STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNNIE LEE LAWSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in allowing the State to properly authenticate Appellant's ten print card taken at a correctional facility, and the State was not required to water down its case and accept a vague stipulation. Additionally, Appellant was not prejudiced by the evidence which made no reference to any prior crimes or arrests. Further any error in allowing testimony that the ten print card originated from a corrections facility was harmless beyond a reasonable doubt.

II.

The trial court did not err in denying an instruction that would amount to a charge on the facts. Further, an instruction on prior bad acts was not warranted where no prior bad acts were admitted into evidence. Appellant was not prejudiced by the trial court's refusal to give the requested instruction.

III.

The trial court did not err in allowing expert testimony on fingerprint analysis. The State's expert was well-qualified and the method employed was reliable. The trial court did not abuse its discretion in its gatekeeper role to find the testimony met the threshold for admission.

STATEMENT OF THE CASE

The Lexington County grand jury indicted Appellant Lawson for breaking into a motor vehicle. Lawson was convicted by a jury as charged and was sentenced by the Honorable R. Knox McMahon to five years imprisonment.

STATEMENT OF FACTS

Jessica and Blake Wilbanks were moving items to the house they just bought in Cayce and making repairs. They were moving from Barnwell to the "Avenues" section of Cayce. They were unloading their Land Rover and 2001 Volvo C70 convertible at approximately 10:30 p.m. They brought a spring box mattress inside the house. Jessica went back outside and heard a scraping noise, sounding like metal on metal, from the Volvo. Concerned, she called out her husband's name as she walked toward the Volvo and was startled by a stranger, not her husband as she expected, standing by the passenger side door. The man ran. He was a tall, broad-shouldered blackman, but Jessica was unable to provide any further description. She noted the perpetrator was significantly taller than her. She is 5'5" tall. The car window was pushed down and the Volvo was damaged. Tr. pp. 54-65; p. 71; p. 86. Jessica observed pollen or dirt fingerprints left on the car window. Tr. p. 78. Blake also noted the fingerprints on the car window. Tr. p. 122.

Sergeant Jason Merrill of the Cayce Department of Public Safety responded to the scene and testified he lifted fingerprints from the Volvo's car window. Tr. p. 149. Sergeant Merrill observed three pollen-ridden prints on the inside and one print on the outside of window. Sergeant Merrill determined the position of the prints suggested someone placed their hand over the glass to manipulate the window. Merrill lifted the three prints and made a duplicate of one of the prints left on the inside of the window. Tr. pp. 151-58.

Sergeant Merrill noted a crowbar was found by the church across the street, about 100-150 feet from the Volvo. Tr. pp. 161-62. Sergeant Merrill determined the crowbar was not suitable for prints, and he disposed of the crowbar because it carried no evidentiary value. Tr. pp. 164-66.

Sergeant Merrill knows Lawson and advised the jury that Lawson lives in Cayce, less than a mile from the scene of the break-in. Tr. p. 169. Sergeant Merrill had no leads on the perpetrator of the crime, just the prints. Tr. p. 170. However, after he submitted the prints for analysis, the prints came back as a match to Lawson. Tr. pp. 170-71.

James Hickman with the Lexington County Sheriff's Department testified. Hickman has been a latent print examiner for thirty-six years. Hickman has been certified for AFIS (Automated Fingerprint Identification System) for about ten to fifteen years. Tr. p. 264.

Hickman examined the submitted prints. He found two of the four prints unusable. The two prints he found usable were duplicate prints. Hickman determined the usable print was for either finger three or finger eight. Hickman submitted the usable print to a search in AFIS for a match. AFIS returned the top twenty matches. Hickman started with the record at the top of the list, the one with the highest score. Upon analysis, Hickman found the prints, which only reflected an identification number and not the identity of the subject of the ten print card, matched the prints lifted from the Volvo. Tr. pp. 293-97.

Hickman showed the jury eight characteristics from the ten print card that matched the lifted prints. Although not identified in the display for the jury, Hickman testified he found fifteen matches between the known standard and the lifted print. Hickman testified the latent print left on the Volvo matched Lawson's print. Tr. pp. 301-05. On cross-examination and redirect examination, Hickman noted AFIS detected ten matches between the known standard and the prints on the Volvo. Tr. p. 334; pp. 344-45.

ARGUMENT

I.

