

FILED
KING COUNTY, WASHINGTON

MAR 29 2024

SUPERIOR COURT CLEPK

BY LeTanya Smith
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

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Plaintiff,

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No. 21-1-04851-2 KNT

JOSHUA PULOKA,

—

Aka JOSHUA EVERYBODYTALKSABOUT,

Defendant.

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FINDINGS OF FACT AND

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CONCLUSIONS OF LAW RE: FRYE

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HEARING ON ADMISSIBILITY OF

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VIDEOS ENHANCED BY

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ARTIFICIAL INTELLIGENCE

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On Wednesday, February 21 and Thursday, February 22, the Court heard testimony from defense witness Brian Racherbaeumer and State's witness Grant Fredericks regarding proposed defense video exhibits enhanced by artificial intelligence..On Monday, February 26, the Court heard oral argument from both parties. In addition to the witness testimony and oral arguments, the Court reviewed each party's filed briefing and the relevant pre-trial exhibits, and gave an oral ruling on Thursday, February 29, which is **incorporated by reference**. The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW
ON STATE'S MOTION TO SUPPRESS PURSUANT
TCi FRYF)

I. FINDINGS OF FACT:

1. The use of artificial intelligence (AI) tools to enhance video introduced in a criminal trial is a novel technique.
2. Defense expert witness Brian Racherbaeumer utilized at least one AI enhancement tool to enhance a total of 7 (seven) videos, admitted on a flash drive as pre-trial Exhibit 5 (five).
3. At trial, the defense intends to admit at a minimum an AI-enhanced version of a video recorded by a civilian witness on an iPhone. The original recording was streamed to Snapchat. The AI enhanced copy of the video recording was admitted pre-trial as Exhibit 2 (two).
4. A version of this iPhone video extracted directly from the civilian witness's iPhone was admitted on a flash drive as pre-trial Exhibit 1 (one). This video — hereinafter referred to as the 'source video' is about 10 (ten) seconds in duration.
5. Defense witness Racherbaeumer was a self-identified videographer and filmmaker who started working with video in 1993. He was very candid and open about the fact that he is not — and has not claimed to be a forensic video technician and has not been forensically trained.
6. Racherbaeumer testified that the source video (Exhibit 1) was of low resolution, and contained substantial 'motion blur'
7. In contrast to Exhibit 1, the defense witness presented Exhibit 2 as an enhanced version of Exhibit 1 which he said added clarity through use of an AI video-editing tool in the program 'Topaz Labs AI', and was further processed on Adobe Premier Pro.
8. Racherbaeumer testified that the Topaz Labs AI program uses 'technology to intelligently scale up the video' to increase resolution. He stated that the tool adds sharpness, definition, and smoother edges to objects in the video, whereas the source video contained fuzzier images with 'blocky' edge patterns.
9. Racherbaeumer was candid, and was unable to say whether the Topaz Labs AI tool he used, which has been commercially available for about 3 (three) years, is currently utilized by the forensic video analysis community. He described peer usage as 'corporate.' He was unaware of any testing, publications, or discussion groups within his peer group that was involved in evaluating the reliability of AI tools for video enhancement purposes.
10. Racherbaeumer described that the Topaz Labs AI tool uses 'machine learning,' employing specific processing models based on a vast library of videos, but he did not know what videos the AI-enhancement models are 'trained' on, did not know whether

such models employ 'generative AI' in their algorithms, and agreed that such algorithms are opaque and proprietary.

11. The defense argued that the AI tool is not based on new science and urged the Court to accept the 'video production community', which embraces both filmography and videography, as the relevant community for purposes of Frye.

12. In its oral argument, the Defense candidly admitted to the court that its other retained expert, Matt Nodel, could utilize the source video (Exhibit I) as the basis for his expert testimony.

13. The State's expert witness, Grant Fredericks, is a Certified Forensic Video Analyst, with national and international forensic video analysis credentials.

