

STATE v. David Wayne KUNZE

Court of Appeals of Washington, Division 2.
97 Wash.App. 832, 988 P.2d 977 (1999)

MORGAN, J.

David Wayne Kunze appeals his convictions for aggravated murder and other crimes. The principal issue is whether the State's witnesses could opine, based on the relationship among some of the anatomical features of the external ear, that Kunze was the probable and likely source of a latent earprint discovered at the scene. Other issues are whether two police officers could opine that the crime scene might have been staged to look like a burglary, and whether the trial court properly restricted the cross-examination of a jailhouse informant. We reverse and remand for new trial.

In the early morning hours of December 16, 1994, an intruder entered the Clark County home of James McCann. McCann was asleep in the master bedroom. His son Tyler, age 13, was asleep in another bedroom. The intruder bludgeoned McCann in the head with a blunt object, causing his death. The intruder also bludgeoned Tyler in the head, causing a fractured skull. When the intruder left, Tyler crawled out to the front porch, where he was found after daylight by a passerby.

While awaiting surgery at the hospital, Tyler told the police that he had been afraid to look at his attacker closely. He thought, however, that the attacker was a darkly complected male, possibly Puerto Rican, about six feet tall with medium build, dark or black hair to mid-ear, 25 to 30 years of age, and a deep voice. Tyler later recalled that the attacker wore gloves but not glasses, and had a flashlight in his mouth. Kunze is in his mid-forties, wears glasses, and has reddish-blond hair.

Back at the house, the police observed that the intruder had opened drawers and cabinets without disturbing the contents. They also found that the intruder had taken a TV, a VCR, stereo speakers, a "boom box," McCann's wallet containing identification and credit cards, McCann's truck, and various other items.

George Millar, a fingerprint technician with the Washington State Crime Laboratory, processed the home for evidence. He discovered a partial latent earprint on the hallway-side surface of McCann's bedroom door. He "dusted" the print by applying black fingerprint powder with a fiberglass brush. He "lifted" the print by applying palm-print tape first to the door and then to a palm-print card. The resulting print showed the antitragus and portions of the tragus, helix, helix rim, and antihelix. The external features of a complete ear are shown in the following diagram.

The police were immediately interested in Kunze, notwithstanding Tyler's description of the intruder. Kunze had been married to Diana James from 1976 to April 1994. On December 12, 1994, four days before the intruder entered McCann's home, James told Kunze that she and McCann were planning to be married. Kunze was upset by the news, according to his own later statement.

The police interviewed Kunze several times. They also searched, with his consent, his truck, house, boat, storage locker, and safety deposit box. The searches did not disclose anything

significant, with the possible exception of a receipt for a flashlight.

On or about March 28, 1995, Michael Grubb, a criminologist with the Washington State Crime Laboratory, compared the latent print from McCann's bedroom door with photos of the left side of Kunze's face. He concluded that the latent print "could have been made by Dave Kunze." He also thought that "[i]t may be possible to obtain additional information by comparing the [latent print] to exemplar impressions."

On September 21, 1995, Millar and Grubb met with Kunze to obtain earprint exemplars. Neither had taken an earprint exemplar before, although each had practiced on laboratory staff in preparation for meeting with Kunze. For each of the seven exemplars they took, they had Kunze put hand lotion on his ear and press the ear against a glass surface with a different degree of pressure ("light," "medium," or "hard"). They then dusted the glass with fingerprint powder and used palm-print tape to transfer the resulting impression onto a transparent plastic overlay.

The reason Millar and Grubb took multiple exemplars is that they were consciously trying to produce one that would match (i.e., "duplicate" the latent print from McCann's door. They knew that earprints of the same ear vary according to the angle and rotation of the head, and also according to the degree of pressure with which the head is pressed against the receiving surface. They did not know the angle and rotation of the head that made the latent print, or the degree of pressure with which that head had been pressed against McCann's door. Hoping to compensate for these difficulties, they told Kunze to use a different degree of pressure each time ("light," "medium" or "hard"), and they looked at the latent print as they worked.

After Millar and Grubb took the exemplars, they were asked to compare them to the latent print. Millar declined because his laboratory supervisor thought that earprint identification was "out of the expertise of the [crime lab's] latent unit." Grubb went ahead, concluding that "David Kunze is a likely source for the earprint and cheekprint which were lifted from the outside of the bedroom door at the homicide scene."

