent print was identified as the defendant's.

In his brief, the defendant argues that this case, "presents the same situation as *State v. Connor*, 156 N.H. 544 (2007). D. Br. 12-14. *Connor* involved Jackson, as an examiner, testifying that Corson had verified his work. In *Connor*, this Court found that, "Jackson's testimony relating to the verification process and Corson's independent opinion extend[ed] well beyond establishing Jackson's compliance with procedure" and "constitute[ed] inadmissible hearsay." *Connor*, 156 N.H. at 547. *Connor* is readily distinguishable from the present case. Most noticeably, in the

lower court in *Connor* did not give a limiting instruction that the verifier's opinion could not be considered as substantive evidence. *Id.* at 550. With regard to the limiting instruction, the dissent in *Connor* is instructive, "In this case, the proper procedure would have been for the defendant to request, and the trial court to give, an instruction that the verification testimony was not to be considered for its truth but for the limited purpose of explaining how Jackson was able to render his opinion under the ACE-V protocol." *Id.* As the limiting instruction specifically told the jury that it could not consider Jackson's testimony for its truth ("You are not to consider the verifier's work in this case as an additional opinion or as any way a supplement to Ms. Corson's opinion"), the lower court followed the proper procedure for admitting the verification evidence. Tr. 243.

Furthermore, the testifying examiner in *Connor* went well beyond stating that his work had been verified, and testified to the verifier's actual opinion. Specifically, the examiner testified that the verifier determined that the latent print, "was, in fact, made by the left middle finger from the individual whose name appears on the fingerprint card of David Connor." *Id.* at 546. As such, this Court noted that the examiner had "testified" to the verifier's "opinion." *Id.* In the present case, Corson's testimony regarding Jackson's verification was limited to, "[M]y work was verified by Timothy Jackson." Tr. 160. The defendant also cross-examined Corson on the verification, whereby Corson admitted that she had no idea what Jackson had done during his examination and that she could not speak to the quality of his verification. Tr. 174. The limiting instruction, Corson's limited testimony about Jackson's

verification, and her statements on cross-examination regarding her lack of knowledge of the details of Jackson's verification, demonstrate that in the present case, the verification testimony was significantly more limited than the verification testimony in *Connor*. As such, the testimony was admitted to establish that Corson complied with procedure, as distinguished from *Connor*, where the testimony "extend[ed] well beyond establishing Jackson's compliance with procedure." *State v. Connor*, 156 N.H. at 547.

**B. Evidence Of Verification Was Relevant Without Evidence Of Jackson's Substantive Opinion, And Even If The Limiting Instruction Weakened The Evidence Of Verification The Lower Court Properly Admitted Corson's Identification Because Evidence Of Verification Goes To Weight, Not Admissibility.**

The defendant claims that the trial court erred in admitting Corson's identification because "verification evidence must be presented to the jury so that it can fulfill its role in assessing and weighing the credibility of any purported identification." D. Br. 15. The defendant claims that no verification evidence was presented to the jury ("the trial court's limiting instruction appears to operate to remove from the jury any evidence of the verification step"). D. Br. 16-17. The defendant's argument fails because, as previously discussed, the limiting instruction operated to remove Jackson's substantive opinion from consideration by the jury while allowing them to consider it for the foundational aspect of showing that the verification step of the ACE-V analysis was completed. Out of court statements may be offered for many purposes other than to prove the matter asserted. *See Ellsworth*

*v. Watkins*, 101 N.H. 51, 53 (1957) (“Many relevant oral expressions made out of court may be offered for a variety of purposes other than to prove the facts asserted . . . . A common example is where an utterance is offered to show the effect on the hearer for the purpose of proving circumstantially the state of mind of the person to whom the statement is made or to show the information he had as bearing on the reasonableness of his subsequent conduct.”); *see also State v. Jordan*, 148 N.H. 115, 119 (2002) (where trial court did not abuse its discretion in admitting statements made by 911 operator and county dispatch operator when purposes of statements was to put statements given by 911 caller into context and provide background for the call).

