

Earprint Burglary Conviction Tossed

Mark Kempster was a 35-year-old handyman when convicted in March 2001 of burglarizing a widow's home in Southampton, England of about \$90 (£45). (Southampton is 80 miles southwest of London.) Kempster had performed some work around the woman's home several months prior to its midnight burglarization in June 2000.

No fingerprints or biological material traceable to the burglar was found in the house. What the police did find was the impression of an earprint recovered from the outside of the window where the burglar entered the house. The police theorized that before entering the house the burglar listened at the window for noise to be sure no one was awake. The woman was awoken by the burglar who asked her where her money was. His head was covered so she couldn't identify him.

Southampton police fingerprint examiner Cheryl McGowan provided the prosecution's key evidence against Kempster. She had some familiarity with comparing earprints, and she compared an impression of Kempster's earprint with the crime scene earprint. Kempster was charged with the burglary based on McGowan's report that the earprints matched.

At Kempster's trial McGowan testified that earprints are unique like fingerprints in that no two person's earprints are alike. Kempster's attorney neither challenged McGowan's testimony about the uniqueness of earprints, nor the methodology she used in comparing the crime scene earprint with Kempster's earprint. Furthermore, he did not present expert testimony to counter her assessment that the windowpane earprint matched Kempster's ear.

Kempster was so distraught at his lawyer's performance that he fired him in the middle of the trial. After the judge refused to declare a mistrial, Kempster proceeded to represent himself. He testified that he had been to the victim's house twice while performing work for her, but that it was ridiculous to suggest he would burglarize the house of someone that knew him well and could identify him. He also testified that he couldn't have committed the burglary because on the night it occurred he was out with his family until about midnight, and that when they returned home they discovered his horse had given birth to a foal. Kempster's wife, mother and brother-in-law all testified consistent with his alibi, and a similar statement by his sister was read into the record. That timeline wouldn't have enabled Kempster to commit the burglary,

which was in progress when the woman's silent alarm alerted the police at 12:16 a.m.

The prosecution argued Kempster cased out the house for valuables when he worked on it. The jury relied on McGowan's unchallenged testimony to reject Kempster's alibi and convict him of the burglary. He was sentenced to ten years imprisonment.

Kempster's family hired a lawyer to handle his appeal. The lawyer hired an expert to provide evidence in support of the appeal's ground that McGowan's earprint testimony had no probative value and should have been excluded. The expert, Dr. Christophe Champod, did not compare the crime scene earprint with Kempster's earprint. Instead he approached the issue from the perspective that earprint analysis is an imperfect evolving identification technique, and it "could properly be used to exclude a person as a suspect, but it could not provide a positive identification of a suspect." The Court of Appeal denied Kempster's appeal in December 2003.

Kempster's family then hired Dr. Graeme Ingleby to analyze the earprint evidence in preparation for submittal of an application to England's Criminal Case Review Commission. Dr. Ingleby is a respected expert involved in a European research project known as FearID (Forensic earprint identification), that was set up to evaluate the use of earprint identification as forensic evidence. Ingleby examined the same evidence that McGowan relied on. His conclusion, however, was much different: The windowpane earprint relied on to convict Kempster was of insufficient quality to make a reliable match with his ear.

Kempster application to the CCRC was largely based on Ingleby's report, and they accepted his case in April 2006. After conducting an investigation that included a more elaborate analysis by Ingleby of the actual earprint evidence, the CCRC referred Kempster's case to the Court of Appeal in May 2007.

During the hearing in the Court of Appeal on April 16, 2008, the CCRC's case primarily consisted of a presentation by Dr. Ingleby of the three reasons why he thought the identification of Kempster's earprint as the source of the crime scene earprint was unreliable. First, he demonstrated that the documentary evidence presented by McGowan during the trial purporting to show a match in fact shows significant irreconcilable differences between the two earprints. Second, he presented his own transparencies of the crime scene earprint laid over Kempster's earprint to demonstrate the discrepancies between the two earprints. Third, he explained that the crime scene earprint was of insufficient qual-

ity to make an identification of its source, since it didn't provide enough minute anatomical features such as notches, nodules or creases in the ear structure to reliably be matched with Kempster's earprint. However, he also explained that the non-minute details present were sufficient to exclude Kempster as the source – since the outside rim of the two ears had different measurements.

Michael Mansfield, one of England's most respected lawyers, represented Kempster during the hearing. He argued to the court after Ingleby's presentation that ear print evidence was "art more than science," and that it was a "highly subjective" identification technique that was "still in its infancy."

After the hearing the court orally overturned Kempster's conviction based on the unreliability of his identification as the culprit by a lone earprint. The court's written decision was released three weeks later. (*R v Kempster*, [2008] EWCA Crim 975 (07 May 2008))

Kempster was fortunate to have the unconditional support of his family was willing and able to hire lawyers and experts to help him. They know of his innocence because he was with them when the burglary was committed.

Sources:

R v Kempster, [2008] EWCA Crim 975 (07 May 2008)
Ear evidence gets a day in court, *BBC News*, April 16, 2008.

Cab Video Nixes Rape Claim

After a young couple directed a cab driver to take them to an early morning party in May 2008, they jumped out at the destination without paying. The woman forgot her purse, and when she returned to get it back the Stockholm, Sweden cab driver told her he would report them to the police if they didn't pay.

The woman refused to pay, and to get her purse back the couple reported to the police that the cab driver raped her. The police stormed the cab driver's home and arrested him. He explained what happened and the cab's surveillance video backed up his claim that the couple fled the cab without paying.

The driver was released and when confronted with the video the man and woman admitted they made up the rape story to get her purse back without paying the cab fare. The couple were then charged with bearing false witness for filing the fake rape report.

The driver told a reporter, "I felt like I'd lost all my rights when I was suddenly arrested. I just wanted to get paid for the trip."

Source: Cab driver cleared of false rape allegations, *The Local* (Stockholm, Sweden), September 29, 2008.