STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from York County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2015-002563

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THE STATE,

Respondent,

vs.

JOHN KENNETH MASSEY, JR.,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I.

The trial judge properly permitted Appellant to waive his right to counsel and represent himself during trial in a pro se capacity because the record of the trial proceedings demonstrated Appellant's waiver was voluntarily and knowingly made with a full understanding of both his right to counsel and the dangers and disadvantages of self-representation in light of his background, education, intelligence, and substantial prior experience with the criminal justice system.

II.

The trial judge did not abuse his broad discretion by qualifying a witness as an expert in canine human scent tracking and by permitting the witness to testify about his use of a tracking dog to follow Appellant's scent while investigating the theft of a recently-stolen four-wheeler because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Appellant's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications, the acuteness of the tracking dog's sense of smell, the reliability of the tracking dog, the reasonableness of the time period during which the tracking dog was placed on the suspect's trail, and the lack of contamination to the suspect's trail before the tracking dog began tracking Appellant's scent.

III.

The trial judge properly awarded Appellant credit for all the time he served in pre-trial detention in connection to the offenses for which he was charged in the case sub judice in compliance with the mandates of S.C. Code Ann. § 24-13-40.

## STATEMENT OF THE CASE

In July of 2013, Appellant John Kenneth Massey, Jr. was arrested following an investigation into the theft of a four-wheeler from a residence located in McConnells, South Carolina. In October of 2013, the York County Grand Jury indicted Appellant for grand larceny and malicious injury to personal property with both offenses subject to enhancement as third or subsequent property crimes. On November 30, 2015, a jury trial was commenced in the York County Court of General Sessions with the Honorable Paul M. Burch, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to consecutive terms of imprisonment of ten years for grand larceny and two years for malicious injury to personal property. Appellant then timely filed a notice of appeal.

## STATEMENT OF FACTS

At approximately 5:19 a.m. on the morning of July 17, 2013, Detective Bobby Ferrell, a civil process officer with the York County Sheriff's Office, was driving to work before sunrise when he observed Appellant John Kenneth Massey, Jr. standing in the middle of a roadway a few yards away from a muddy four-wheeler resting in a ditch that was situated down an embankment from a residence located in McConnells, South Carolina.[1] (R. pp. 13-14; p. 19; p. 114; p. 122; pp. 127-128; p. 157; p. 169). Based on his observations, the detective stopped his vehicle, approached Appellant, and asked him if everything was okay. (R. p. 15). Appellant responded he had been involved in an argument with his girlfriend at a location in Lowrys, South Carolina, and was walking home while trying to call for a ride.[2] (R. p. 15). Detective Ferrell then asked Appellant about the four-wheeler he had observed, and Appellant inquired of him what he was talking about. (R. p. 15). At that point, Detective Ferrell directed his flashlight at the four-wheeler, and Appellant promptly denied he had seen the vehicle. (R. p. 15). Detective Ferrell then requested the assistance of other officers with the York County Sheriff's Office and detained Appellant at the scene until assistance could arrive. (R. pp. 16-18).

Shortly thereafter, Deputy Travis Shealey of the York County Sheriff's Office responded to the scene and arrived at approximately 5:30 a.m.[3] (R. p. 22; pp. 108-109; pp. 111-113). Upon arriving, Deputy Shealey observed the four-wheeler in the ditch and noticed it had what was later

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[1] At that time, Appellant was sweaty, his clothing was muddy, and his pants were saturated with water. (R. p. 14; p. 114; pp. 125-126; p. 143; p. 160; pp. 247-248). Notably, the mud on Appellant's clothing was consistent with the mud on the four-wheeler. (R. pp. 128-129).

[2] On the date of the incident, Appellant was living at a residence in Rock Hill, South Carolina, with his girlfriend. (R. pp. 270-271).

[3] Prior to arriving at the scene, Deputy Shealey was familiar with Appellant because Appellant had previously been implicated in the theft of the exact same four-wheeler at an earlier time. (R. pp. 22-23).

determined to be a cut-off piece of a garden hose tied to the front of it.[4] (R. pp. 115-116; p. 121). He then informed Appellant of his rights before speaking with him, and, during their ensuing conversation, Appellant indicated he was walking home from a location in Chester County following an incident with his girlfriend while further reporting he had recently undergone surgery after being diagnosed with cancer in his buttocks.[5] [6] (R. pp. 23-26; p. 30; p. 32; pp. 122-123; p. 144). Meanwhile, multiple other officers arrived at the scene along with a red truck.[7] (R. pp. 28-29; p. 113; p. 135; p. 137; p. 148). In response, Deputy Shealey kept the other officers away from the four-wheeler so the area would not be contaminated prior to the arrival of a canine tracking unit and spoke with the driver of the truck, who indicated he had come to pick Appellant up after Appellant called him requesting a ride.[8] (R. p. 41; p. 114; p. 117; p. 135).

Thereafter, at approximately 6:19 a.m., Deputy Tim Carroll of the York County Sheriff's Office arrived at the scene with his bloodhound, Hattie, who had been trained to detect and track human odors. (R. p. 40; pp. 43-44; p. 46; p. 150; pp. 187-189; p. 196). Upon arriving, Deputy Carroll spoke with officers at the scene about what had taken place and then had Hattie conduct a

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[4] During trial, testimony was presented establishing a heavy-duty garden hose had been positioned in the victim's yard in the four-wheeler's path of travel from the shed where it had been stored to the ditch where it was found following the theft. (R. p. 184).