The defendant cites to *State v. Dahood*, 143 N.H. 471 (1999) (*Dahood I*), in support of his argument that evidence of verification was a prerequisite to admitting Corson’s identification. D. Br. 15-16. That case does not support the defendant’s claim. *Dahood I* addressed the foundational requirements for admitting the defendant’s estimated BAC, where the estimated BAC was calculated using a mathematical formula. Part of the mathematical formula was the rate at which alcohol “burns off,” and thereby the time elapsed between alcohol consumption and driving. *See State v. Wheeler*, 120 N.H. 496, 497-98 (1980) (where defendant would have testified to his blood alcohol content based on mathematical formula taking into account his body weight, the number of drinks allegedly consumed and the “burn-off” rate”). In *Dahood I*, this Court found that the State’s expert witness could not testify to the defendant’s estimated BAC without having knowledge of the timing of the

defendant's alcohol consumption. *Dahood*, 143 N.H. at 475. The present case is dissimilar. The ACE-V methodology is not a mathematical formula, and the verification evidence is not a number that would have changed the result of Corson's analysis. Rather, Corson testified that she conducted an independent analysis. As such, her conclusion would remain the same regardless of the verifier's determination.

New Hampshire 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.

Corson was qualified, without objection, as an expert in latent fingerprint analysis. Tr. 118, 124. Once Corson was qualified as an expert, any deficiencies in her test results go to the weight of the evidence rather than admissibility. As such, the weight and credibility to be afforded Corson's testimony was a matter for the jury. In *State v. Dahood*, 148 N.H. 723, 727 (2002), this Court held, as it repeatedly has, "that evidence does not have to be infallible to be admissible. "[I]s deficiencies or weaknesses are a matter of defense, which affect the weight of the evidence but do not determine its admissibility." Because Corson properly completed all steps of the ACE-V analysis, and any deficiency in regard to the verification evidence presented to the jury was minor and went to the weight of the evidence and not its admissibility, and the lower court did not unsustainably exercise its discretion by admitting the evidence.

Accordingly, the limiting instruction with regard to the verification evidence did not render Corson's identification inadmissible, and the trial court did not engage in an unsustainable exercise of discretion when it admitted the evidence.

**C. The Admission Of Corson's Testimony Regarding Jackson's Verification Did Not Violate The Defendant's Right To Confrontation Because It Was Not Offered To Establish The Truth Of The Matter Asserted.**

The defendant argues that the admission of Corson's testimony about Jackson's verification violated his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. D. Br. 18-25. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). However, "[t]he [C]onfrontation Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9; accord *United States v. Paulino*, 445 F.3d 211, 216 (2d Cir. 2006); see also *State v. Munoz*, 157 N.H. 143, 148 (2008) (where court concluded that testimony admitted for a non-hearsay purpose was testimony was not barred by *Crawford*). "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v. Roberts*, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68.

In the present case, Jackson's testimony about Corson's verification was not offered for the truth of the matter asserted, and therefore, its admission did not violate the defendant's right to confrontation. The defendant bases his argument on the proposition that the verification evidence was hearsay. In support of this argument he states, "the only significance of verification is in the truth of the matter it asserts." D. Br. 18. The defendant again relies on the holding in *Connor*, 156 N.H. at 547. As previously discussed, *Connor* is distinguishable in that the examiner testified to the verifier's ultimate opinion that identified the print as the defendant's. In *Connor*, this Court held, "The verification process, *as described by Jackson*, supports our conclusion .... By its very nature, the purpose of this verification, *as described by Jackson*, lies in the truth of Corson's opinion, that is, that her independent ACE procedure resulted in the same conclusion, thus corroborating Jackson's opinion." *Id.* at 546-47. The present case is distinguishable because Corson did not describe Jackson's ultimate conclusion as part of the verification process. Most importantly, as discussed previously, the present case is distinguishable from *Connor* in that there were two limiting instructions given to the jury with regard to the verification evidence. These limiting instructions, which specify that Corson's opinion that the jury may consider, make it clear that Jackson's verification was not offered for the truth of the matter asserted. Therefore, the context here is very different from that in *Connor*.

The defendant also argues that his right to confrontation was violated in light of the decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). D. Br.

20, 22-25. Contrary to the defendant's argument, this case is distinguishable from *Melendez-Diaz*. *Melendez-Diaz* dealt with a very narrow circumstance, where the prosecution introduced certificates of state laboratory analysts stating that a substance was cocaine as prima facie evidence of the identity of the substance and offered no testimony from the analysts at trial. *Id.* at 2529. Thus, the defendant had no ability to cross-examine anyone about how the tests were conducted. In that case, the Court found that the certificates' "sole purpose was to provide prima facie evidence of the substances' composition, quality, and net weight." *Id.* In the present case, the defendant did have an opportunity to cross-examine Corson, the analyst who provided the prima facie evidence of the defendant's guilt. The purpose of the verification evidence was not to provide prima facie evidence of the defendant's guilt but to provide a foundation for Corson's testimony. Therefore, the defendant's right to confrontation was satisfied and the verifier's testimony was not necessary.