In June 1996, the State charged Kunze with aggravated murder, assault, robbery, burglary, and kidnapping. In October 1996, Kunze moved for "a pre-trial order excluding any evidence of earprint identification." In December 1996, the trial court convened a Frye hearing at which Grubb and other witnesses were called. We must understand their testimony in detail in order to resolve the issues on appeal.

Grubb testified to extensive qualifications as a criminalist. He had been working as a criminalist for more than twenty years, and he was currently the manager of the state crime lab's Seattle office. Although he had never before dealt with earprints, he specialized in firearm and toolmark identification, and he had analyzed "impression evidence" of other kinds. He had not seen any data or studies on earprints, or on "how often an ear having the general shape of the questioned print in this case appears in the general human population;" he thought, however, that a Dutch policeman named Cor Van der Lugt might have such information. He had used transparent overlays to compare the latent and the exemplars in this case, and such overlays are a generally accepted method of making comparisons. When he compared the latent print with the exemplars taken from Kunze, he emphasized the exemplars taken with "a lighter amount of pressure," because those "more closely approximated ... the impression from the crime scene." He claimed that latent earprint identification is generally accepted in the scientific community, reasoning that "the earprint is just another form of impression evidence," and that other "impression evidence is generally accepted in the scientific community." He concluded that "Mr. Kunze could be the source of

[the latent] impression, and even further, I believe it's likely that the impression from [the] crime scene is Mr. Kunze's ear and cheek print.”

Cor Van der Lugt testified to extensive qualifications as a police evidence technician. He had been a Dutch police officer since 1971 and a crime scene officer since 1979. He had trained other crime scene officers for many years. Being interested in the reliability of earprints, he had written “a lot of letters all around the world to people who did something with earprints, but unfortunately ... didn't get too much of [a] response.” He had adopted methods used by Professor Lunga of Germany, “who did [an] investigation as to what parts of the ear look alike between parents and their children;” methods used by Mr. Hirschi of Switzerland, who “did an investigation between the relation of the height of defining of an earprint and the body length of the offender;” and the methods used by several other people in the eastern part of Germany. He had received over 600 cases “for comparative analysis” and had made an identification to his own satisfaction in “somewhere between 200 and 250 cases.” On the basis of “somewhere between 100 and 200 prints,” he had concluded that pressure distortion is not a problem that prevents you from making an identification or a comparison between ears, even though you must “get the same pressure on the ear as the ear that was found on the scene of a crime;” the solution, he thought, was merely to take several exemplars under different degrees of pressure, then “pick the one that comes closest” to the latent print. He had been to court in six earprint cases, all in Holland, and the judges in those cases had not been concerned about his methodology; indeed, they had “accepted that you can identify an individual by his earprint.” He did not present or refer to any published literature stating that earprint identification was generally accepted in the scientific community. He did, however, testify as follows:

Q: [D]o you have an opinion as to whether ... the uniqueness of the human ear as a basis for personal identification is a notion that is generally accepted in the Netherlands and elsewhere amongst those engaged in forensic identification?

A: It is accepted, yes.

Alfred V. Iannarelli testified to extensive qualifications as a law enforcement officer. For 30 years, he had worked as a deputy sheriff in Alameda County, California, as the chief of campus police at California State University at Hayward, and in several other law enforcement positions. Thereafter, he had worked as a consultant on ear identification. He became interested in ears in 1948, and over the next 14 years classified perhaps 7,000 ears from photographs (but not from latent prints). In 1964, he published a book describing his system, which he calls “earology” or the “science of ear identification.” In 1989, he published a second edition through a different publisher. He had been prohibited from testifying in a 1985 Florida case called *State v. Polite* on the ground that his system of ear identification was not generally accepted in the scientific community. He had testified without objection in a 1984 California murder case called *People v. Anzillotti*. He did not know of any published scientific studies confirming his theory that individuals can be identified using earprints, and he did not claim that his system was generally accepted in the scientific community. On the contrary, he testified:

Q: Are you aware of any scientific research at all that would confirm your theory that ears are so unique that individuals can be positively identified by comparing known earprints with latent ear impressions?

A. Ear photographs, not earprints. Counsel, this is relatively a new science.

His personal belief was that human ears are sufficiently unique to support a positive identification in an appropriate case, and that the latent print left on McCann's door “matche

[d] exactly” the exemplars taken from Kunze.

The 1989 edition of Iannarelli's book was introduced along with his oral testimony. Titled “Ear Identification,” it is published by the Paramount Publishing Company of Fremont, California. It contains no bibliography and no scientific verification.

