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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

LEVY LARKIN BROWN,

Appellant.

Appellate Case No. 2021-000485

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by (1) qualifying Jeremiah Fraser as an expert witness in bloodhound tracking because Fraser did not have the requisite knowledge, skill, experience, training, or education to be qualified as an expert witness and (2) admitting dog tracking evidence because the state failed to show the dog used to track had by experience been found reliable and because the trail was contaminated?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court did not err in finding the bloodhound tracking testimony reliable because both Copper – the bloodhound who successfully tracked in the past – and his trainer – with eighteen years' experience – were reliable and the foundational requirements for admission were fulfilled. Appellant conceded at trial that the trail was not contaminated.

STATEMENT OF THE CASE

A jury convicted Appellant Brown of armed robbery following trial on April 21-23, 2021. The Honorable Camen T. Mullen, who presided over the trial, sentenced Appellant to sixteen years' imprisonment.

STATEMENT OF FACTS

On July 15, 2018, Sergeant Mikhail Kopylov responded to a robbery at McDonald's restaurant. Sergeant Kopylov met an employee, Smalls, and her boyfriend, Timothy Garvin. Garvin found all the remaining employees locked in the freezer. Tr. pp. 97-100.

Once other officers arrived on the scene and an investigator took over, Sergeant Kopylov looked outside for evidence. He observed two shoes in the bushes. Tr. pp. 102-04. Sergeant Kopylov testified, maybe fifteen to twenty minutes afterwards, Appellant and his accomplice, Blue, approached the officers and asked questions about the incident. Tr. p. 104. Sergeant Kopylov explained earlier in the shift, he saw Appellant and Blue together in the Bi-Lo parking lot, which backs up to the McDonald's. They were dressed in all-black clothing. Sergeant Kopylov knew Appellant, who was a McDonald's employee, and recognized him by his distinctive gait – Appellant walks on his tip-toes. Tr. pp. 105-06.

Petrea Lesene lived in Shell Point Apartments with her three kids, including Shanya. Tr. p. 125. Appellant and Blue were unexpectedly sitting on her steps. Tr. p. 126. Lesene explained they were not allowed to intrude on her property, and it “was shocking” to her to find them there. Tr. p. 127. Appellant told Lesene about the robbery that just took place and said one of the robbers pointed a gun at Shanya. Tr. p. 127.

Blue and Appellant accompanied Lesene as she walked to McDonald's. Instead of taking the trail, they walked on the road. Blue and Lesene spoke with an officer. Tr. pp. 128-30. Lesene noted Appellant was sweating profusely. Tr. pp. 131-32.

Lesene admitted she texted Shanya asking if she had anything to do with the robbery. Lesene later fussed, “You all ass-planned that shit.” Her level of cooperation changed during this

point of the testimony. Although she admitted she knew Appellant, she would not look and identify him, even refusing to stand when asked by the prosecutor. Tr. pp. 133-35. When asked during cross-examination if her daughter was charged as an accessory after the fact, Lesene answered, "I guess." Tr. p. 137.

Brandy Nicole DeWitt testified she worked at EnMarket when Appellant, a regular customer, entered the store, sweating profusely and not wearing shoes. Appellant claimed he needed to run from the apartment complex and discard a gun after receiving a cell phone call from a cousin. Tr. p. 143. In State's Exhibit 5, Appellant is seen fidgeting in the store in an agitated manner with sweat stains on his shirt, and he wears black crew cut socks – no shoes.

One of the two robbers pointed a gun at Sandy Whitmore, a McDonald's employee, and directed her to the freezer. Once inside the freezer, she called 911. Tr. p. 149. The doors at McDonald's were already locked; the doors are locked in advance of the 11:00 p.m. closing time. Suzanne Krebs, an employee, noticed two men in sweatshirts and hoods – on a hot summer night – walking through the drive-thru lane of the parking lot. Although the doors should have been locked, she was confronted by an armed robber as she went to take a closer look. Tr. pp. 155-59. The robber asked her to open the safe. Krebs told him she could not get in the safe. The robber said, "I will shoot you right now" and insisted she open the safe. Krebs opened the safe and tossed the money towards the robbers. Krebs wondered how the robber knew a bag was in there, and to her, they seemed to know the store procedure. Tr. pp. 159-60.