**II. THE LOWER COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE LATENT PRINT AND A KNOWN PRINT OF THE DEFENDANT BECAUSE THE EVIDENCE WAS PROPERLY AUTHENTICATED.**

The defendant next argues that the lower court erred when it admitted State's Exhibit 1, photographs of the latent print and a known print of the defendant. D. Br. 26. In support of his argument, the defendant claims that there was no evidence linking the latent print found by Officer Houle to the latent print Corson examined and identified as the defendant's. D. Br. 28, 29. The lower court admitted the photographs at the close of evidence over the defendant's objection, finding that the jury should have an opportunity to review them in conjunction with Corson's testimony. Tr. 236. The photographs were admitted after Corson had testified in detail about the specific features of the latent print and known print of the defendant that matched, and after Corson had identified the latent print as that of the defendant.

This Court will "accord considerable deference to a trial court's evidentiary rulings." *State v. Belton*, 150 N.H. 741, 743 (2004). This Court will only intervene when an unsustainable exercise of discretion has been demonstrated. *Id.* "Unless a party establishes that such a ruling was clearly untenable or unreasonable to the prejudice of the party's case, it will not be disturbed." *Id.* The defendant cannot meet this burden here.

Contrary to the defendant's argument, there was sufficient evidence at trial establishing a chain of custody. New Hampshire Rule of Evidence 901(a) provides:

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” This Court has commented, “The rule does not constitute an onerous burden.” *State v. Moscillo*, 139 N.H. 79, 80 (1994). Rather, to suffice for authentication:

The State need only demonstrate a rational basis from which to conclude that the exhibit did, in fact, belong to the defendant. The contested evidence, if otherwise relevant, should be admitted once a prima facie case has been made on the issue [of authentication]. Once the evidence is admitted, the rest is up to the jury.

*Id.*

In this case, there was a rational basis to conclude that the print removed from Katz’s dresser by Officer Houle was, in fact, the latent print examined by Corson. Corson testified that she received an exhibit of a single latent print along with an exhibit containing five other lifts. Tr. 136, 138, 193. Officer Houle testified that he removed one latent print from Katz’s dresser and placed it into evidence with a form requesting analysis by the state lab. Tr. 99-100. Detective Bennett testified that he removed five sets of latent prints off of the bottle in Katz’s house, also to be brought to the state lab for testing. Tr. 86, 88. Corson affirmed that she did receive evidence with regard to this case from the Derry Police Department. Tr. 134, 136. Both Houle and Corson described that the print was in a sealed Ziploc bag. Tr. 104, 193. Although Houle’s and Corson’s testimony differs as to whether the bag was self-adhesive or sealed with red evidence tape, such a discrepancy is minor and

understandable given the passage of approximately five years between the recovery and examination of the print and the defendant's trial.

The defendant cites to *State v. Woitkowski*, 139 N.H. 79 (1992), *State v. Reid*, 135 N.H. 376 (1992), and *Moscillo* in support of his argument that the State failed to establish a proper chain of custody. However, these cases support the argument that the State did, in fact, meet its burden for establishing chain of custody because in all of them this Court upheld the admission of evidence despite gaps in chain of custody. Missing links in the chain of custody do not necessarily preclude admission of evidence, but rather, are matters for the jury to assess the weight of the evidence. See *Moscillo*, 139 N.H. at 81 ("Such gaps in the chain affect only the weight to be accorded proffered evidence.").

In *Woitkowski*, this Court found that the omission of evidence as to who removed the defendant's sneakers was not fatal because "the evidence provides a link sufficient to support the authentication." *Woitkowski*, 135 N.H. at 383. The Court noted that there had been testimony about the standard booking procedure used by the police department, which involved taking the footwear from all prisoners who were booked. *Id.* Similarly, there was testimony from Corson regarding the standard operating procedures of the lab, which require that evidence be sealed with tamper-proof tape or a tamper-proof adhesive strip; be marked with the agency's name, case number, and exhibit number; and remain stored in the lab's secure vault until removed for analysis. Tr. 136-37. Because there was a rational basis from which to conclude that the single latent print examined by Corson was the print Officer Houle

recovered from the crime scene, the lower court did not unsustainably exercise its discretion by admitting the photographs.