Dr. Ellis Kerley testified to extensive qualifications as a physical anthropologist. He has a doctorate in anthropology from the University of Michigan and was for many years a professor of that subject. He has taught the anatomy of the human ear. He formerly was President of the American Academy of Forensic Sciences, and President and First Diplomat of the American Board of Forensic Anthropology. He has worked on cases such as the assassination of President John F. Kennedy. He thought that the human ear is probably different for each person, but he had “no information” indicating whether one ear can be differentiated from another by observing the ear's gross external anatomy. He did not “consider Mr. Iannarelli's work scientific;” on the contrary, it was “narrative,” not “reported in a scientific manner,” and “not subjected to any statistical analysis.” He rejected Van der Lugt's approach of “apply[ing] pressure until you can make the [exemplar] prints look about the same” as the latent print in issue; as he put it, “we don't do that in science ... [b]ecause we're not trying to make them look alike.” He stated that earprint identification “has not been presented in generally scientific sessions or publications,” and that he was not “aware of any scientific research or authoritative literature ... concerning earprint identification[.]” It was his opinion that earprint identification has not achieved “general acceptance” in the forensic science community.

Professor Andre Moenssens testified to extensive qualifications as a fingerprint examiner and law professor. He began his career as a criminalist in Belgium. He holds a J.D., and an LL.M. in scientific evidence. He teaches scientific evidence and has published numerous books on that subject. He testified in part:

Q: [D]o you have an opinion whether or not earprint identification is generally accepted as reliable in the forensic science community?

A: [T]he forensic sciences ... do not recognize as a separate discipline the identification of ear impressions. There are some people in the forensic science community, the broader forensic science community, who feel that it can be done. But if we are talking about a general acceptance by scientists, there is no such general acceptance.

Q: Is there any evidence that earprint identification has ever been tested by scientific methodology?

A: To my knowledge, it has not been.

Q: Or adequately subjected to scientific peer review?

A: If by peer review, you mean inquiry and verification and studies to confirm or deny the existence of the underlying premise, that is, ear uniqueness, to my knowledge that has not been done.

...

Q: With respect to earprint identification, has it ever been shown that results can be reliably obtained in terms of an acceptable rate of error?

A: To my knowledge, there has been no investigation in the possible rate of error that comparisons between known and unknown ear samples might produce.

While he agreed that one earprint can always be compared with another, he noted that “[t]he question is whether that comparison means anything.” He did not know of any generally accepted methods for recording ear characteristics or determining the significance of a “match.”

George Bonebrake testified to extensive qualifications as a latent fingerprint examiner. He worked for the FBI from 1941 to 1978, when he retired and became a private fingerprint consultant. During his last three years with the FBI, he was in charge of its latent print section, supervising 100 examiners and 65 support people. He never identified anyone based on earprints, and to his knowledge no one else at the FBI did either. He testified:

Q: Is there anything in the materials that you have read that indicates earprint identification has been generally accepted in the forensic science community?

A: No, sir.

Q: What is your impression of the state of earprint identification at this point in forensic science history?

A: That there have been a few cases of individuals making earprint comparisons and identifications, but I'm not aware of any study or research that would indicate to me the uniqueness of earprints when it comes to the comparison of [known] earprint impressions ... with the latent earprint impressions; that's based on class characteristics.

...

Q: Does the literature indicate that there are problems in attempting to obtain earprint exemplars?

A: Especially when it comes to pressure, yes, sir.

...

Q: Have you ever seen any authoritative text published in any discipline of forensic science that's gone on record claiming that earprint identification is generally accepted in the forensic science community?

A: No, sir.

In his professional opinion, the latent print from McCann's door "is of poor quality," shows only class characteristics, and shows nothing unique.

Tommy Moorefield testified that he was a fingerprint specialist with the FBI in Washington, D.C. He had worked for the FBI for 36 years as of December 1996. He had conducted advanced latent fingerprint courses throughout the United States, instructed new agents on collecting and preserving evidence, and worked on both the Waco disaster and the TWA Flight 800 disaster. He had once made an identification from a lip print, but he had never made an identification from an earprint. He was "not real sure" that ear print identification is generally accepted in the community of forensic scientists, and he was unaware of the FBI collecting any data on earprints.

William Stokes testified that he was a special agent and chief of all photographic operations for the FBI in Washington, D.C. He had identified individuals from photographs of their ears, but not from latent earprints. He had "no knowledge" of whether latent earprint identification is generally accepted by the scientific community.