The trial court did not err in allowing the State to properly authenticate Appellant's ten print card taken at a correctional facility, and the State was not required to water down its case and accept a vague stipulation. Additionally, Appellant was not prejudiced by the evidence which made no reference to any prior crimes or arrests. Further any error in allowing testimony that the ten print card originated from a corrections facility was harmless beyond a reasonable doubt.

Law enforcement solved the case by comparing the print recovered from the Volvo against a known standard – Lawson's ten-print card from the Kirkland Correctional facility. Lawson offered to stipulate to authentication of the ten print card. Tr. p. 112. Note Lawson did not offer to stipulate to the efficacy of the match of the ten-print card with the Volvo prints. Along with the offer to stipulate, Lawson expressed having "an issue with the hearsay of **what he was arrested for** on the back. **I'm fine with the rest of it**, but I think that that's improper." Tr. p. 112, lines 7-14 (emphasis added). The trial court agreed with Lawson that his criminal record on the card should be redacted. Tr. pp. 112-13. The prosecutor did not accept the offer to stipulate. Tr. p. 113, lines 19-23. Lawson responded to this refusal as follows: "As long as his prior record, none of his prior arrests are not there." Tr. p. 113, lines 24-25. Thereafter, the trial court asked counselors if there was anything further before the jury came back to the courtroom and Lawson responded, "Not that I can think of, Your Honor." Tr. p. 114, lines 10-12.

The State called two more witnesses before SLED agent Seraphim Haftoglou testified about how records are attained and maintained for AFIS. Agent Haftoglou is the AFIS supervisor at SLED. Tr. p. 234. The prints are attained under a statute that allows SLED to store them. "These

are criminal and some applicant." Tr. p. 236, line 20. Agent Haftoglou mentioned SLED also collects prints from concealed permit holders and security officers, which are manually entered in the system (fingerprint records from correctional facilities are digitally entered). Tr. p. 238, lines 4-5. The ten print card was admitted over an objection previously made at a bench conference. Tr. p. 245, lines 3-11.

Agent Haftoglou testified the print was created July 23, 2003, and the print originated at Kirkland Correctional Institute. Agent Haftoglou did not say whether it was an employee print or an inmate print. Tr. p. 248, lines 18-24. Lawson objected at this point. The following conversation occurred outside the presence of the jurors.

> Ms. Zmroczek: Your Honor, it's my understanding of your previous ruling, when I brought this up before the jury came in this morning that any information regarding arrests or criminal history was to be redacted before entered into evidence and –
>
> The Court: The criminal history is. I don't understand what you're saying.
>
> Ms. Zmroczek: Okay. The criminal history is not redacted from that.
>
> The Court: It is redacted. He didn't say anything about the criminal history. Her question was where was the prints taken from?

Tr. p. 249, lines 14-25. Lawson's counsel explained her objection further, complaining mention of the originating institution was improper "because now they know that he's been arrested before." Tr. p. 250, line 24 – p. 251, line 1. The trial court noted that was not Lawson's original objection when the trial court ordered the criminal record be redacted and noted State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009), which discussed authentication requirements for ten-print cards. Tr. p. 251, lines 2-25. Only then did Counsel enlarge her objection to "improper hearsay about or the improper

character evidence associated with the location." Tr. p. 252, lines 12-14. The trial court noted the State did not need to accept the stipulation and further noted Lawson's original objection during the pretrial argument was not to the institution being named. Tr. p. 253, line 20 – p. 254, line 25. The prosecution continued with testimony authenticating the card. Tr. pp. 256-57.

First, the issue is not preserved for review. Express consent to the admission of evidence constitutes a waiver of the issue on appeal. State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989). A party cannot complain of error induced by his own conduct. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 *cert denied* 519 U.S. 1045 (1996). The Court of Appeals does not sit to relieve self-inflicted wounds. Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring). In camera, counsel complained only about "an issue with the hearsay of what he was arrested for on the back. I'm fine with the rest of it, but I think that that's improper." Tr. p. 112, lines 7-14. After the trial court ordered the prior convictions redacted, counsel confirmed the limit of her objection: "As long as his prior record, none of his prior arrests are not there." Tr. p. 113, lines 24-25. Redacted from the ten print card were convictions for operating an uninsured motor vehicle, failure to appear for a uniform traffic citation, driving under suspension, second offense driving under suspension, miscellaneous traffic offense, and failure to appear. Note the unredacted ten print card contained reference to being collected at Kirkland Correctional Institute and in the exhibit provided to the jury "Corr" was redacted. State's Exhibit No. 16, Court's Exhibit No. 2.