[5] The location where Appellant was detained was located approximately two miles away from the nearest boundary line for Chester County and approximately four miles away from the town of Lowrys. (R. p. 26; p. 111; p. 172).

[6] During her trial testimony, Joy Valverde, who was Appellant's girlfriend at the time of the incident, indicated Appellant underwent surgery to have a tumor removed from his hip around the time of his arrest but not "right close" to that time. (R. p. 273; p. 279). She further noted Appellant's doctor had advised him not to exert himself or lift anything over ten pounds during his recovery. (R. p. 280).

[7] Aside from the law enforcement officers who responded to the scene and the driver of red truck, no other people used the roadway where Appellant was stopped and detained on the morning of the incident and no other people were observed in the area, which was described as isolated and containing "more cows than people." (R. p. 115).

[8] Prior to that point, Appellant had placed several phone calls by using his girlfriend's phone, which was in his possession. (R. p. 20; p. 242; pp. 244-245; p. 262; p. 270).

sniff of Appellant's leg in order to pick up his scent.[9] (R. p. 41; pp. 210-211; p. 214). After picking up Appellant's scent, Hattie led Deputy Carroll from Appellant's location to the four-wheeler, up an embankment, through a yard, and to the storage shed in which the four-wheeler had been stored prior to its theft before losing the scent.[10] (Tr. pp. 41-43; p. 77; pp. 190-191; p. 193; p. 211; p. 242).

Based on the fact Appellant's scent was tracked to the location from which the four-wheeler had been stolen, Appellant was placed under arrest and transported to the detention center.[11] (Tr. p. 27; p. 257; p. 267). Detective Nick Schifferle of the York County Sheriff's Office then met with Appellant and engaged in a brief conversation with him. (Tr. pp. 27-28; p. 30; p. 258). During their conversation, Appellant claimed he could not have stolen the four-wheeler because he had recently undergone surgery and was not able to push even ten pounds of weight. (Tr. p. 30; p. 258). Appellant further asserted he was simply coming from his girlfriend's father's house on the morning of the incident.[12] (Tr. p. 30; p. 258). Detective Schifferle then asked Appellant for a more specific address in regard to where he had been that morning, and Appellant informed the officer he was "not that good" several times. (Tr. p. 30; p. 258). After that, Appellant invoked his rights and terminated the interview.[13] (Tr. p. 30; p. 258).

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[9] During trial, Deputy Carroll estimated Hattie began tracking Appellant's scent approximately two hours after Appellant was detained. (Tr. p. 247). However, other evidence and testimony was presented establishing Appellant was transported to the detention center at 6:45 a.m. (Tr. p. 29; pp. 372-380).

[10] The storage shed was situated approximately fifty yards away from location where the four-wheeler was resting in the ditch. (Tr. p. 159).

[11] At the detention center, Appellant went through the booking process and reported an address in Rock Hill as his home address. (Tr. p. 257).

[12] During her trial testimony, Appellant's girlfriend at the time of the incident indicated her father lived in Rock Hill. (Tr. p. 289).

[13] Following his meeting with Appellant, Detective Schifferle collected the phone found in Appellant's possession and obtained a search warrant for that phone. (Tr. p. 259). Thereafter, the information on the phone was extracted,

Subsequently, Appellant was indicted for grand larceny and malicious injury to personal property with both crimes subject to enhancement based on Appellant's numerous prior property crime convictions, and he elected to proceed forward to trial.[14] (R. p. 5; pp. 460-465). At the outset of trial, a hearing was conducted in regard to the admissibility of Appellant's statements on the date of the incident, and the trial judge ultimately found those statements to be admissible after conducting an in camera hearing on the matter. (R. pp. 13-39). Following that ruling, the solicitor noted testimony needed to be proffered in regard to the canine tracking expert involved in Appellant's case, and the trial judge conducted another in camera hearing to address that issue. (R. pp. 39-40).

During that hearing, Deputy Carroll testified about his background, Hattie's background, and their involvement in the investigation into the incident. (R. pp. 40-75). Specifically, Deputy Carroll noted he had multiple years of experience working with the canine tracking unit, had been a member of that unit on a full-time basis for over seven years, and had worked directly with Hattie for over seven years. (R. pp. 40-41; p. 43). Similarly, Deputy Carroll noted Hattie had been trained solely in the tracking of human odors since she was eight weeks old, began formally working for the canine unit when she was approximately one year old, had been trained to follow a single scent while ignoring others, and had previously demonstrated reliable detection of human odor prior to the incident. (R. pp. 41-44). Additionally, Deputy Carroll discussed the various week-long training seminars he and Hattie had attended over their years together, which were conducted by the York County Sheriff's Office, the South Carolina State Law Enforcement Division, and the National Police Bloodhound Association. (R. pp. 42-43). Likewise, the officer

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and the officer discovered a number of internet searches had been conducted on the phone in regard to four-wheelers and heavy equipment. (R. p. 245).