The second robber sent Krebs to the freezer. She explained most McDonald's restaurants have a lock on the freezer, but the lock on their freezer was broken. She testified, "I don't know how they would know that they wouldn't have to use a key for it or how they knew all these other

things, but they did.” Tr. p. 160 (quote, p. 160, lines 17-24). When she went into the freezer, she was relieved the other employees were already in the freezer and they were all okay. Tr. p. 161, lines 1-7. She clicked the door shut: “And we were safe that way. They wouldn’t come back after us and kill us.” Tr. p. 162, lines 9-15.

Krebs suffers from PTSD as a result of the robbery. She worked with Appellant for several months. Tr. p. 163. Krebs testified Smalls was cleaning in the store lobby and was able to get out of the store when the robbers arrived. Tr. p. 169. The restaurant was also robbed in 2017, although no connection was shown to the instant case. Tr. p. 169.

Sergeant David Tafoya was the handler for Copper, the bloodhound that is the center of the issue in this case. He responded to the robbery and then was directed to fetch two dogs. He loaded two bloodhounds, including Copper. Tr. pp. 172-74.

Copper is a last-known dog. The last known item presented to Copper was a \$10 bill dropped outside the restaurant. He tracked immediately to a doo-rag. Copper was tracking: his nose was to the ground and he pulled Sergeant Tafoya, “taking us to where the track led to.” Copper took Sergeant Tafoya down the path, across the Bi-Lo parking lot, and to an apartment building where Sergeant Tafoya saw two black males on the third floor balcony. He told the team to make contact with the two men. Copper circled the building two times. Tr. pp. 177-80. Sergeant Tafoya noted that outside the restaurant there was also a pair of sandals and another \$10 bill. Tr. p. 177.

Jeremiah Fraser supervises the bloodhound tracking team. He trained all the bloodhounds on the team. The bloodhounds are trained as specific article and last known trackers:

In other words, we can present them with an article in a bag,

something somebody has touched. The dog will smell that article, lock in on that scent and track that scent.

They can also track what's called the last-known or fresh scent. In other words, if somebody takes off running in a certain direction, somebody sees which direction they went, we can contain that area, that being the last freshest scent in that area, and strike the dog off that freshest scent.

In this case with Copper, a pure-blood bloodhound, he tracks last-scent or freshest scent and an article.

Tr. p. 189, line 20 – p. 190, line 6

Copper started training in 2015. Sergeant Fraser trained Copper, and Sergeant Fraser explained the training. Tr. pp. 190-91. Sergeant Fraser explained the bloodhounds are tools intended to take the tracker from one piece of evidence to another. Tr. p. 193. He explained bloodhounds are able to differentiate between different people by their scent and smell the skin cells that people leave behind. An individual in fear would expend a greater amount of cells for the bloodhound to detect. Tr. pp. 193-94.

Port Royal Police advised the direction the robbers ran and Copper was brought to where two \$10 bills lay on the side of the road (and perhaps a flip-flop). Copper struck a scent immediately. Tr. p. 197. He struck a black do-rag in the parking lot. Copper tracked from the Bi-Lo parking lot to a foot trail leading to Port Royal Apartments. Tr. p. 199.

Sergeant Fraser testified Copper arrived at apartment building 273 and he would not leave, but instead kept circling the building. Sergeant Fraser explained a bloodhound will follow the freshest scent and will not leave it. Tr. pp. 200-01. This will result in a dog circling, as Sergeant Fraser explained:

It's what's called a scent pool. As you guys have been sitting here all day, more and more of our skin cells are falling off. The rafts are falling off and more and more are building up. It's called a scent

pool. It just keeps growing the longer you stay in one spot. That's what happened in this case.

Tr. p. 201, lines 7-12.

Copper never located an exit scent. Tr. p. 201, lines 13-15. Sergeant Fraser explained:

[T]he dog will track the freshest scent. It goes back to prey. When a dog is after prey, the dog will not go out after an older scent. The dog recognizes fresh, hot scent. He will stay in that area, trying to locate that fresh, hot scent. They are not going to leave.

Tr. p. 201, lines 20-25.

Sergeant Fraser testified two guys stood on the balcony Copper kept circling. The two guys on the balcony identified themselves as Appellant and Blue. Tr. p. 202. Sergeant Fraser explained why Copper would not likely go up the stairs to the third floor balcony:

When you are standing outside in an elevated locations with all the skin cells falling down, they are falling out at a wider range than if you are standing on the ground.