The testimony about how the ten print card was created and where it was created was necessary. In State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987), the Supreme Court found the State

did not sufficiently authenticate a print from a police file because no testimony was presented "as to when and by whom the card was made and that the prints on the card were in fact those of this defendant . . ." Id. at 173-174, 359 S.E.2d at 282 (quoting State v. Foster, 200 S.E.2d 782 (N.C. 1973)) (internal quotations omitted).

In Anderson, a SLED agent testified the ten-print card was a SLED record taken of Anderson by "a law enforcement agency." Anderson, 386 S.C. at 124, 687 S.E.2d at 37. The latent print examiner testified "that when a person is arrested, the police or jail personnel roll the person's fingerprints onto a ten-print card." Id. The Supreme Court noted defense counsel agreed to allow the witness to use the term "law enforcement agency" in lieu of identifying the record as originating from a correctional facility and noted no issue was raised as to potential prior bad act evidence at trial. Id. at 124 n.2, 687 S.E.2d at 37 n.2. The Supreme Court noted its prior holding in Rich that "testimony regarding the police fingerprint records [are] inadmissible without evidence as to when and by whom the card was made and that the prints on the card were in fact those of the defendant." Id. at 127, 687 S.E.2d at 39 (citations and internal quotation marks omitted). Ultimately, the Supreme Court held it was not necessary to have the person who actually took the prints testify, and the Supreme Court found the testimony elicited met authentication requirements. Id.

In the instant case, Lawson complains the State should have been required to accept the vague stipulation to authentication, without a stipulation to the prints matching. Obviously, the only defense Lawson pursued was the defense that the match was incorrect. It is understandable then that the State was not comfortable with a cherry-picked stipulation. Of course, both parties need to assent for a stipulation to be offered in lieu of competent evidence. State v. Anderson, 318 S.C. 395, 399,

458 S.E.2d 56, 58 (Ct. App. 1995).

In Old Chief, 519 U.S. 172 (1997), the United States Supreme Court analyzed whether a stipulation that Old Chief was previously convicted of a felony should have been required under Fed. Rule Evid. 403, in lieu of admitting specific evidence of the triggering conviction, in a prosecution for possession of a weapon by a felon. The United States Supreme Court noted "the familiar standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Id. at 653.

> Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once . . . . Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support its conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.

Id.

The general rule is the prosecution cannot be forced to accept stipulations. State v. Simmons, 352 S.C. 342, 356-57, 573 S.E.2d 856, 864 (Ct. App. 2002) (noting that the State cannot be forced to stipulate to the prior convictions element of burglary in the first degree; however, in order to eliminate prejudice to the defendant, the State may not introduce evidence of the details of the prior convictions, and the trial judge should instruct the jury that the prior convictions should only be considered for the limited purpose of proving one of the elements of burglary in the first degree).

Lawson's reliance on State v. Henderson, 347 S.C. 455, 459, 556 S.E.2d 691, 693 (Ct. App.

2001) is unavailing. In Henderson, the evidence presented – notice that the DUI defendant could request independent testing – was unnecessary for authentication of the test results. The Henderson court noted such evidence was not admissible against a DUI defendant and carried no probative value. In the present case, pursuant to Rich, the State needed to show authentication including establishing the location and time the fingerprint record was made. Lawson was only willing to stipulate to admitting the ten print card, not that the ten print card was his fingerprint, much less that it matched the print recovered from the crime scene. Therefore, the State should not have been forced to stipulate and weaken the force of its case which required establishing the efficacy of the match between the print recovered from the crime scene and the known standard. Old Chief; Simmons.

Additionally, Lawson was not prejudiced by the reference to a correctional institute. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 ((1961) (finding testimony by a witness that Robinson told him that he was on the way to the probation office did not create an inference that Robinson was convicted of another crime) *overruled on other grounds by* Torrence; State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial

where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes.").

Further, under the facts of the case, any error was harmless. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Undoubtedly, the jury's mind was focused on the singular issue in this case, whether Lawson's fingerprints were on the car window. This was amply supported by uncontroverted expert testimony and the powerful circumstantial evidence that out of the whole state, the anonymous fingerprint record Hickman analyzed and found a match was from a person living less than a mile away from the crime scene. It simply is unfathomable the jury failed to believe the fingerprint evidence but convicted Lawson anyway because he may or may not have been an inmate at a correctional facility years ago.