14. According to Fredericks' testimony, which the Court finds credible, about half of his 300 appearances testifying in Court over the last ten years have been for the State or Plaintiff, and about half for the Defense.

i.s. Fredericks' focus in performing forensic video analysis is on 'image integrity', and not on creating a smoother, more attractive product for a user.

16. According to Fredericks, the AI tool(s) utilized by Racherbaeumer added approximately sixteen times the number of pixels, compared to the number of pixels in the original images to enhance each video frame, Utilizing an algorithm and enhancement method unknown to and unreviewed by any forensic video expert. Furthermore, he demonstrated that the AI method created false image detail and that process is not acceptable to the forensic video community because it has the effect of changing the meaning of portions of the video.

17. As Fredericks explained, the AI tool(s) modified the source video by eliminating much of the motion blur and smoothing edges such that objects in the enhanced video on Exhibit 2 did not maintain their original shape and color from the source video on Exhibit 1.

18. Mr. Fredericks explained and demonstrated that the AI process removed information that was in the original images and it added information that was not in the original images. The proffered AI-enhanced video removed artifacts on individual images, altered shapes, and removed the opportunity to forensically analyze which frames in the video utilized reference, predictive, and bi-directional images. In short, the AI-enhancement tools made proper, accepted forensic analysis of the video impossible.

19. Fredericks defined the relevant community as the forensic video analysis community, one that spans across North America, Europe, and other parts of the world.

20. In contrast to approved image enlargement techniques like 'nearest neighbor', 'bi-cubic', and 'bi-linear' — which have been utilized by the forensic video analysis community for decades, and which create video products that are reproducible across approved video

processing programs such as Adobe Premier Pro, Adobe Photoshop, Amped5 and Axon Investigate — the Topaz Labs AI model uses an opaque process called ‘machine learning’ to enlarge and enhance video.

21. Fredericks referenced the Scientific Working Group on Digital Evidence (SWGDE), whose members represent state, local and federal law enforcement agencies engaged in forensic video examinations, as a peer group that regularly publishes Best Practices and Guidelines for video enhancement for legal purposes. One specific SWGDE publication “*Fundamentals of Resizing Imagery and Considerations for Legal Proceedings*”, was admitted as Pre-trial Exhibit 6. Fredericks testified consistent with the SWGDE document that up-scaling an image (resizing) is referred to as ‘interpolation’ and that the most accurate interpolation method that preserves image detail when observing small objects is called Nearest Neighbor. Section 6 of the SWDGE document establishes that:

Utilizing Nearest Neighbor interpolation to enlarge imagery that contains small objects within (e.g., weapon in hands) may help mitigate the distortion of the object's shape, length, or size represented by a few pixels. The Nearest Neighbor algorithm can reduce the potential of providing a misleading representation of the level of pixel detail in the original imagery.

See Pre-trial Exhibit 6 at 8.

22. Although the ‘machine learning’ AI-enhancement algorithm(s) utilized by Topaz Video AI tools may have been market-tested by members of the video production community, they do not have a formal organization and they do not publish their testing outcomes. As a result, their findings, if they exist, cannot be evaluated by the defense expert, the forensic video analysis community, or by this court.

23. Rather than approving the use of such AI-enhancement tools, the forensic video analysis community has issued only warnings about the use of such tools in a courtroom; for example, SWGDE has found that, for ‘machine- learning’ interpolation algorithms, “it can be challenging to identify what process were applied to the imagery and replicate those steps with accuracy.” See Pre-trial Exhibit 6 at 7.

II. CONCLUSIONS OF LAW

1. Given the Court's finding that use of artificial intelligence (AI) tools to enhance video introduced in a criminal trial is a novel technique, the proponent of evidence utilizing these AI tools must make a showing that any expert's opinion or theory is based on a methodology accepted in the relevant community. State v. Russell, 125 Wn.2d 24, 41 (1994).

2 The standard for admitting evidence utilizing a novel scientific theory or principle is whether it has achieved general acceptance in the relevant scientific community. F United States, 293 F.1013, 1014 (D.C. Cir. 1923).