For the dog to try to process that entire area and then walk up the stairs, it's not likely. There are so many things in between the third floor, the second floor, and then the ground. There are a lot of things, but those skin cells are still falling to the ground in a wider area, which is why the dog kept circling the building.

Tr. p. 204, line 18 – p. 205, line 2.

Sergeant Nicholas Thomas, on the tracking team, confirmed Appellant was one of the two men standing on the balcony. Tr. pp. 205-06.

Sergeant John Hogue testified he interviewed Krebs, who was distraught. Tr. p. 208. In reviewing the surveillance, it appeared the robbers went straight to the only unlocked door. Tr. p. 209. Reviewing this surveillance, he noted Shanya Higgins secured the door at one point, but later kept the door from re-securing. This is how the robbers came in. Tr. pp. 210-12. The robbers are

seen already dropping money from their backpack while leaving the restaurant. Tr. pp. 212-13. Sergeant Hogue testified the next day, the on-duty manager found another headscarf in one of the recycling bins. Tr. p. 223. State's Exhibit 9 shows a still of two men, including Appellant, in EnMarket. Sergeant Hogue noted Appellant is in the video wearing a pair of Nike slides. Tr. pp. 225-26.

Tim French, with the Beaufort County Sheriff's Office forensic lab, performed DNA testing on the flip-flops, shoes found in bushes, and the two head scarves. Tr. pp. 252-54. Appellant was a one in 199 octillion match to "item 2" [scarf] and Blue was a contributor. Appellant was a 1 in 32 septillion match to item 4, while Shanya Higgins was a one in 9 billion match as a contributor. Tr. pp. 258-260.

In surveillance footage earlier in the day, Appellant is seen wearing a backpack that appears similar to the backpack one of the robbers wore. State's Exhibits 23, 24.

The defense only called two law enforcement witnesses, primarily to introduce dashcam video and photographs not already introduced during trial.

During sentencing, Appellant – seeking mercy – explained, "I didn't try to hurt nobody." Tr. p. 335.

STANDARD OF REVIEW

At issue is the admissibility of evidence. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

ARGUMENT

The trial court did not err in finding the bloodhound tracking testimony reliable because both Copper – the bloodhound who successfully tracked in the past – and his handler – with eighteen years’ experience – were reliable and the foundational requirements for admission were fulfilled. Appellant conceded at trial that the trail was not contaminated.

Appellant argues the trial court erred in admitting bloodhound tracking evidence because the trainer did not take enough classes, ignoring the trainer’s eighteen years’ of experience, and because Copper, the bloodhound was not shown to be reliable. Copper’s experience demonstrated he is able to smell an item with a person’s fresh scent and reliably follow that scent to evidence, to where the scent leaves the trail, or even under the right conditions, the person themselves. Other arguments Appellant presents were not made to the trial court or were even conceded. The trial court did not err and evidence was overwhelming, so any error was harmless.

In camera testimony and trial court’s ruling that the foundational requirements were met.

The State, in response to Appellant’s motion, presented Master Sergeant Fraser of the Beaufort County Sheriff’s Office. Sergeant Fraser manages the bloodhound tracking team since 2010, and been a member for eighteen years. Tr. p. 24. He participated in training all the team’s bloodhounds during that time frame. Sergeant Fraser testified as an expert once, perhaps twice. Tr. p. 25. Sergeant Fraser attended training schools twice, in 2003, and an additional 40 hour training in 2010. Additionally, Sergeant Fraser testified, “We train every week.” Tr. p. 26.

Copper, the bloodhound who tracked to the building where Appellant and his accomplice were located, is trained to work from a specific article and also from a last-known scent. Tr. p. 28.

Sergeant Fraser explained: “For our purposes, dogs can track from a last-known scent where a known person has gone. Copper is trained in that way. As long as that area has been uncontaminated, the dog will follow the freshest scent from that spot to where he tracks to.” Tr. p. 28, lines 18-22.

Typically, Copper is trained weekly. Tr. p. 29. When asked if Copper was “shown to be generally reliable,” Sergeant Fraser answered affirmatively. Tr. p. 29, lines 11-12. When asked by the trial court, Sergeant Fraser agreed the science of dog tracking is pretty much the same as it was in 2003 when Sergeant Fraser was first trained. The trial court found Sergeant Fraser qualified as an expert in bloodhound tracking. Tr. pp. 30-31.