[14] At the time of trial, Appellant was forty years old. (R. p. 362).

noted he had previously been qualified as an expert in canine tracking during an earlier proceeding, and numerous records related to Hattie's training were presented to the trial judge.[15] (R. pp. 43-45). Furthermore, Deputy Carroll discussed the circumstances surrounding Hattie's tracking efforts on the morning of the incident, indicated efforts had been made to protect the incident location from contamination prior to their arrival, noted there was only a light wind on the date of the incident, and stated he personally observed tracks and footprints along the path Hattie led him that allowed him to confirm the accuracy of what Hattie was doing. (R. pp. 46-49; pp. 53-54). However, Deputy Carroll acknowledged Hattie had not been certified in tracking or peer reviewed by another agency, and he indicated he was unaware of Hattie's error rate in regard to tracking. (R. pp. 58-59). He further acknowledged he had been required to correct Hattie on a few occasions during training exercises over the years, Hattie had experienced difficulty in tracking a scent in high winds during one training exercise, and Hattie had experienced other issues on a few occasions during training exercises at various points during her years of training.[16] (R. pp. 60-72). Additionally, he noted Hattie's training had not typically been focused on reverse tracking a scent from a suspect and indicated such training had only been conducted once subsequent to the incident. (R. pp. 72-73). However, Deputy Carroll testified he was confident in the accuracy of Hattie's tracking on the date of the incident. (R. p. 75).

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[15] According to the records, Hattie participated in 313 tracking exercises during her training conducted between December of 2008 and July of 2015, and Deputy Carroll was specifically identified as Hattie's training partner in seventy-five of those exercises. (Court's Exhibit # 2 (Hattie's Training Records)). Of the over 300 training exercises Hattie participated in, she successfully tracked the target in 286 exercises without experiencing any significant difficulties, experienced problems but ultimately successfully tracked the target in twenty-four of the exercises, and only failed to track the target in three of the exercises with one of those failures resulting from the fact the trail she was supposed to track was mowed before she was able to follow it. (Court's Exhibit # 2). Notably, Hattie successfully tracked her target in each of the seventy-five training exercises in which Deputy Carroll was identified as her training partner. (Court's Exhibit # 2).

[16] Notably, Deputy Carroll did not correct Hattie at any point when she was tracking Appellant's scent on the date of the incident. (R. p. 85; p. 229).

Following the presentation of that testimony, defense counsel alerted the trial judge Appellant wished to personally cross-examine Deputy Carroll.[17] (R. p. 76). However, the trial judge cautioned Appellant was not permitted to do so unless he took over his defense and relieved defense counsel. (R. p. 76). At that point, defense counsel and Appellant conferred with one another, and defense counsel indicated Appellant desired a recess so he would have further time to speak with defense counsel. (R. p. 76). The trial judge then granted the request, and a recess was taken. (R. p. 76). Following the recess, defense counsel indicated Appellant "after contemplation" decided he would "feel more comfortable" representing himself for the remainder of the trial with defense counsel's assistance. (R. p. 77). Defense counsel further noted Appellant "underst[ood] he would be representing himself" from that point going forward. (R. p. 77). The trial judge then conducted a colloquy with Appellant in regard to his desire to represent himself. (R. p. 77).

During the colloquy, the trial judge noted he could appoint defense counsel to serve as stand-by counsel going forward but defense counsel would no longer be able to conduct any more questioning on Appellant's behalf. (R. p. 77). The trial judge further noted "sometimes representing yourself can be a dangerous proposition." (R. p. 77). He then asked Appellant about his familiarity with the judicial system and educational background, and Appellant responded he was "fairly" familiar with the judicial system and had completed fourteen or fifteen years of education, including two years at a university and one semester at a technical college.[18]

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[17] Up to that point, defense counsel had conducted the cross-examination of Deputy Carroll. (R. pp. 53-73).

[18] Regarding Appellant's familiarity with the court system, Appellant had an extensive criminal record dating back to 1997 at the time of trial, had prior trial experience as recently as March of 2015, had been sentenced to terms of incarceration at various points in time, and had previously been convicted of assault and battery of a high and aggravated nature, conspiracy, shoplifting, giving false information to law enforcement, multiple probation violations, multiple counts of disorderly conduct, multiple counts of petit larceny, multiple counts of breaking into a motor vehicle, multiple counts of financial transaction card fraud, and fourteen counts of forgery. (R. pp. 357-359;

(R. p. 77). The trial judge then asked Appellant if he was familiar with "the old saying," and Appellant responded: "Representing himself's a fool." (R. p. 77).

Following that discussion, the trial judge asked Appellant if he still wished to represent himself after reflecting upon what they had discussed, and Appellant responded he did wish to do so with defense counsel's assistance in locating and going through material he had not yet had an opportunity to review. (R. p. 78). In response to Appellant's remarks, the trial judge reiterated defense counsel would be able to provide assistance but the assistance would be limited in light of the fact he was being relieved as counsel, and Appellant confirmed he understood that fact. (R. p. 78). Thereafter, the trial judge determined Appellant would be permitted to represent himself based on his demonstrated intelligence and educational background, and he relieved defense counsel as active counsel in Appellant's case. (R. pp. 78-79).

Subsequently, Appellant began representing himself pro se, and he conducted cross-examination of Deputy Carroll. (R. pp. 79-84). During that cross-examination, Deputy Carroll indicated he was not sure how many officers were present at the time of the incident, but he confirmed the individuals present at the scene were kept away from the four-wheeler and out of the victim's yard. (R. pp. 79-80). The officer further stated Appellant had been present at the scene for approximately one hour at the time he arrived, which he characterized as an average amount of elapsed time for purposes of tracking. (R. pp. 82-83).