In his brief, the defendant has limited his argument to the admission of the photographs, and has not argued that Corson's testimony should have been excluded on these grounds. As such, even if the photographs were improperly admitted, they were cumulative of Corson's testimony, and therefore their admission did not prejudice the defendant, and any error in admitting them was harmless. "An error is harmless if [this Court] can say beyond a reasonable doubt that it did not affect the verdict." *Barnes*, 150 N.H. 715, 717 (2004) (citing *State v. Goodale*, 144 N.H. 224, 232 (1999)). "The State bears the burden of proving that an error is harmless." *State v. Barnes*, 150 N.H. at 717 (citing *Goodale*, 144 N.H. at 232). "The evaluation of whether the State has met its burden involves consideration of the alternative evidence presented at trial and the character of the contested evidence." *Barnes*, 150 N.H. at 717 (citing *State v. Enderson*, 149 N.H. 252, 255 (2002)).

Before the photographs were admitted, Corson had already testified in detail about the steps she took and the conclusions she reached during the ACE-V analysis of the print, and had specifically testified about the specific features on the single latent print and the known print of the defendant that matched using the photographs. Tr. 143-149. Therefore, the information in the photographs of the latent print and the known print of the defendant was cumulative of other evidence that the latent print was that of the defendant, and any error in admitting the photographs was harmless.

**III. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO PROVE THE DEFENDANT GUILTY OF BURGLARY BEYOND A REASONABLE DOUBT.**

The defendant argues that the evidence presented to the trial court was insufficient to reach a guilty verdict. D. Br. 31-34. No such error existed because the evidence presented by the State was sufficient for the defendant to be found guilty.

The standard of review for issues of sufficiency of the evidence at a criminal trial is well established:

To prevail upon his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. ... When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. ... Under this standard, however, [this Court will] still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation.

*State v. MacDonald*, 156 N.H. 803, 804 (2008) (internal citations omitted). The defendant argues, however, that the evidence of the defendant's guilt was circumstantial. D. Br. 31. When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict. *State v. Silva*, 158 N.H. 96, 99 (2008). Here, because the defendant was charged with burglary the State was required to prove that he entered an occupied structure with the purpose to commit a crime therein, unless the premises was at the time open to the public or the defendant was licensed or privileged to enter. RSA 635:1, I (2007).

The evidence was sufficient to exclude all rational conclusions except guilt. The defendant lived in the same apartment complex as the victim, and admitted to

being home on the day of the burglary and to leaving his apartment at one point. Tr. 29-30, 31, 62. Katz's apartment was easily accessible to the defendant, as she lived on the first floor of the building and someone could get into her apartment from her ground-level balcony. Tr. 29. In addition, the property manager had lost the keys to the building the previous summer. Katz testified to suspicious behavior by the defendant, including that he, "would like stare in" if the blinds to her apartment were open. Tr. 29. When questioned about the incident, the defendant changed his story, first telling Officer Belanger that he had been inside his apartment all day, and then saying he did leave at one point to get his mail. Tr. 62. In addition, Officer Belanger believed that the defendant was nervous when he was questioning him, and described him as having a hard time answering his questions and responding to them slowly. Tr. 64-65.

The defendant argues that Christina Piccirilli of Weber Auto and Truck Parts never identified the defendant as the man to whom she sold the 1992 Ford Taurus. D. Br. 32. However, she sufficiently identified the man by describing him as Justine Decotis's boyfriend, and the evidence at trial established that the defendant lived with Justine Decotis at the time of the burglary. Tr. 29-30, 61. The defendant's purchase of the car with two one-hundred-dollar bills further established his guilt because there were ten one hundred-dollar-bills stolen from Katz. Tr. 22, 43. For these reasons, the evidence was sufficient to prove the defendant guilty of burglary beyond a reasonable doubt.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

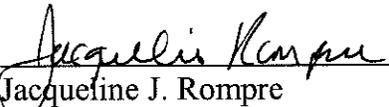
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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Pamela E. Phelan, counsel of record.

  
Jacqueline J. Rompre