Examination turned to the topic of Copper’s experience. In January 2017, Copper attempted to track a runaway. Copper tracked to a backyard of an abandoned property, circled back to the porch, searched the property, and did not find anyone. He was unable to find a scent at other locations (the article used for the scent was a pillow). Tr. pp. 32-33.

In May, 2017, Copper was called for another track. He was used for a last-known location of a person, which relies on an air scent. It appears from the testimony that Copper did not find the person because he never left his house. Tr. pp. 33-34.

In August 2017, Copper successfully found a person when presented with clothing. He tracked through a wooded area, around some vehicles and to a shed. Then he tracked towards a residence and eventually found the person the police were looking for. Tr. pp. 35-37.

Copper did not find anyone for a track on July 15, 2018. Tr. pp. 36-37. In another track following an armed robbery, Copper tracked to an intersection. Tr. p. 41, lines 5-13. In another track following an armed robbery, Copper did not find the suspect but did locate evidence along

the way. Tr. p. 41, line 14 – line 24.

On September 5 (year not specified), Copper found one of the suspects. The track concluded with the suspect coming out of the woods. Evidence was found along the way. Copper was not alone, but working with another dog. Sergeant Fraser explained the dogs are loud and talk to each other, which prompts the suspects to keep moving. A perimeter is established helping to keep the suspects from escaping. Tr. p. 42, line 12 – p. 43, line 7.

At one point, the Court asked defense counsel if Copper's failure to find anyone is a failure to do his job or meant he was inconsistent, and defense counsel admitted he was not saying that means Copper was not consistent, but claimed he was saying Copper was not reliable. Tr. p. 38, lines 15-24. By defense counsel's measure, Copper was successful in two out of twelve tracks. Tr. p. 39. However, Sergeant Fraser explained the fallacy in defense counsel's reasoning:

What I think is important to notice and what isn't being brought out is that in most of these, the dog is tracking to an intersect [sic]. What we run into now is cell phones, things like that. We often track places where somebody has a ride waiting. They call somebody to come and pick them up. A lot of times, the dog doesn't end in the woods where nothing is there.

Generally speaking, these crimes didn't happen in a preplanned manner. So generally we will find evidence along the way. We will find shoe impressions. Evidence can be any number of things. Shoe impressions. . . .

Tr. p. 41, line 24 – p. 42, line 10.

Sergeant Fraser explained another important aspect of the tracks:

We strike the dog, but not necessarily to find them. If they do decide to lay down, we will find them. But most of the time, they try to get out of the perimeter. They will see a patrol car with blue lights on and move. They eventually find a place they can cross a river and get out of the perimeter and get out.

This case [the robbery with three suspects] is a good example

of that. There were three suspects. What happened is that one of them got out, I think, and they caught them across 170 and 280. So there was a successful dog catch in this case.

Tr. p. 43, lines 8-17

Sergeant Fraser explained bloodhounds are law enforcement tools relied on “to get us through places where there is evidence.” Tr. p. 46, lines 1-4. He further testified: “In other words, where there is not a shoe impression, not a dropped item. There is not direct evidence that somebody just ran through broken sticks, overturned leaves. That is what the bloodhound is for. It gets us from Point A to Point B when there is no evidence. We confirm where the bloodhound is working through that evidence.” Tr. p. 46, lines 3-10. Sergeant Fraser further explained an arrest is not “based on what the dog has done. There is other evidence involved.” Tr. p. 46, lines 11-16.

On December 13 (year not specified), Copper tracked in search of a woman who left a care facility. Tr. p. 43, line 22- p. 44, line 1. Sergeant Fraser explained:

The dog in this case tracked from Alia to Highway 17 and was tracking towards Charleston on 17. This woman had gotten a ride on Highway 17. The guy who picked her up could tell that something wasn't right with her, so he took her to the hospital. If the dog was tracking towards Charleston, it would have been a long ride. But she had gotten a ride on Highway 17.

Tr. p. 44, lines 5-14. Unless Appellant seriously contends that it would have been successful only if Copper caught up to the car, this clearly should count as a successful, or at least accurate, track.