At the conclusion of Deputy Carroll's testimony, the solicitor argued the officer should be qualified as an expert in canine handling while contending all the pertinent requirements for the admission of his testimony had been met. (R. pp. 85-87). In rebuttal, Appellant contended Deputy Carroll should not be qualified as an expert because Hattie was not certified, no peer

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pp. 382-453). Notably, Appellant's prior shoplifting conviction was subject to enhancement as a third or subsequent property crime. (R. pp. 382-453).

reviews had been conducted, Hattie's error rate was unknown, and Hattie had purportedly not been trained to reverse track. (R. p. 87). After considering those contentions, the trial judge ruled Deputy Carroll was qualified as an expert witness and would be permitted to testify during trial. (R. p. 88). Specifically, in reaching that conclusion, the trial judge noted Deputy Carroll had previously been qualified as an expert witness and Hattie had extensive training and experience with tracking as reflected in the records kept by the York County Sheriff's Office, which he found to be sufficient to meet the threshold level necessary for the evidence to be admitted. (R. p. 88). However, the trial judge noted it would ultimately be up to the jury to determine the weight of the expert testimony presented. (R. p. 88).

Subsequently, the trial proceeded forward, and Deputy Shealey testified about his involvement in the investigation into the theft of the four-wheeler found in the ditch. (R. pp. 105-169). Following his testimony, Benjamin Fairfax, the owner of the stolen four-wheeler, testified about the events that unfolded on the morning of the incident, opined his four-wheeler had a fair market value of $3,500 to $4,000 at the time of the crime, and indicated his garden hose, which had been cut and partially attached to the four-wheeler, cost roughly $150. (R. pp. 171-185). Fairfax further stated his four-wheeler could easily be moved in the condition it was in at the time of the crime by a man simply pushing it and noted the vehicle had only been moved approximately one-hundred-fifty feet when it was discovered in the ditch. (R. pp. 181-185).

Thereafter, Deputy Carroll recounted his and Hattie's involvement in the investigation into the incident for the jury, and he was qualified as an expert in canine human scent tracking over Appellant's objection. (R. pp. 187-192). During his testimony, he discussed their training and experience, noted Hattie had previously demonstrated reliability when completing several

hundred tracking exercises in training and in actual practice, and recounted how Hattie tracked Appellant's scent from Appellant's body to the four-wheeler and then on to the shed where the four-wheeler had been stored prior to the crime. (R. pp. 187-195). Following the presentation of that testimony, Appellant thoroughly cross-examined Deputy Carroll about Hattie's tracking abilities, elicited testimony from the officer indicating tracking dogs generally prefer to track a scent from hot to cold, and elicited an acknowledgement from the officer Hattie had only conducted a single reverse tracking training exercise. (R. pp. 196-221). However, Deputy Carroll explained Hattie had been successful in the only reverse tracking training exercise she had participated in, and he noted she was capable of reverse tracking a scent up to a mile, which constituted a much greater distance than the distance she tracked the scent in Appellant's case. (R. pp. 205-206; pp. 228-229). Furthermore, Deputy Carroll explained reverse tracking – like other types of tracking – still involved tracking human odor and indicated there would be no difference in Hattie's behavior while tracking in reverse over a short distance. (R. p. 228).

Subsequently, following the testimony of a few more witnesses for the State, the solicitor rested the State's case, and Appellant moved for a directed verdict. (R. p. 292). However, the trial judge denied that motion. (R. p. 294). Appellant then requested a jury instruction on mere presence along with jury instructions on lesser-included "offenses" of the charged crimes, including a charge on trespassing. (R. p. 297). After considering the matter, the trial judge denied Appellant's request for a trespassing charge but agreed to instruct the jury on the lesser-included offense of petit larceny. (R. pp. 297-298). Appellant then rested his case, and the parties presented their closing arguments to the jury.[19] (R. pp. 298-331). Following the closing

[19] During his closing argument, Appellant argued to the jury the State had failed to meet its burden of proof while contending the State's evidence had been refuted or was contradictory, non-existent, or unreliable. (R. pp. 299-300). Furthermore, Appellant asserted the reverse tracking evidence was unreliable in light of the fact Hattie had only completed one training exercise in regard to reverse tracking, claimed he was not physically able to move the four-

arguments, the trial judge instructed the jury on the applicable law and presented jury instructions on petit larceny and mere presence as requested by Appellant, and the jury began its deliberations.[20] (R. pp. 332-344). At that time, the trial judge commended Appellant on his performance during the trial and noted he did a good job with his presentation of the case.[21] (R. pp. 345-346).

Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 354). Following the verdict, the trial judge conducted sentencing proceedings, and the solicitor recounted the details of Appellant's extensive prior criminal record.[22] (R. pp. 357-359). The solicitor then noted Appellant had been detained in the detention center awaiting trial for ninety-nine days and had previously been detained for approximately two years before that point. (R. p. 359). However, the solicitor indicated Appellant had received credit for time served for that two-year time period on an unrelated shoplifting charge that Appellant was convicted of in March of 2015. (R. p. 359). As a result, the solicitor contended Appellant was not statutorily

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wheeler at the time of the crime, and pointed out there were no eyewitnesses, incriminating fingerprints, or D.N.A. matches in his case. (R. pp. 305-309; p. 312; pp. 315-317).

[20] In instructing the jury on the applicable law, the trial judge explained to the jurors the State had the burden of proving Appellant's guilt beyond a reasonable doubt, Appellant was presumed innocent, and they must find Appellant not guilty if the State failed to meet its burden of proving Appellant's guilt beyond a reasonable doubt. (R. pp. 332-333).