II.

The trial court did not err in denying an instruction that would amount to a charge on the facts. Further, an instruction on prior bad acts was not warranted where no prior bad acts were admitted into evidence. Appellant was not prejudiced by the trial court's refusal to give the requested instruction.

The trial court rejected the exact language of Lawson's request for an instruction on "prior bad acts" because it specifically referenced incarceration at Kirkland Correctional, which amounts to an instruction on the facts. Tr. p. 390, lines 21-25. The trial court correctly noted no evidence of prior bad acts was introduced, and therefore an instruction on prior bad acts "highlights [an] inference that he has a prior bad act and there's no testimony whatsoever that he has a prior bad act." Tr. p. 392, lines 4-6. Frankly, it is unclear as to whether at that point Lawson's counsel was more concerned with testimony regarding the ten print card or Investigator Merrill's testimony that he knew Lawson well. Lawson's counsel raised the point about Investigator Merrill's testimony, and the trial court noted that it might only have meant they were friends. Counsel explained in response: "My brother in-law is one, yes. But that's the only reason I put it in there. I'm not as concerned with that." Tr. p. 392, lines 7-21.

Lawson cites cases where prior convictions were admitted into evidence and the trial court found error in not providing instructions to the jury on the limited purpose of those convictions. In the instant case, no prior convictions were admitted into evidence. Accordingly, the trial court did not err.

Further, Lawson cites State v. Smalls, 260 S.C. 44, 47-48, 194 S.E.2d 188, 189-90 (1973) in which the Supreme Court noted its concern that without a limiting instruction, the jury could

consider the prior convictions "for any purpose, including the probability that appellant committed the crime because he had demonstated a prior criminal tendency." In that case, defense counsel elicited the testimony from Smalls when he was testifying, anticipating the State eliciting the testimony. Given the context in which the prior convictions were admitted against Smalls, jurors might have thought the evidence was admitted to show Smalls' propensity for crime. In the instant case, the testimony was elicited from the law enforcement agent who maintains fingerprint records rather than from Lawson. In this context, it would be obvious to a juror that the testimony was admitted to show that the fingerprint admitted as a known standard was Lawson's fingerprint and not as propensity evidence.

Lawson distorts a rule from two out-of-state post-conviction relief cases, Tate v. State, 912 So.2d 919, 928 (Miss. 2005) and Phillips v. State, 675 S.E.2d 1 (Ga. 2009). Certainly the premise of those two cases is true: a trial attorney may make a strategic decision not to request an instruction that the trial attorney worries would highlight unfavorable evidence. However, those cases do not stand for the proposition that the trial court lacks discretion to fashion an instruction for the jury or decline an instruction that may be confusing. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (finding corroboration instruction was confusing and an impermissible comment on the facts, even though it was a correct proposition of law). Lawson relies on Mullaly v. Smyth, 96 S.C. 14, 79 S.E. 634 (1913). In that civil case, it was not clear what instruction was objected to and nonetheless, Smyth's scope is clearly not as broad as Lawson argues in light of Stukes, which found a correct statement of law constituted an impermissible comment on the facts.

Further, to warrant reversal, a trial court's refusal to give a requested jury charge must be

both erroneous and prejudicial to the defendant. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). In the instant case, for the same reasons Lawson was not prejudiced by the testimony about the origin of the ten print card, Lawson was not prejudiced by the trial court's refusal to give the requested instruction. The jury's attention was surely focused on the singular question of whether he left his print on the car, not an oblique reference to a prior incarceration.

III.

The trial court did not err in allowing expert testimony on fingerprint analysis. The State's expert was well-qualified and the method employed was reliable. The trial court did not abuse its discretion in its gatekeeper role to find the testimony met the minimal threshold for admission.

Lawson complains the trial court erred in qualifying James Hickman as an expert. Hickman has thirty-six years of experience and used the well-known ACE-V method of analysis. The trial court did not abuse its discretion in finding Hickman qualified.

Hickman has been a latent print examiner for thirty-six years and an AFIS operator for ten or fifteen years. In addition to some standard law enforcement training, he completed several classes related to fingerprint comparisons. Hickman completed a fingerprint recognition class at Midland's Tech, a Basic Fingerprint Comparison class at the South Carolina Criminal Justice Academy, an Advanced Latent Print Comparison class at the Criminal Justice Academy, the FBI's Advanced Administrative Latent Print examiner's Course at Quantico, Virginia, and a course on latent prints and fingerprint identification with the Institute of Applied Science in Chicago. Tr. pp. 262-65.

