STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



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Appeal from York County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000445

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THE STATE,

Respondent,

v.

LEXIE JAMES TURNER, JR.,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

**The trial court properly exercised its gatekeeping role in allowing expert testimony from Commander Marvin Brown and Appellant did not suffer prejudice as the jury was advised that qualification as an expert does not give the expert any special status.**

## STATEMENT OF THE CASE

During its August, 2012 term, the York County Grand Jury returned a true billed indictment charging Appellant with Possession with Intent to Distribute Cocaine Base (2012-GS-46-02872) and Distribution of Cocaine Base (2012-GS-46-04278). On February 26, 2013, Appellant, represented by Melissa Inzerillo, Esquire, proceeded to a trial by jury before the Honorable Steven H. John. On February 27, 2013, the jury found Appellant guilty of Possession with Intent to Distribute Cocaine Base and not guilty of Distribution of Cocaine Base; whereupon, Judge John sentenced Appellant to eleven years imprisonment. Appellant thereafter filed an appeal. The State of South Carolina's initial brief follows.

## STATEMENT OF THE FACTS

On May 18, 2012, Appellant met with Ben Quick, a confidential police informant, at a liquor store known as "The Party Shop." R. 7-11. Quick met with police officers prior to this meeting and had been outfitted with both a wire and video device. R. 8, ll. 4-7. Quick gave Appellant a twenty dollar bill and received in exchange a bag of crack cocaine. Following the exchange, Appellant proceeded to a car in which he was a passenger. The car stopped in a parking lot shortly thereafter. Officers Faulkenberry, Ervin, and Figeuroa and Commander Marvin Brown followed Appellant's car as he left the liquor store. R. 7, ll. 12-19. Once the vehicle stopped in the parking lot, Commander Brown and Officer Figeuroa approached Appellant. R. 13. Commander Brown placed Appellant under arrest. R. 13. Officer Figeuroa then received consent from the driver of the vehicle, Travis Moore, to search the vehicle. R. 14. After a brief search, Officer Figeuroa located another bag of crack cocaine in the vehicle. R. 14.

## ARGUMENT

**The trial court properly exercised its gatekeeping role in allowing expert testimony by Commander Marvin Brown and Appellant did not suffer prejudice as the jury was advised that qualification as an expert does not give the expert any special status.**

Appellant contends the trial court improperly admitted Commander Marvin Brown's expert testimony as this testimony was not reliable. However, the record establishes the trial court properly discharged its gatekeeping function in determining Commander Brown was qualified as an expert and his testimony was reliable for the evidence to be submitted to the jury. Thus, Appellant's conviction and sentence should be affirmed.

In South Carolina, "[t]he admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion." State v. Tapp, 398 S.C. 376, 385, 728 S.E.2d 468, 473 (2012). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." Id. The qualification of a witness as an expert falls within the sound discretion of the trial court. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011).

A witness "is competent as an expert when he or she has acquired knowledge, skill, or experience so that he or she is better able than the jury to form an opinion on the subject matter." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). In order for a court to qualify a witness as an expert "the trial court must find (1) the expert's testimony will assist

the trier of fact; (2) the expert possesses the requisite knowledge, skill, experience, training, or education; and (3) the expert's testimony is reliable." Martin at 513, 705 S.E.2d. at 42.

In the instant case, Commander Brown provided nonscientific expert testimony. In State v. White, the South Carolina Supreme Court held that "[n]onscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). Therefore, a trial court's gatekeeping function in assessing the admissibility of expert testimony does not change whether the expert testimony is scientific or nonscientific. See id. In this case, the State presented Commander Brown to testify as to:

> [A] typical intoxicating dose of crack cocaine; how it's used; the typical going price rate for the intoxicating dose; what is, in his mind, typical of a person who intends to distribute the cocaine versus the person who intends solely to use it; things like the absence of pipes; and his experience as an officer, the way it's packaged, what that indicates to him; and things of that nature.

R. 15, ll. 21-22 to R. 16, ll. 1-3. The trial judge, in response, asked the State to be more specific as to the areas in which they intended to qualify Commander Brown as an expert. R. 20, ll. 9-11. The State responded:

> Crack cocaine packaging; the going price; the typical intoxicating dose; and the different habits between the typical addict and the typical drug dealer. Essentially it would be phrased as 'in your expert opinion, based upon your experience, is possession of this amount of crack cocaine without a pipe more typical of a user or a dealer?' Or I could ask him 'in your experience, have you encountered

> an individual with this much crack cocaine without a pipe for its use?'

R. 20, ll. 12-22.

This dialogue between the trial judge and the State evidences that the trial judge properly exercised his gatekeeping function in the admission of this evidence. The trial judge, being skeptical of the expert testimony, questioned the State to specify what in particular Commander Brown was being qualified as an expert for. Not completely satisfied with the response, the trial judge went further, and cautioned the State that "I think rather than a general open-ended question, I think you need to zero in on his expertise and experience" when asking questions. R. 22, ll. 20-22. The State then proceeded to question Commander Brown's experience, training, and knowledge in narcotics enforcement. R. 24-26. Commander Brown testified that he had been qualified as an expert twice at the federal level and more than half a dozen times at the state level. R. 27, ll. 1-3. The Court's exchange with the State during this portion of the trial transcript establishes that the trial judge evaluated the substance of Commander Brown's testimony and determined that it was reliable.

