

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge
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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LEVY LARKIN BROWN,

APPELLANT

Opinion No. 2023-UP-365 (S.C. Ct. App. Filed November 15, 2023)

APPELLATE CASE NO. 2021-000485

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APPENDIX
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Levy Larkin Brown, Appellant.

Appellate Case No. 2021-000485

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

Unpublished Opinion No. 2023-UP-365
Submitted October 2, 2023 – Filed November 15, 2023

AFFIRMED

Appellate Defender Sarah Elizabeth Shipe, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Attorney General David A. Spencer, and Senior
Assistant Attorney General Mark Reynolds Farthing, all
of Columbia; and Solicitor Duffie McDuffie Stone, III, of
Bluffton, for Respondent.

PER CURIAM: Levy Larkin Brown appeals his conviction for armed robbery and sentence of sixteen years' imprisonment. On appeal, Brown argues the trial court erred by admitting bloodhound tracking evidence because (1) the police officer who supervised the dog track should not have qualified as an expert in bloodhound tracking; (2) the bloodhound used by police to track the perpetrator was not reliable; and (3) the trail was contaminated. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

We hold the trial court did not abuse its discretion by admitting the bloodhound tracking evidence. *See State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *State v. Wallace*, 440 S.C. 537, 543, 892 S.E.2d 310, 313 (2023) ("[I]f the record reflects the trial court 'exercise[ed] its discretion according to law,' we will almost always affirm the ruling." (quoting *Morris v. BB&T Corp.*, 438 S.C. 582, 585-86, 885 S.E.2d 394, 396 (2023))). First, we hold the trial court did not abuse its discretion by qualifying the police officer as an expert because the officer had eighteen years' experience in dog tracking, had trained the Beaufort County Sheriff's Office bloodhound tracking team's dogs, and had qualified as an expert in at least one prior case. *See State v. Prather*, 429 S.C. 583, 599, 840 S.E.2d 551, 559 (2020) ("Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE."); *State v. White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009) ("[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. Henry*, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997) ("[D]ifferences in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility."); 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."). Second, we hold the trial court did not abuse its discretion by finding the bloodhound was reliable because the tracking team trained weekly with the bloodhound; the officer who monitored the bloodhound explained that the dog was trained weekly using specific

methodologies to track from a "last known scent" or "off a specific article"; the bloodhound's track was based on items that contained Brown's DNA; and the officer attested to his reliability. *See White*, 382 S.C. at 272, 676 S.E.2d at 687 (providing "a sufficient foundation for the admission of dog tracking evidence is established if . . . by experience the dog is found to be reliable"). Third, we hold the issue of the trail's contamination is not preserved for review because Brown conceded the issue at the pretrial hearing. *See State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (holding an issue conceded at trial is not preserved for appellate review).

AFFIRMED.¹

MCDONALD and VINSON, JJ., and LOCKEMY, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 2023-UP-365

THE STATE,

RESPONDENT,

V.

LEVY LARKIN BROWN,

APPELLANT

APPELLATE CASE NO. 2021-000485

PETITION FOR REHEARING

On November 15, 2023, this Court affirmed appellant’s conviction and sentence where appellant argued 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. Pursuant to Rule 221(a), SCACR, Levy Larkin Brown requests that this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

In affirming appellant's conviction and sentence, this Court held the trial court did not abuse its discretion "by qualifying the police officer as an expert because the officer had eighteen years' experience in dog tracking, had trained the Beaufort County Sheriff's office bloodhound tracking team's dogs, and had been qualified as an expert in at least one prior case. This Court cited *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997), for the proposition that defects in the amount and quality of the expert's education or experience go to the weight and not the admissibility of the testimony.

In *Henry* this Court held the psychotherapist possessed requisite skill, training, experience, learning, and knowledge to render an expert opinion regarding victim's posttraumatic stress disorder. *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). In that case the psychotherapist had a postgraduate academic degree and was a practicing psychotherapist for seven years. Additionally, she had been qualified more than fifteen times as an expert in state court and had also been qualified as an expert in federal district court and family court.

This case differs from *Henry*. In *Henry*, the expert at issue was a medical professional with an advanced degree that had been admitted as an expert numerous times. Here, while Officer Fraser had worked with the bloodhound tracking team for several years, he had only ever been to *two* trainings in that time and only received certification from his training in 2003. Although this Court's opinion states Officer Fraser had been qualified as an expert in at least one prior case, Fraser himself seemed unsure whether he had been qualified as an expert before stating that he thought he had been qualified two times prior but maybe it was only one time.

Additionally, as argued in the brief the state failed to show that Fraser satisfied the qualifications of an expert under Rule 702, SCRE. See *State v. Harris*, 318 S.C. 178, 456 S.E.2d 433 (Ct.App.1995) (party presenting expert must show witness possesses, either through study or

experience, specialized knowledge that makes him better qualified than jury to form opinion on particular subject).

The trial court failed to “execut[e] its gatekeeping duties pursuant to Rule 702, SCRE and *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). While the subject matter of Fraser’s testimony was likely beyond the ordinary knowledge of the jury, the substance of Fraser’s testimony was unreliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Respectfully, Officer Fraser’s testimony regarding how bloodhounds track by scent was disconcerting. Even if this Court finds the trial court properly qualified Fraser as an expert in bloodhound tracking he certainly is not an expert in how the human body releases scent or sheds skin cells.

This Court also held “the trial court did not abuse its discretion by finding the bloodhound was reliable because the tracking team trained weekly with the bloodhound; the officer who monitored the bloodhound explained that the dog was trained weekly using specific methodologies to track from a ‘last known scent’ or ‘off a specific article’; the bloodhound’s track was based on items that contained [appellant’s] DNA; and the officer attested to his reliability.” This Court cited of *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), in support of its holding.

Unlike here, White conceded that the dog handler met the Rule 702, SCRE, qualifications due to his experience and training. *Id* at 269, 676 S.E.2d at 686. Also, in *White* the South Carolina Supreme Court found there was “ample evidence concerning the training and reliability of the dog.” *Id.* at 271, 676 S.E.2d 687. While this Court cited to the extensive training of the bloodhound in this case it only mentions that Fraser “attested to [Copper’s] reliability.”

Moreover, the trial court's finding of reliability is not supported by the record. Instead, the record reflects the dog, Copper, went on twelve different calls and of those twelve it appears that Copper only successfully found two individuals. R. 37, ll. 1-13; 39, ll. 17-23. Fraser merely claimed Copper had shown to be "generally reliable." R. 29, ll. 5-12.

Accordingly, appellant respectfully requests this Court reverse appellant's conviction and sentence based on the trial court's erroneous admission of the bloodhound tracking evidence.



Sarah E. Shipe
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ATTORNEY FOR APPELLANT

This 22nd day of November, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEVY LARKIN BROWN,

APPELLANT

APPELLATE CASE NO. 2021-000485

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Levy Larkin Brown, #367857, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 22nd day of November, 2023.

Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Levy Larkin Brown, Appellant.

Appellate Case No. 2021-000485

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Stephen P. McDonald

J.

[Signature]

J.

James E. Lockery

A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Sarah Elizabeth Shipe, Esquire

David A. Spencer, Esquire

Isaac McDuffie Stone, III, Esquire

Mark Reynolds Farthing, Esquire

The Honorable Carmen T. Mullen

FILED
Dec 14 2023