[21] Aside from pointing out Appellant asked some repetitious questions, the trial judge's only criticism of Appellant's performance during trial was noting Appellant opened the door to evidence he did not want to be admitted during his questioning of the victim. (R. p. 346). In offering that criticism, the trial judge was referencing what occurred when Appellant asked the victim if he had seen him at any point in time on the morning of the incident. (R. p. 186). In response to that question, the victim indicated the law enforcement officers present at the scene did not permit him to see Appellant because he was "pretty upset" in light of the fact it was "the second time [his] four-wheeler was stolen" and Appellant's "name was brought up related to the situation." (R. p. 186).

[22] During the sentencing proceedings, the solicitor also noted Appellant had been actively involved in plea negotiations and had offered to plead guilty in exchange for a negotiated sentence of seven years before seeking to alter that offer after the solicitor accepted it. (R. p. 366). Furthermore, the solicitor indicated Appellant's case had been called to trial a week earlier and the trial could not go forward because the judge presiding over that term of court had to recuse himself based on the fact he was a potential witness in a federal lawsuit filed by Appellant. (R. p. 366). During that earlier term of court, the solicitor noted the presiding judge indicated to Appellant "he'd be inclined" to sentence Appellant to a sentence of time served if he would plead guilty. (R. p. 366). However, Appellant refused to do so and indicated no jury would find him guilty of the charges. (R. p. 366).

entitled to credit for the two-year time period related to the shoplifting charge and, instead, should only receive credit for the forty-one days Appellant served in pre-trial detention before being released on bond and the ninety-nine days he served while awaiting trial for the charged offenses after he was taken back into custody.[23] (R. pp. 360-361). In response, Appellant asserted he had been incarcerated since December 30, 2013, and was not sure about the applicability of the statute regarding his eligibility for credit for time served.[24] (R. p. 362). Appellant then candidly apologized to the victim for his actions, and the trial judge sentenced him to an aggregate term of imprisonment of twelve years while awarding Appellant credit for one-hundred-forty days of time served towards the charges. (R. p. 369).

[23] Specifically, Appellant was released on bond on August 27, 2013, following his arrest in connection to the theft of the victim's four-wheeler. (R. pp. 457-458, p. 459).

[24] According to York County public records, Appellant was arrested in connection to an unrelated burglary after he was released on bond in the present matter and later arrested for shoplifting. (R. p. 359; Records for John Kenneth Massey, Jr., York County Sixteenth Judicial Circuit Public Index, http://publicindex.sccourts.org/York/PublicIndex).

## ARGUMENT

I.

**The trial judge properly permitted Appellant to waive his right to counsel and represent himself during trial in a pro se capacity because the record of the trial proceedings demonstrated Appellant's waiver was voluntarily and knowingly made with a full understanding of both his right to counsel and the dangers and disadvantages of self-representation in light of his background, education, intelligence, and substantial prior experience with the criminal justice system.**

Appellant contends the trial judge committed reversible error by permitting him to waive his right to the assistance of counsel and exercise his right to personally represent himself during trial. In support of that contention, Appellant maintains the trial judge failed to sufficiently apprise him of the dangers and disadvantages of self-representation or ensure he understood the nature of the charges against him before allowing him to waive his right to counsel. Appellant further maintains the record of the trial proceedings failed to establish he either had a sufficient background to validly waive his right to counsel or had been apprised of his rights from some other source. To the contrary, the record of the trial proceedings established Appellant had a sufficient background based on his education, intelligence, and substantial experience with the criminal justice system, including trial experience, to be able to knowingly and intelligently waive his right to counsel. In light of that fact, the trial judge properly permitted Appellant to exercise his right to represent himself pro se during trial despite the fact that decision may have ultimately proven to be imprudent or unwise. Appellant's convictions should be affirmed.

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina "must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C.

Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."). However, "[t]he right to defend is personal." Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions."). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant's choice to do so "must be honored out of 'that respect for the individual which is the lifeblood of the law.' " Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to effectuate a valid waiver of the right to counsel, a defendant must be advised of the right to counsel and adequately warned of the dangers of self-representation. Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009). Before allowing a defendant to proceed pro se, the trial judge has a duty to determine whether the defendant knowingly and voluntarily waived his right to counsel, and the **preferred** method for doing so is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant. Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135; see United States v. King, 582 F.2d 888, 890 (4th Cir. 1978) (instructing "no particular form of interrogation is required" in order for a trial judge to determine whether a defendant's waiver of his right to counsel is knowing and intelligent). However, "the ultimate test is not the trial judge's advice but the accused's understanding." State v. Cash, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992). Significantly, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the

requirements of a voluntary waiver will be satisfied." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

In cases in which a trial judge fails to conduct a specific inquiry addressing the disadvantages of pro se representation before permitting a defendant to represent himself during trial, a reviewing court will look to the record to determine whether the defendant had a sufficient background or was apprised of his rights by some other source such that he could validly waive his right to counsel. State v. McLauren, 349 S.C. 488, 494, 563 S.E.2d 346, 349 (Ct. App. 2002). In making such a determination, the following factors should be considered: (1) the defendant's age, educational background, physical health, and mental health; (2) whether the defendant was previously involved in criminal trials; (3) whether the defendant knew the nature of the charges and the possible penalties; (4) whether the defendant was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether the defendant was attempting to delay or manipulate the proceedings; (6) whether the trial judge appointed stand-by counsel; (7) whether the defendant knew he would be required to comply with the rules of procedure at trial; (8) whether the defendant knew the legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the defendant and the trial judge consisted merely of pro forma answers to pro forma questions; and (10) whether the defendant's waiver resulted from either coercion or mistreatment. Cash, 309 S.C. at 43, 419 S.E.2d at 813. Critically, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Thompson, 355 S.C. at 263, 584 S.E.2d at 135.