Hickman testified as follows on how he keeps up to date with any new developments in the area of latent print examinations:

> Yes, ma'am, I try to keep up with things [that are] going on. It – it's a lot of the fingerprint examiners now have websites As we all know, the internet is taking over everything, so it took over us too. So I check with them each – every now and then and make sure everything is going all right. I communicate with them, different people, and I also keep a small library of books that I keep up to date and several of the trade magazines comes in and I keep up to date with those too.

Tr. p. 266, lines 2-10. Hickman makes comparisons every day and described fingerprint comparison

as 90% of his job. Asked how many latent prints he has examined in thirty-six years, Hickman responded, "Let's say in the thousands. I want to say millions, but I don't want to get that high." Tr. p. 268, line 25 – p. 269, line 1. Hickman is a former member of the South Carolina Division of the International Association of Identification and the International Association for Identification. Tr. p. 270, lines 5-9.

Asked about validation procedures, Hickman explained after he makes an analysis and makes a report, he provides the report to another examiner who validates the report, "If he doesn't agree with me there's no identification." Tr. pp. 271-72 (direct quote, p. 272, lines 3-4). Hickman testified he has used the ACE-V methodology since before it was called the ACE-V method. Tr. p. 273. Hickman explained, the V represents the part of the process where "I give it to another examiner, he does the same thing again to determine if I'm doing it properly[.]" Tr. p. 273, lines 22-24. Hickman explained ACE-V is the quality control mechanism. Tr. p. 274. When asked about accreditation, Hickman explained he did not know anyone that accredits agencies to do latent prints. Tr. p. 274, lines 14-18.

Following voir dire, Lawson's counsel argued Hickman was not qualified to testify as an expert because he had not kept up with his certifications. She noted she asked the prosecution for all policy and procedural manuals so she could have them reviewed by an expert and was told they did not exist. Tr. p. 276, lines 10-23.

In finding Lawson qualified, the trial court listed the various classes and noted Hickman's lengthy law enforcement experience and experience as a latent print examiner. The trial court also noted the validation process as a check and balance. He noted the number examinations by Lawson

and also referenced Lawson's review of other examiner's websites. The trial court concluded Hickman was qualified in the area of fingerprint analysis. Tr. pp. 279-80.

Once qualified by the trial court, Hickman explained the benefit of fingerprint analysis as follows:

> Fingerprints [are] the most positive means of identification that we have. There is no other way that I can, when I match a fingerprint to someone, I can say that it was him; there's no way that, that he kept, it's the most positive means of identification. When I say it's him; it's him. It's that print. There's no way, like DNA is, is great and it's coming along and it's a good thing to have, but DNA gives you a ratio, like it's 10 million to 1 that it could be you, but whenever I match a fingerprint up and make a positive identification, *it is you; it is no one else.*[1]

Tr. p. 285, lines 6-16. During cross-examination, Hickman named three websites he follows to keep updated, Latent Fingerprint Examiner, the IAI, and WHORL. Tr. p. 317.

In the instant case, the trial court properly exercised its discretion and met its "gatekeeper" duty to determine that Hickman's testimony readily met the minimum threshold for allowing the testimony to be presented to the jury. Rule 702, SCRE addresses the admissibility of expert testimony as follows:

> 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.

All expert testimony, whether scientific, technical, or otherwise, must meet the requirements

[1] While Lawson attempts to categorize the italicized portion of this testimony as a claim of personal infallibility, in context, Hickman was merely explaining the difference between fingerprints, which are truly unique, and DNA matching, in which the results are stated in odds – he was not making an

of Rule 702. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). In order for a witness to be qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has 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).

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the trial court should consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. White, 382 S.C. at 274, 676 S.E.2d at 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

Contrary to Lawson's argument, the gatekeeping function for trial courts considering expert testimony did not originate with White. Instead, the term "gatekeeper" flowed into the Supreme Court's opinion in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008).

"arrogant proclamation" as Lawson maintains.

Fields was review of a lawsuit by homeowners against a builder for installing defective stucco siding. The Supreme Court found the lower court erred in suppressing expert testimony from the initial inspector of the plaintiff's home on the basis that the inspector failed to comply with South Carolina's home inspection licensing requirements. The Supreme Court noted the following:

> Rule 702 does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert. Instead, Rule 702 recognizes that here are a variety of ways in which a person can become so 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.