The record clearly establishes that Commander Brown was reliable. Commander Brown conducted hundreds of interviews with drug users, participated in thousands of drug arrests particularly involving crack cocaine since 1990, and attended extensive classes and trainings on narcotics. Furthermore, Commander Brown teaches various law enforcement training

courses on basic narcotics. The trial court properly concluded Commander Brown's expert testimony would be reliable because of his extensive experience, knowledge, and training. Moreover, Commander Brown had been qualified as an expert in numerous prior drug-related cases, including State v. Robinson, supra, where this Court affirmed the trial court's qualification of him as an expert. Commander Brown's extensive experience, both as a law enforcement officer and as an expert witness, further supports his reliability.

Following his qualification, Commander Brown testified to the general appearance of crack cocaine, how it's packaged, its street value, what an intoxicating dose is, and habits of a typical drug user versus a typical addict, including as to the common paraphernalia that would be found on the person of a crack cocaine user. R. 29-31. Commander Brown further testified as to the street value of the cocaine found during the Appellant's arrest. R. 30. This testimony aided the trier of fact in providing background information on the topic of narcotics, including the distribution thereof a subject matter typically beyond the common knowledge and understanding of lay jurors. See State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) ("There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge."). Additionally, it is common practice across many jurisdictions for a trial court to admit the expert testimony of veteran law enforcement

officers regarding criminal behavior where it may aid a jury otherwise lacking knowledge about such behavior. See, e.g, State v. Vega, 691 A.2d 22 (Conn. App. Ct. 1997); Wise v. State,. 257 Ga. App. 211, 570 S.E.2d 656 (2002) (the admission of a police officer's opinion evidence that the amount of cocaine seized from the defendant's home would typically be intended for distribution rather than for personal use was not improper); State v. Montana, 421 So. 2d 895 (La. 1982) (because procedure and techniques for both the use and distribution are generally unknown to the public at large, such matters may be explained to the jury by one possessing special training or experience in such matters); State v. Crosby, 748 Sd.2d 502 (La. Ct. App. 1999); Commonwealth v. Frias, 712 N.E.2d 1178 (Mass. App. Ct. 1999); Bui v. State, 964 S.W.2d 335 (Texas Ct. App. 1998). Thus, the trial court properly admitted Commander Brown's expert testimony as he was qualified and reliable. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (finding expert testimony on dog tracking evidence was reliable and properly admitted).

However, if it were found that the trial court did, in fact, err in admitting Commander Brown's testimony, such an error would be harmless because Appellant suffered no prejudice from the admission of Commander Brown's expert testimony. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)

(citing State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993)). "Whether an error is harmless depends on the circumstances of the particular case." Id. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. "Error is harmless when it could not reasonably have affected the result of the trial." Id.

The trial judge properly instructed the jury on Commander Brown's testimony, curing any potential prejudice that Appellant may have suffered from this testimony. The trial judge gave the following jury instruction:

> I qualified two witnesses in this case to give their opinion. Sometimes they are called expert witnesses. Sometimes the court qualifies people because of their training, experience, education, their work in a certain area to be qualified to give their opinion. Normally we won't allow people to give their opinion, what they think. You have to testify to what you saw, what you hear, what took place in your presence. *But just because the court qualified the witnesses to give their opinion does not mean or does not give them any special status.* Again, you weigh all the evidence the same. You look at all the evidence the same. You find that evidence which convinces of its truth.

R. 84, ll. 11-23 (emphasis added). In State v. Douglas, the court found the qualification of an expert witness did not prejudice the defendant because the qualification "did not require the jury to accord [the expert's] testimony any greater weight than that given to any other witness." 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009). Furthermore, in Robinson, this Court determined that the defendant suffered no prejudice as a result of the qualification of

Commander Brown as an expert because the qualification did not result in the jury giving the expert testimony "any greater weight than that given to a lay witness." Id. at 587, 722 S.E.2d at 825.

Similar to both Douglas and Robinson, Appellant in the instant case suffered no prejudice as a result of Commander Brown's expert testimony. The trial judge specifically instructed the jury to weigh the expert testimony in the same manner it would weigh any other evidence. And, "[a]s with any witness, the jury is free to accept or reject the testimony of any expert witness." Douglas at 503, 671 S.E.2d at 609. The trial judge's jury instruction clearly cured any prejudicial effect Commander Brown's testimony may have had on Appellant.

Finally, Appellant suffered no harm from Commander Brown's expert testimony due to the overwhelming evidence of guilt in this case. The State presented into evidence a video tape of the transaction between the confidential police informant, Ben Quick, and Appellant. R. 12, et. seq. The video tape vividly displayed the drug transaction that took place between Quick and Appellant, and itself provided sufficient proof of Appellant's guilt.

Accordingly, the trial court did not err in admitting Commander Brown's expert testimony because the trial court properly determined this testimony to meet the threshold requirements of expert testimony including being reliable. Furthermore, if the trial court erred in admitting Commander Brown's testimony, Appellant suffered no prejudice, as the trial court's jury

instructions and the overwhelming evidence of Appellant's guilt, would render it a harmless error.

## CONCLUSION

For the foregoing reasons, the State submits that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

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April 8, 2014

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Honorable Steven H. John, Circuit Court Judge
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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Appellant.

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**PROOF OF SERVICE**

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I, Ellen DuBois, certify that I have served the Motion to Dismiss Appeal on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Christopher Shannon Leonard, Kendrick and Leonard, P.C., Post Office Box 886, Columbia, SC 29202 and Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 8th day of April, 2014.

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