Notably, in State v. McLauren, this Court addressed a challenge to a trial judge's decision to allow a criminal defendant to represent himself during trial. Id., 349 S.C. at 490-491, 563 S.E.2d at 347. In that case, McLauren was criminally charged after he filed legal documents on another inmates behalf despite the fact he was not and never had been a licensed attorney. Id. at 491, 563 S.E.2d at 347. During the arraignment process, McLauren affirmatively requested to represent himself, and the trial judge responded by ensuring McLauren was familiar with the "old saying," offering to appoint counsel to McLauren, and assigning stand-by counsel to assist McLauren with the trial. Id. at 492-493, 563 S.E.2d at 348. McLauren then represented himself throughout the trial, was convicted, and appealed. Id. at 493, 563 S.E.2d at 348. On appeal, this Court affirmed. Id. at 491, 563 S.E.2d at 347. In affirming, this Court considered the pertinent factors in determining whether McLauren had a sufficient background to understand the dangers of self-representation and concluded he did. Id. at 495, 563 S.E.2d at 349. In reaching that conclusion, this Court noted McLauren was mature, he had both a formal and informal education, nothing suggested he was physically or mentally impaired, he had a lengthy criminal record and was incarcerated at the time of trial, he had been involved in other defendants' criminal proceedings, he knew the nature of the charges as evidenced by his actions during trial, stand-by counsel was made available to him during trial, there was nothing suggesting he was attempting to manipulate or delay the proceedings, he knew to comply with procedural rules and had at least some familiarity with them based on his actions during trial, he knew of the legal challenges he could raise based on the defense he actually raised during trial, the exchange he had with the trial judge did not involve pro forma answers to pro forma questions, his actions during trial indicated he had an understanding of the legal system, and there was no evidence he

was coerced or mistreated into waiving his right to counsel. Id. at 495-496, 563 S.E.2d at 349-350.

Just like in McLauren, the record in the case sub judice established Appellant knowingly and voluntarily waived his right to counsel before he was allowed to represent himself during trial. Looking to the relevant factors, Appellant was an intelligent forty-year-old adult at the time of the trial, and, by that point in his life, he had received fourteen to fifteen years of education, including multiple years of education at a university. Also, nothing presented during trial suggested Appellant had any physical or mental impairments that would have affected his ability to waive his rights or represent himself, and Appellant had obtained **substantial** prior experience with the criminal justice system by the time of his trial, including prior trial experience in the same calendar year.[25] Specifically, by the time of his trial, Appellant's criminal career spanned a total of eighteen years, he had previously been convicted of **twenty-eight** separate offenses during that career, and he had been incarcerated for various periods of time based on those convictions, including shortly before his trial. Moreover, Appellant had last been involved in a criminal trial as recently as March of 2015, which was just ten months before he was tried in the case at bar.[26] Beyond that substantial experience with the criminal justice system, Appellant clearly knew the nature of the charges against him based on his actions and performance during trial, and he would have had little doubt about the potential sentence he was facing on those charges as his trial in March of 2015 involved a prosecution for a property crime

[25] During sentencing proceedings, the trial judge aptly described Appellant's prior courtroom experience as "ample." (R. p. 361).

[26] On appeal, Appellant contends it is unclear whether he was represented by counsel at his earlier trial. (App. Br. p. 16). However, the sentencing sheet from that earlier trial, which was presented to the trial judge, demonstrates Appellant was represented by counsel at that time as it contains the South Carolina bar number of the attorney who represented him during those earlier proceedings. (R. pp. 382-453). Furthermore, according to York County public records, Appellant was represented during that earlier trial by the same attorney who initially represented him in the case sub judice. (Records for John Kenneth Massey, Jr., York County Sixteenth Judicial Circuit Public Index, http://publicindex.sccourts.org/York/PublicIndex).

under the same sentencing enhancement statute he was prosecuted under in the case currently before this Court.[27] Similarly, Appellant was represented by counsel prior to and at the outset of trial, Appellant was able to consult with his counsel prior to electing to represent himself pro se, and stand-by counsel was made available to Appellant throughout the trial after he expressed a desire to represent himself going forward. Likewise, nothing was presented during trial suggesting Appellant was attempting to manipulate or delay the proceedings by requesting to represent himself, and, based on his actions, he was at least somewhat familiar with the relevant procedural rules during trial. Demonstrating that fact, Appellant effectively cross-examined witnesses within the framework of our procedural rules, made arguments to the trial judge in regard to the admission of expert testimony, presented opening and closing arguments to the jury, successfully introduced exhibits into evidence in support of his defense, moved for a directed verdict motion at the close of the State's case, and requested favorable legal instructions that were ultimately presented to the jury during the jury charge. Additionally, Appellant was aware of the legal challenges he could raise in his own defense, which was demonstrated by the fact Appellant focused his defense on the reliability of the State's evidence, the contention he was merely present at the scene of the crime, and the assertion the State had failed to meet its burden of proof. Furthermore, although brief, Appellant's colloquy with the trial judge did not involve pro forma answers to pro forma questions and, instead, was specific to Appellant while being focused on Appellant's desire to represent himself, Appellant's intelligence and background, and Appellant's understanding it could be dangerous and – according to Appellant's own characterization – foolish to represent himself during trial. Finally, Appellant's actions

[27] Notably, if there could be any doubt as to whether Appellant knew of the nature of the charges against him, the records filed in his case establish a judge – along with informing him of his right to counsel – specifically informed him of the charges against him and the nature of those charges before he was released on bond prior to trial. (R. p. 456).

during trial indicated he had an understanding of the legal system, and there was no evidence of any kind suggesting Appellant's desire to represent himself was the product of coercion or mistreatment.