Id. at 86, 658 S.E.2d at 556.

The Supreme Court found "this Court's jurisprudence emphasizes the role of the trial court as gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact." Id. The Supreme Court reasoned that in determining a witness's qualifications as an expert, "the trial court should make an inquiry broad in scope." Id. Ultimately, the Supreme Court found that while the lack of licensing may be a factor in determining a witness' qualifications, the trial court errs when it makes licensing its "solitary focus." Id.[2]

In the instant case, Lawson claims Hickman should not have been qualified because his lack of recent certifications or membership in professional associations. However, as demonstrated by Fields, there is no requirement of certification or membership in a professional organization required to find a witness qualified. Hickman was "better qualified than the jury to form an opinion on these

[2] Likewise, "no U.S. court has ever ruled that certification is required to qualify a latent print examiner to testify" as noted in one of Appellant's secondary sources. Simon A. Cole, MORE THAN ZERO: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1032 (Spring 2005).

topics." State v. Anderson, 407 S.C. 278, 285, 754 S.E.2d 905, 909 (Ct. App. 2014) (rejecting claim that examiner, who had examined only 300 to 500 unknown prints and was never qualified as an expert before, did not have the proper "schooling"). Notably, Anderson cites State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) favorably, which was one of the pre-White cases relied on by the trial court.

Lawson misconstrues the application of the reliability requirement. The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert."). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

> [The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999).

The use of fingerprint evidence is one of the cornerstones of the investigative process used by law enforcement throughout the country. Tellingly, Lawson is unable to cite to any case where fingerprint evidence was found unreliable. Rather, every Court that examined the issue quickly dismissed the notion that fingerprint evidence is scientifically unreliable.

In State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990), the South Carolina Supreme Court examined the reliability of a new scientific technique known as DNA Print Identification or Restriction Fragment Link Polymorphism (RFLP). The Court ruled:

> The RFLP analysis and test results would be admissible under both the Frye standard and the standard set forth in State v. Jones, supra. Having found that RFLP analysis involves scientific techniques which have been generally accepted by the professional community, the initial test for admissibility has been met. In future cases, a Frye type hearing will not be necessary. This initial burden has been established and DNA analysis may be admitted in judicial proceedings in this state in the same manner as other scientific evidence which is routinely used in trial court proceedings such as **fingerprint analysis** and ABO blood tests.

Id. at 490 (emphasis added). The ruling in Ford has significance in the current case for two reasons. First, the Court recognizes that a Frye type hearing is not necessary in cases where the reliability of a given science is beyond dispute. Second, the Court's inclusion of fingerprint evidence as a shining example of the type of evidence routinely admitted without a Frye hearing because its previously established reliability serves as recognition of the fact that fingerprint evidence is reliable to the point that a hearing on the reliability of that evidence is not required.

Appellant cites the NRC Report that complains about the lack of validated standards for declaring matches in latent print examinations. Committee on Identifying Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United Stated: A Path Forward (2009) at 142. Tellingly, the Report concedes "[b]ecause of the amount of detail available in friction ridges, it seems plausible that a careful comparison of two impressions can accurately discern whether or not they had a common source." Id. at 142. The NRC Report also acknowledges, "[h]istorically, friction ridge analysis has served as a valuable tool, both to identify the guilty and to exclude the innocent." Id.

In the years since the release of the NRC Report in 2009, criminal defendants in many jurisdictions cited the report to argue for the wholesale exclusion of fingerprint evidence. Notably, these challenges were uniformly rejected. See People v. Luna, 989 N.E.2d 655, 671 (Ill. App. 1. Dist. 2013) (upholding trial court's rejection of Luna's request to hold a Frye hearing based on the NRC Report, noting "wholesale objections to ACE-V methodology have been uniformly rejected by state appellate courts (under Frye, Daubert, or some hybrid standard of admissibility and by federal appellate courts (under Daubert))"); Commonwealth v. Gambora, 933 N.E.2d 50 (Mass. 2010) (finding the NRC Report did not question the underlying theory that "there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person's life." The Court acknowledged issues raised by the NRC Report but noted the report accepted the theory that a "careful comparison of two impressions can accurately discern whether or not they had a common source.").