3 To determine whether a consensus of scientific opinion has been achieved, the court
4 examines testimony that asserts general acceptance, articles and publications, widespread
5 use in the community, secondary legal sources, and/or legal authority from other
jurisdictions. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire and Marine Ins. Co.,
176 Wn. App 168, 176, 313 P.3d 408, 412 (2013)

6 Testimony from an expert is admissible only if such evidence will assist the trier of fact,
7 and is reliable. ER 702.

8 5. Even if relevant, evidence is not admissible if its probative value is substantially
outweighed by the danger of unfair prejudice. ER 403.

9 6. “Y rye excludes testimony based on novel scientific methodology until a scientific
10 consensus decides the methodology is reliable, [whereas] ER 702 excludes testimony
where the expert fails to adhere to that reliable methodology.” In re Detention of
McGary 175 Wn.App. 328, 339 (2013).

11 7. The court does not determine if the scientific theory underlying the proposed testimony is
12 correct; rather, the court “must look to see whether the theory has achieved general
13 acceptance in the appropriate scientific community.” State v. Riker, 123 Wn.2d 351, 369-
370 (1994).

14 8. For example, where a psychologist's opinion was based on the ‘MATS-1’ test he himself
15 had created, the test had not been sufficiently utilized by other forensic experts in the
16 community, and no published state or federal appellate court decisions referred to the
‘MATS-I’ test, a trial court did not err in finding that “the test was not reasonably relied
upon by experts generally [in the relevant community] and thus not sufficiently reliable
to support [this expert's] opinion.” McGary, 175 Wn.App. at 341.

17 9. The scientific community relevant to this Court's determination of the admissibility of
18 videos enhanced by AI tools is the forensic video analysis community.

19 t , The Topaz Video AI enhancement tool(s), which utilize ‘machine learning’ algorithms,
20 have not been peer-reviewed by the forensic video analysis community, are — at the
present time — not reproducible by that community, and are not accepted generally in that
community.

21 11. The defense has not offered any state or federal appellate court decisions, from any
22 jurisdiction, which have examined — let alone approved of — the introduction of AI-
enhanced videos in a criminal or civil trial.

12. The defense has not offered any articles, publications, or secondary legal sources approving the introduction of AI-enhanced video evidence in a criminal or civil trial.

13. The video evidence produced by the Topaz Video AI enhancement model does not satisfy ER 401, as the resulting video does not show with integrity what actually happened but uses opaque methods to represent what the AI model 'thinks' should be shown.

t4. Moreover, this Court finds that admission of this AI-enhanced evidence would lead to a confusion of the issues and a muddling of eyewitness testimony, and could lead to a time-consuming trial within a trial about the non-peer-reviewable-process used by the AI model, such that any relevance is substantially outweighed by the danger of unfair prejudice under ER 403.

15. The danger of unfair prejudice is particularly concerning in this case, as the jury will likely be focused on the size and location of individuals and objects during the events depicted by the AI-enhanced video.

16. The best evidence for the jury is the source video recorded and preserved in Exhibit 1.

17. Any testimony which would be offered using the AI-enhanced video is not crucial to the charges, as the State intends to call multiple eyewitnesses and will offer the source video (Exhibit 1) at trial. Both sides can use the source video for argument, and the jury will be able to utilize the source video for its determination.

18. The Defense's proffered pre-trial Exhibit 2. is refused, and all AI-enhanced videos on pre-trial Exhibit 5 are refused.

Signed in OPEN COURT this ____ by of March, 2024.


The Hon. Judge Leroy McCullough

Presented by:

/s/ Thomas O'Ban
Thomas C. O'Ban, WSBA #50179
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Senior Deputy Prosecuting Attorneys

INDINGS OF FACT & CONCLUSIONS OF LAW
ON STATE'S MOTION TO SUPPRESS PURSUANT
TO FRYT/

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2 Approved as to Form:

no objection received 3/28/29 2:40 pm

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6 Attorneys for the Defendant

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