In light of those factors, Appellant had a sufficient background and level of understanding to knowingly and intelligently waive his right to counsel, and he was constitutionally entitled to waive that right regardless of whether that decision – in hindsight – ultimately proved to be imprudent or unwise based on what occurred during trial. See State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("The only relevant inquiry is whether the defendant has made a knowing and intelligent waiver of the right to counsel. . . . A decision can be made intelligently, with an understanding of the consequences, **without the decision itself being a wise one**." (emphasis added and citations omitted)); cf. Faretta, 422 U.S. at 835-836 ("The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of his right to defend himself."). Accordingly, although the trial judge's colloquy with Appellant was not as thorough as may have been preferred, Appellant nonetheless validly waived his right to counsel, and the trial judge committed no error by honoring Appellant's sincere request to personally present his defense to the jury.[28] See Graves v. State, 309 S.C. 307, 309, 422 S.E.2d 125, 127

[28] Notably, assuming arguendo the record was somehow insufficient to establish Appellant knowingly and intelligently waived his right to counsel, the appropriate remedy would be for the matter to be remanded to the trial

(1992) ("Petitioner contends that the trial judge should have questioned him to ascertain if he knew of the dangers of self-representation. The ultimate test, however, is not the trial judge's advice, but rather the petitioner's understanding."); see also Faretta, 422 U.S. at 817 ("[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."); cf. McLauren, 349 S.C. at 496, 563 S.E.2d at 350 ("We find McLauren's waiver was knowing and voluntary. He was advised of his right to counsel, and even though the trial judge did not make a specific inquiry addressing the disadvantages of self-representation, McLauren had a sufficient background to make a valid waiver under the Cash factors."); Cash, 309 S.C. at 43-46, 419 S.E.2d at 812-814 (finding Cash had a sufficient background to understand the dangers and disadvantages of self-representation where the record established Cash was an adult with some college experience, did not appear to be physically or mentally impaired, had been involved with the criminal justice system for the majority of his life, understood the nature of the charges against him, appreciated the difficulty of his own case, was not attempting to manipulate the proceedings, was appointed stand-by counsel, was aware he would have to comply with the rules, was aware of the defenses he could raise, engaged in a colloquy with the trial judge about his self-representation, and did not appear to be declining the assistance of counsel as the result of coercion or mistreatment). Appellant's convictions should be affirmed.

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court for an evidentiary hearing to determine whether Appellant's waiver was, in fact, valid. See In re Christopher H., 359 S.C. 161, 169, 596 S.E.2d 500, 505 (Ct. App. 2004) ("The typical remedy for failing to show a knowing and intelligent waiver of counsel is to remand to the trial court for an evidentiary hearing to determine whether the wavier was, in fact, knowingly and intelligently made."); see also State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420-421 (1977) ("The case is remanded to the lower court for a determination of whether the wavier was intelligently made.").

II.

**The trial judge did not abuse his broad discretion by qualifying a witness as an expert in canine human scent tracking and by permitting the witness to testify about his use of a tracking dog to follow Appellant's scent while investigating the theft of a recently-stolen four-wheeler because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Appellant's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications, the acuteness of the tracking dog's sense of smell, the reliability of the tracking dog, the reasonableness of the time period during which the tracking dog was placed on the suspect's trail, and the lack of contamination to the suspect's trail before the tracking dog began tracking Appellant's scent.**

Appellant contends the trial judge erred by qualifying Deputy Carroll as an expert and admitting his testimony regarding dog tracking. In support of that contention, Appellant maintains the dog tracking testimony was improperly admitted because the State allegedly failed to establish a sufficient foundation for the admission of the evidence by failing to show it was reliable. To the contrary, Deputy Carroll's testimony regarding dog tracking was properly admitted during trial because it satisfied all the requirements for the admission of expert testimony. Specifically, the evidence and testimony presented during trial established the deputy's testimony could assist the jury in understanding and resolving the issues raised in Appellant's case. Likewise, the evidence and testimony presented during trial demonstrated Deputy Carroll personally possessed the requisite knowledge, skill, training, and experience to be qualified as an expert in canine human scent tracking. Furthermore, the evidence and testimony presented during trial established Deputy Carroll's testimony was reliable in light of his own expert qualifications, the acuteness of his tracking dog's sense of smell, his tracking dog's proven reliability in tracking human odor, the reasonableness of the time period during which his tracking dog was placed on the suspect's trail, and the lack of contamination to the suspect's trail before the tracking dog began tracking Appellant's scent. As a result, Deputy

Carroll's expert testimony was admissible, and the trial judge did not abuse his broad discretion by qualifying the deputy as an expert and permitting him to present his expert testimony regarding Hattie's tracking of Appellant's scent to the jury. Appellant's convictions should be affirmed.

In South Carolina, "[e]xpert 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). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175. Significantly, "[t]he qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990); see State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) ("The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion. The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." (citations omitted)); see also Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> 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.

Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual predicate in the record"). 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, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "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." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can

become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial judge must also ensure the testimony "meets a threshold level of reliability, regardless of whether it is scientific or nonscientific." State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (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 control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 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.