Ralph Turbyfill testified that he is the long-time chief latent fingerprint examiner for the Arkansas State Crime Laboratory. He was able to identify a person from an earprint in one case, because of hair follicles that were peculiarly located. He had tried, unsuccessfully, to identify people from earprints in two other cases. He did not believe that earprint identification is generally accepted in the forensic science community, and he did not know of any publication or treatise that so claims.

Gary Siebenthal testified that he had been an officer with the Peoria, Illinois, police department for 23 years and a crime scene technician for 20 of those years. Although he had identified a defendant from an earprint on one occasion, he did not know of anyone who had

“proclaim[ed] that earprint identification is generally accepted as reliable in the forensic science community.” Nor did he know of any scientific research on reliable techniques for making earprints or dealing with pressure distortion.

Paul Norkus was a long-time latent print analyst from Pensacola, Florida. He had been involved in the 1985 case, *State v. Polite*, in which Iannarelli had also been involved. Although he and Iannarelli thought they had made an earprint identification in that case, the trial court ruled that earprint identification was not generally accepted in the scientific community; thus, they were not allowed to testify. He did not believe that the FBI classifies or even keeps a file of earprints, and he had no “idea how often a given general ear shape occurs in the general population.” Except possibly for a 1949 article by a Russian author, he did not know of any publications stating “that earprint identification is generally accepted in the forensic science community[.]”

Ernest Hamm testified that he had been a crime laboratory analyst-supervisor in Jacksonville, Florida, for approximately 16 years. He had made an earprint identification in one case. He had been able to do that because the defendant “had a very peculiar mark in the lobe area of the ear.” Although he personally believed that earprints can be identified, he knew of nothing to indicate that earprint identification is generally accepted in the forensic science community.

William Sherlock testified that he had worked in law enforcement for more than 30 years. In part, he had trained others to identify tool marks. He had been involved in several earprint cases, but none had gone to trial and he had never testified on earprint identification. “The limited amount of people [he had] talked to ... don't really have an opinion” on whether earprint evidence is generally accepted as reliable in the forensic science community.

John Olenik testified that he had worked for the Ohio Bureau of Criminal Identification and Investigation for 27 years before starting his own business. He was a past president of the Ohio Identification Officers' Association and had published several articles. He had been involved in two earprint cases, neither of which had gone to trial, so he had never testified on earprints. Although he personally believed that earprints could be reliably compared, he did not know of any publications stating that earprint identification is generally accepted in the scientific community.

Roy Gourley testified that he was a detective from Sonoma County, California. Like Iannarelli, he had worked on the 1984 murder case of *People v. Anzillotti*. Because an earprint had been found in that case, he sought information on earprints from the FBI's latent print section in Washington D.C. He was told that the FBI had no experience with earprints and that he should contact Iannarelli. Iannarelli compared the latent print, found that it was the defendant's, and testified as a witness at trial--without objection from the defense. Gourley was not asked whether earprint identification evidence is generally accepted in the scientific community.

At the end of the hearing, the trial court entered written findings of fact and conclusions of law. It concluded that “the principle ... known as ‘individualization’ through the use of transparent overlay, applied to the comparison of the latent impression in the present case with the known standards of the defendant, is based upon principles and methods which are sufficiently established to have gained general acceptance in the relevant scientific community.” As a result, it admitted the earprint evidence.

Trial commenced on June 25, 1997. The State called Grubb and Van der Lugt, but not Iannarelli, to compare the latent print to the exemplars and to opine about the significance of

the comparison. Grubb testified that the latent print showed “the antihelix, the interior portion of the ear; the helix rim, that is the top of the rim of the ear; tragus and antitragus, two portions of the ear down below;” that he had compared those anatomical features using transparencies; and that he had found “very good correspondence of those features.” He opined, to a reasonable degree of scientific certainty, that “Mr. Kunze's left ear and cheek [were] the likely source of this [ear print] impression at the [crime] scene.”

Van der Lugt testified that he also compared the latent earprint and the exemplars by using transparencies. He found “a few parts that correspond completely,” but also some “differences.” He believed that the differences were insignificant, because “[y]ou will never find ... a 100 percent fit” and “any dissimilarities” were caused “by pressure distortion.” Although he conceded that “no study has ever been published in the world that could tell the jury how much correspondence is actually required in order to declare a match,” he also opined:

Q: Mr. Van der Lugt, as a result of your comparison of the Grubb standards and your independent comparison of your own standards with the crime scene tracing earprint that was taken in this case, do you have an opinion as to the probability that the defendant's left ear is the source of the latent impression which was left at the scene of the crime in this case?