On January 19, 2018, Copper was tracking armed robbery suspects. He tracked down Spanish Moss Trail to Ribaut Road. This is a location with a parking lot for people accessing the trail. Copper was brought to another area where he did not pick up any further trail. Tr. pp. 44-

45.

In the instant case, the prosecutor explained Copper tracked to several items on the path, including to a head scarf with Appellant's DNA on it. Tr. p. 40, lines 10-17.

The trial court then ruled as follows:

I think we all have agreed in looking at this that the State v. White case sets out and talks about the six different factors to look at. I can tell you that at this point, I think the evidence has shown that the dog handler, Mr. Fraser, satisfies the qualifications as an expert under Rule 702. I will note your objection, Ms. Duque.

He has been doing this for 18 years. He has testified since 2003. He is one of six dog handlers here in Beaufort County. I think he has the qualifications, certainly, and the expertise and experience to meet the requirements of Number 1. As far as the evidence shows, the dog is characterized by acute power of smell. I think obviously a full bloodhound has no question a very keen sense of smell. It's used for that exact purpose. I think Copper in this case meets that requirement.

The dog has been trained to follow a trail. Sergeant Fraser tells us that they train the dog and they train them every week on Wednesdays, it sounds like. So I think that section has been met.

Tr. p. 49, lines 1-21.

The trial court then asked for argument on Copper's reliability. Appellant's counsel argued Copper was successful in only two out of twelve cases. The prosecutor rightly noted that depends on what counts as success. Success includes tracking to where the person got in a car or cases where items of evidence are found. Tr. pp. 49-52. The trial court agreed with the prosecution and found Copper was shown by experience to be reliable. Tr. p. 52, lines 10-11.

The trial court noted, without disagreement, that Copper, shortly after the robbery, was placed on the trail the suspect was known to flee, and defense counsel agreed with the trial court no evidence was presented that the trail was contaminated. Tr. p. 52, lines 12-18. The trial court

further noted several items with Appellant's DNA were found on the trail by Copper. Tr. p. 52, lines 19-24.

The judge concluded that at that point in time, the trial court would allow the dog-tracking evidence, but the trial court would need to hear the evidence in full during trial. Tr. p. 53, lines 1-11.

How to establish a sufficient foundation for admission of dog tracking evidence.

"[A] sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated." State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009).

(1) Sergeant Fraser was qualified based on training and experience (18 years).

First, Appellant argues Sergeant Fraser did not possess the necessary expertise to be qualified under Rule 702, SCRE. This is a weak start for Appellant because, for instance, Appellant overlooks Sergeant Fraser's experience. Under Rule 702, SCRE:

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.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or

education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.” State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

Appellant’s argument – based on education – is too narrow in focus: “[T]here are a variety of ways in which a person can become skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence.” Fields v. J.Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) (“[A] trial court’s decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts”).

In Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), Prior contended the circuit court erred in qualifying two social workers as experts to testify on a victim’s mental condition. However, the Court of Appeals observed: “A witness may be competent to testify as an expert although the witness acquired his or her knowledge **through practical experience** and not by scientific study, training, or research.” Id. at 530, 369 S.E.2d at 849 (emphasis added). The Court of Appeals found each social worker was qualified based on their education, post-graduate training, and clinical experience with victims of sexual assault, as well as their opportunities to

observe the victim. Id. at 531, 369 S.E.2d at 849.

Appellant neglects to mention that Sergeant Fraser, the bloodhound team's leader, at the time of trial had eighteen years' experience with bloodhound tracking and trains weekly with his team. By ignoring these facts, Appellant also fails to argue how the trial court's ruling is not supported by evidence. The trial court did not abuse its discretion.

(2) Bloodhounds excel in their sense of smell.

The trial court found obvious that bloodhounds are a breed characterized by acute powers of smell. Appellant's counsel did not disagree. The Criminal Court of Appeals of Oklahoma concluded in depth analysis with the observation, "It may be here stated that in all of the cases above cited it is the unanimous statement of all the trainers of bloodhounds that when they are placed upon individual trail that they will never quit that trail until they are called off, and again put upon some other trail. They will trail where many persons have been and other tracks made, but they will not leave the tracks of the party whose trail they are following." Buck v. State, 138 P.2d 115, 121 (Okla. Crim. App. 1943).

(3)(4) Copper was trained to follow scent and is reliable.