Interestingly, following the release of the 2009 National Research Council Report, the Proceedings of the National Academy of Sciences in the United States of America published a large-scale study by Federal Bureau of Investigation Agents on the reliability of forensic latent fingerprint decisions. BRADFORD T. ULERY ET AL., *ACCURACY AND RELIABILITY OF FORENSIC LATENT FINGERPRINT DECISIONS*, PROC. OF THE NAT'L. ACAD. OF SCI. IN THE U.S., vol. 108 no. 19, 7733-7738 (2011). The work in the study was funded in part under a contract awarded to Noblis Inc. from the FBI Biometric Center of Excellence and in part by the FBI Laboratory Division. Id, at 7738. The report of the study notes, "The National Research Council of the National Academies and the legal and forensic sciences communities have called for research to measure the accuracy and reliability of latent print examiners' decisions." Id. at 7733. In the study, 169 latent print examiners each examined 100 pairs of latent and exemplar fingerprints taken from a pool of 744 pairs. Id. at 7735. The report concluded:

> False positive errors (erroneous individualizations) were made at the rate of 0.1% and never by two examiners on the same comparison. Five of the six errors occurred on image pairs where a large majority of examiners made true negatives. These results indicate that blind verification should be highly effective at detecting this type of error. Five of the 169 examiners (3%) committed false positive errors, out of an average of 33 nonmated pairs per examiner. False negative errors (erroneous exclusions) were much more frequent (7.5% of mated comparisons). The majority of examiners (85%) committed at least one false negative error, with individual examiner error rates varying substantially, out of an average of 69 mated pairs per examiner. Blind verification would have detected the majority of the false negative errors; however, verification of exclusion decisions is not generally practiced in operational procedures, and blind verification is even less frequent. Policymakers will need to consider tradeoffs between the financial and societal costs and benefits of additional verifications.

Id. at 7738. The study took into consideration the concerns of the 2009 NRC Report and assessed the reliability of fingerprints methods. The study's conclusion reaffirms what courts have recognized for over a century: fingerprint identification evidence (especially positive identification evidence, with an error rate of 0.1%) is highly reliable.

Of course, a substantial number of state courts and federal circuits have rejected challenges to the reliability of fingerprint evidence. See United States v. Crisp, 324 F.3d 261, 261, 268-70 (4th Cir. 2003) (holding fingerprint identification evidence satisfies Daubert); United States v. Havvard, 260 F.3d 597, 601-02 (7th Cir. 2001) (latent fingerprint identification satisfied the standards of reliability for admissible expert testimony under Daubert); United States v. John, 597 F.3d 263, 274-76 (5th Cir. 2005) (holding Court was not required to hold Daubert hearing prior to determining admissibility of expert witness testimony concerning fingerprints where "the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review."); State v. Escobido-Ortiz, 126 P.3d 402, 413 (Hawaii App. 2005) ("We take judicial notice, based on the overwhelming case law from other jurisdictions, that the theory underlying latent fingerprint identification is valid and that the procedures used in identifying latent fingerprints, if performed properly, have been widely accepted as reliable . . . the proper means of attacking an expert's positive fingerprint identification is through rigorous cross-examination or presentation of an opposing expert to challenge the positive identification, not the wholesale exclusion of a reliable methodology."); State v. Maestas, 299 P.3d 892, 935 (Utah 2012) (where Maestas cited recent articles criticizing fingerprint identification evidence, the Court found, "although courts have considered such research, we do not find any case in which a court has relied on such academic

articles to conclude that fingerprint evidence is unreliable or not generally accepted" and "although a number of defense attorneys have filed motions contesting the admissibility of fingerprint identification evidence, "[t]hus far, there is no reported decision granting such a motion."); Moore v. State, 109 S.W.3d 537 (Tex. App. 2001) (holding deputy's testimony that fingerprints on two pen packets matched fingerprints taken from defendant was sufficiently reliable, in light of deputy's testimony regarding his specialized training in identification of fingerprints, and in view of general recognition of validity of fingerprint identification evidence.).

In the instant case, Lawson's experience and training made him amply qualified to give an expert opinion and given he followed the well-known ACE-V procedure and received validation from another latent print examiner, the expert testimony met the minimal threshold for the trial court in its role of gatekeeper to allow the testimony be heard by the jury. Since the trial court did not abuse its discretion, the conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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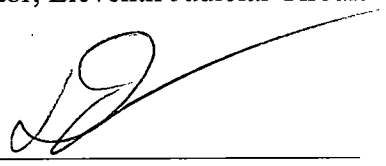
BY: 
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