A: I do have an opinion, yes.

Q: What is your opinion, then?

A: I think it's probable that it's the defendant's ear is the one that was found on the scene.

...

Q: [H]ow confident are you of the opinion that you just expressed?

A: I'm 100 percent confident with that opinion.

Kunze was convicted of aggravated murder, burglary and robbery. He was sentenced to life without possibility of parole on the murder conviction, and to standard range sentences on the other convictions. This appeal timely followed.

I.

The main question on appeal is whether Grubb and Van der Lugt could properly opine, based on the similarities and differences that they observed in the overlays, that Kunze was the likely or probable maker of the latent print. Kunze says they could not, because they were relying on scientific, technical or specialized knowledge not generally accepted in the relevant scientific, technical or specialized community. The State says they could, either because they were not relying on scientific, technical or specialized knowledge, or because they were relying on scientific, technical or specialized knowledge that was generally accepted in the relevant scientific, technical or specialized community. We inquire (A) whether Grubb and Van der Lugt were relying on scientific, technical or specialized knowledge, and (B), if so, whether that knowledge was generally accepted in the relevant scientific, technical or specialized community.

A.

Grubb's and Van der Lugt's testimony was in opinion form. An opinion is admissible only if it has a rational basis, which is the same as to say that the opinion must be based on knowledge. The knowledge may be personal, or it may be scientific, technical or specialized. So-called “lay” opinion is simply opinion based on personal knowledge (i.e., on knowledge derived from the witness' own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion). So-called “expert” opinion is

simply opinion based in whole or in part on scientific, technical or specialized knowledge. At least in some instances, there is no meaningful distinction between scientific knowledge on the one hand and technical or specialized knowledge on the other.

To comprehend how these rules apply here, we must understand that forensic science differs fundamentally from other kinds of science. As one writer has put it, “[f]orensic identification science has selected for itself--or had thrust upon it--a project that is unknown to other fields: the unique identification or, more properly, individualization of various objects, including persons....” Accordingly: The goal of individualization contrasts with conventional science of virtually every kind. “Individualization is unique to forensic science.” Normal science is concerned with grouping objects and events into meaningful classes, discovering systematic relationships among these classes, and developing and testing theoretical explanations for those shared attributes and relationships. While normal science looks only between classes, forensic identification science ... looks within classes. While normal science is concerned with establishing regularities, forensic science is concerned with exploiting irregularities

Because of this atypical goal, forensic science is dependent on the existence and identification of individualizing characteristics, as opposed to class characteristics. An individualizing characteristic is one that shows an object to be unique, or, in alternative terms, one that distinguishes the object from all other objects; it “may be a single feature viewed alone, or an ensemble of features viewed in combination.” A class characteristic merely “separate[s] a group of objects from a universe of diverse objects.”

A forensic scientist must respect this difference between individualizing and class characteristics when opining about the maker of a latent print. On the basis of class characteristics alone, a forensic scientist can say that a suspect “cannot be excluded” as the maker of a latent print, that the suspect “could have made” a latent print, or that a latent print is “consistent with” exemplars. On the basis of individualizing characteristics--and only on the basis of individualizing characteristics--a forensic scientist can say that a suspect made or probably made a latent print.

Here, Grubb and Van der Lugt claimed that Kunze probably made the latent print taken from McCann's door. As a result, they were necessarily claiming that they had found, and were relying on, at least one individualizing characteristic.

According to the record, Grubb or Van der Lugt lacked personal knowledge of any individualizing characteristic. They could not have observed an individualizing characteristic like a scar, tear, mole, or abnormal hair follicle, because the overlays did not show any such feature. They were able to observe the antitragus, tragus, helix, helix rim, and antihelix, insofar as shown in the latent print, but each of those features was a class characteristic, not an individualizing one. They were able to observe the relationship between the antitragus, tragus, helix, helix rim, and antihelix, insofar as it was shown in the latent print, but a lay person using common knowledge would have had no idea whether such relationship was an individualizing characteristic; to conclude that it was, Grubb and Van der Lugt necessarily had to be employing scientific, technical or specialized knowledge. We turn, then, to whether that knowledge was generally accepted in the relevant community.

B.

Washington follows Frye. Frye provides that novel scientific, technical or other specialized knowledge may be admitted or relied upon only if generally accepted as reliable by the relevant scientific, technical or specialized community. General acceptance may be found

from testimony that asserts it, [FN76] from articles and publications, from widespread use in the community, or from the holdings of other courts. General acceptance may not be found “[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence.” When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104(a). When general acceptance cannot be reasonably disputed, it may be judicially noticed in the same way as any other adjudicative fact. We review “de novo,” which means without deference.