Appellant continues trial counsel's contention that Copper was only successful on two out of twelve tracks. In one of the "unsuccessful" tracks, Copper tracked a patient from a care facility to Highway 17 where she was picked up by a driver. This uncovers the absurdity of Appellant's argument on this point. As Sergeant Fraser explained, a bloodhound is an investigative tool that takes investigators from one point to another. In a few of the examples, Copper found evidence rather than the person. Those results show Copper is reliable. In the instant case, while a jury is free to believe Appellant's claim that people commonly discard their clothing items on trails

leading from their place of employment, it certainly is an indication of his reliability that Copper tracked to a head scarf with Appellant's DNA on the path leading to the building where Appellant loitered. In the January 19, 2018 track, Copper tracked down a path to a parking lot. It is certainly likely the person left in a car in the parking lot, and if this track is not evidence of Copper's reliability, it certainly is not any evidence that he is not reliable.

How much demonstration is required for confirmation of a dog's reliability? In August 2017, the handler presented Copper a piece of person's clothing. Copper then tracked through woods, vehicles, a shed, towards a residence, and found the person. That is a remarkable event unless one takes a bloodhound's remarkable skill for granted.

In McCray v. State, 915 So.2d 239, 241 (Fla. Dist. C. App. 2005), Buddy, a canine, conducted twenty tracks, "some of which have resulted in apprehensions." "Within minutes of being taken to where the defendant was last seen, Buddy picked up his scent, grew excited, dragged Officer Baker with him as he tracked the scent which led him to the concrete enclosure where he stopped and began barking and trying to scale the wall when he located the object of the track." Id. The court noted, "the dog picked up the track immediately, the track was continuous, the dog located the defendant hiding in a concrete structure within five minutes of his disappearance, and this concrete structure was located near where the officer lost sight of him . . ."). Id. at 242. The reviewing court found ample evidence supported the reliability of the dog track.

(5)(6) Copper was placed on the trail a short time after the robbery and counsel agreed the trail was not contaminated.

Copper was placed soon after the robbery on the trail and trial counsel agreed there was no evidence it was contaminated. Appellant's appellate counsel argues otherwise on the latter

point, but this point was conceded at trial. State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be argued on appeal). Appellant's argument that the trail was contaminated because a few individuals may have been within the perimeter is unsupported by citation. Considering the bloodhound is tracking from an item in the robber's possession, and is trained to stay on the fresh scent of that person to the exclusion of all others, this case does not present a situation that one could say the trail was contaminated as a matter of law. Buck v. State, 138 P.2d 115, 121 (Okla. Crim. App. 1943) (noting the support found in caselaw establishing bloodhounds "will trail where many persons have been and other tracks made, but they will not leave the tracks of the party whose trail they are following."). This reality is likely why trial counsel conceded the point argued now by Appellant on appeal.

An appellant court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence unless the findings are clearly erroneous, and its review extends only to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The trial court did not err because his ruling is supported by evidence.

Additionally, any error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). The robber lost his shoes and Appellant appeared in stocking feet at the convenience store with a story of the urgent need to dispose of a weapon "for a cousin" shortly after the robbery. His doo-rag was left outside the McDonald's restaurant, the DNA matched Appellant's DNA. Appellant was seen with Blue in black clothing close in time to the robbery by

an officer. Even if the prosecution did not present evidence that Copper tracked to the building, Appellant was found in a place where he was not invited per Lesene.

Accordingly, this Court should affirm the conviction and sentence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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June 22, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No: 2021-000485

THE STATE,

Respondent,

v.


LEVY LARKIN BROWN,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Sarah E. Shipe, Esquire, counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 22nd day of June, 2022.



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Subject: State v. Levy Larkin Brown, 2021-000485
Date: Wednesday, June 22, 2022 11:30:00 AM
Attachments: [image001.png](#)
[Brown Levy - 2021-000485 - Initial Brief Of Respondent and Designation Of Matter \(03019192xD2C78\).PDF](#)

Good morning, Ms. Shipe.

Attached to this email is a copy of the State's Initial Brief Of Respondent and Designation Of Matter in the above criminal appeal. We will be filing this brief with the court electronically via AIS shortly.

If you would, please confirm your receipt of this email and the attachment by return email.

Sincerely,

Anne Mueller, Legal Assistant to Senior Assistant Attorney General David Spencer

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SC Court of Appeals

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