In this case, twelve long-time members of the forensic science community stated or implied that latent earprint identification is not generally accepted in the forensic science community. Kerley, Moenssens, and Bonebrake expressly said it was not. Turbyfill said he believed it was not. Moorefield, Stokes, Siebenthal, Norkus, Hamm, Sherlock, and Olenik each testified to a lack of information or a lack of opinion--but if the forensic science community had generally accepted latent earprint identification, each of them surely would have known about it. Bonebrake, Moorefield, Stokes and Norkus testified that the FBI does not use latent earprint identification-- which the FBI would surely do if the forensic science community had generally accepted latent earprint identification. Even Iannarelli, perhaps the foremost American advocate of earprint identification, declined to assert that latent earprint identification has been generally accepted; he relied instead on his own personal belief.

Grubb asserted general acceptance, but not on tenable grounds. He reasoned, essentially, that latent earprints are a form of impression evidence; that other forms of impression evidence are generally accepted in the forensic science community; and thus that latent earprints must be generally accepted in the forensic science community. We reject his premise that latent earprints automatically have the same degree of acceptance and reliability as fingerprints, toolmarks, ballistics, handwriting, and other diverse forms of impression evidence.

Like Iannarelli, Van der Lugt may not have asserted general acceptance. Even assuming he did, however, his assertion cannot by itself show general acceptance by a preponderance of the evidence. As we noted above, general acceptance may not be found “[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence.” At the very least, this record shows such a dispute. Accordingly, we hold that latent earprint identification is not generally accepted in the forensic science community.

Nothing in our holding bars testimony at retrial concerning how the latent print was lifted, how the exemplars were taken, or how the overlays were prepared. As the State correctly argues in its brief, “[t]here is nothing novel or scientific about lifting or taking a print whether it be of an ear, a lip or a finger,” and nothing “novel or scientific about taking the print and putting it on an overlay.” Lifting prints and preparing overlays involves technical or other specialized knowledge, but that knowledge has been generally accepted for decades.

Nothing in our holding bars testimony at retrial concerning visible similarities and differences between the latent print and the exemplars. This type of comparison--an “eyeballing” of readily discernable similarities and differences--is based on “visual techniques” that “present jury questions,” or, in alternative terms, on personal knowledge that can readily be understood and evaluated by the jury. Thus, it need not be supported by a showing of general acceptance.

Finally, nothing in our holding bars testimony, based on an appropriate comparison of the latent print with the exemplars, that Kunze cannot be excluded as the maker of the latent print. An opinion of non-exclusion (e.g., that a particular person cannot be excluded as the maker of a latent print) can rationally be based on readily discernable class characteristics, but an opinion of inclusion (e.g., that a particular person made or probably made a latent

print) cannot be.

In reaching our holding, we do not overlook the trial court's Finding 15, on which the State heavily relies. In that finding, the trial court stated that “the explanatory principle of ‘individualization,’ that any two items that have a common origin can be compared and an individualization accomplished if the items [are] of a quality that the individuality can be observed, is generally accepted in the branch of forensic science known as criminalistics.” This finding is immaterial here, where the question is whether latent earprint identification is generally accepted (or, in alternative terms, whether earprints in general, and the earprints in this case in particular, are “of a quality that the individuality can be observed”). We agree with and adopt the statements of a commentator who, after noting two generally held tenets—“that no two snowflakes are exactly the same,” and “that no two fingerprints have ever been found to have the same ridge positioning”—states as follows:

In some quarters, these tenets have been scooped up and extended into a single, all-encompassing, generalized principle of uniqueness, which states that “Nature never repeats itself.”

This principle is probably true, although it would not seem susceptible of rigorous proof. But the general principle cannot be substituted for a systematic and thorough investigation of a physical evidence category. One may posit that no two snowflakes are alike, but it does not immediately follow that no two shoe soles are alike, since snowflakes made in clouds and shoes are not. If no two shoe soles are alike, the basis for this uniqueness must rest on other grounds, and those grounds must be identified and enunciated.

We conclude that the trial court erred by allowing Grubb and Van der Lugt to testify that Kunze was the likely or probable maker of the latent, and that a new trial is therefore required.

II.

* * *

[The remaining two issues, not involving ear print identification, are omitted.]

Reversed and remanded for new trial.

HOUGHTON, J., and HUNT, J., concur.