Upon consideration of those requirements for the admissibility of expert testimony, South Carolina courts have historically found expert testimony regarding dog tracking to be proper and admissible during criminal trials. See State v. Johnson, 306 S.C. 119, 127, 410 S.E.2d 547, 552

(1991) ("Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into evidence."); State v. Childs, 299 S.C. 471, 476-477, 385 S.E.2d 839, 842-843 (1989) (holding the trial judge properly admitted the expert testimony of a bloodhound handler in regard to his work with bloodhounds during the investigation into Childs's crimes). Likewise, "an overwhelming number" of courts from other jurisdictions in the United States permit the introduction of such expert testimony. State v. White, 372 S.C. 364, 378, 642 S.E.2d 607, 614 (Ct. App. 2007). Significantly, in South Carolina, expert testimony regarding dog tracking is admissible if the following foundational factors are established: "(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." White, 382 S.C. at 272, 676 S.E.2d at 687.

In the case sub judice, the evidence and testimony presented during trial established: (1) Deputy Carroll's expert testimony regarding dog tracking could assist the jury in understanding and resolving the issues raised in Appellant's case; (2) Deputy Carroll personally had the requisite knowledge, skill, training, and experience to qualify as an expert; and (3) the subject matter of Deputy Carroll's testimony was reliable. See Martin, 391 S.C. at 513, 706 S.E.2d at 42 (instructing expert testimony is admissible where the trial judge finds: "(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) and the expert's testimony is reliable"). Under those circumstances, the trial judge did not abuse his broad discretion regarding evidentiary matters by qualifying Deputy Carroll as an expert in canine human scent tracking in Appellant's case and

permitting him to testify before the jury about Hattie's tracking of Appellant's scent on the date of the incident.

Initially, Deputy Carroll's expert testimony was necessary in Appellant's case to assist the jury in understanding how Hattie was able to track Appellant's scent from his location to the four-wheeler and the location where the four-wheeler was stolen from, which constituted a subject matter beyond the ordinary knowledge of the jurors. See Watson, 389 S.C. at 446, 699 S.E.2d at 175 ("[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury."). Therefore, the trial judge correctly determined it was necessary for Deputy Carroll to testify as an expert in order to explain how Hattie tracked Appellant's scent on the morning of the theft.

Beyond the ability of the deputy's testimony to assist the jury, Deputy Carroll was also personally qualified to offer an expert opinion in regard to Hattie's tracking of Appellant's scent based on his own knowledge, skill, training, and experience. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 ("[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony."). Specifically, Deputy Carroll testified he had over seven years of experience working as a full-time member of a canine tracking unit, several additional years of experience working with the canine tracking unit before he was a full-time member of that unit, and more than seven years of experience working directly with Hattie, the tracking dog deployed in Appellant's case. Additionally, he indicated he personally received tracking training during various week-long seminars conducted by the National Bloodhound

Association and the York County Sheriff's Office along with training in tracking without the use of a canine from SLED, and he had previously been qualified as an expert on a prior occasion. See Martin, 391 S.C. at 513-514, 706 S.E.2d at 42-43 (finding no error in the qualification of a witness as an expert even though the witness's expertise was based in part on in-house training he had received through his employment at SLED). Furthermore, based on the voluminous records introduced during trial in regard to Hattie's tracking training, Deputy Carroll personally went on at least seventy-five tracking excursions with Hattie, and all of those training exercises ended with Hattie successfully identifying her target. Critically, Deputy Carroll's practical experience in tracking coupled with his tracking training from multiple sources demonstrated his expertise on the subject matter and enabled him to assist the jury with a matter beyond the knowledge of an ordinary layperson. See Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) ("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**." (emphasis added)); see also Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006) ("An expert is not limited to any class of persons acting professionally. There is no exact requirement concerning how knowledge or skill must be acquired." (citations omitted)); cf. Peer, 320 S.C. at 554, 466 S.E.2d at 380 (finding no error in the trial judge's qualification of a witness as an expert in sound where the witness had over five years of law enforcement experience, was trained by **another** officer who was certified in the use of sound meter equipment, was capable of demonstrating how a sound level meter worked, and had handled approximately ten cases during the one-and-a-half years he had been conducting sound tests); State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) (finding no abuse of discretion in the qualification of a witness as an expert on a "lane of impact" issue

where the witness had twelve weeks of training that included some specific training on determining the point of impact in accidents, one week of road training with a municipal police force, and four to five months of experience as a state trooper). As a result, the trial judge properly found Deputy Carroll to be personally qualified as an expert in canine handling.

Finally, Deputy Carroll's testimony about Hattie's tracking of Appellant's scent met the threshold level of reliability necessary for it to be admissible during Appellant's trial. Critically, looking to the relevant foundational factors established in Appellant's case, Deputy Carroll's testimony demonstrated he personally possessed the necessary qualifications to be considered an expert canine handler based on his own knowledge, skill, training, and experience. Cf. Henry, 329 S.C. at 277-278, 495 S.E.2d at 468-469 ("The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that **she is better qualified than the jury** to form an opinion on the particular subject of testimony." (emphasis added)). Likewise, the testimony presented during trial established Hattie was a bloodhound, which is a breed of dog that has long been recognized as possessing an acute sense of smell. See Debruler v. Commonwealth, 231 S.W.3d 752, 758 (Ky. 2007) (recognizing some breeds of dogs, including the bloodhound breed, are commonly known to have remarkably acute senses of smell). Similarly, Deputy Carroll's testimony made clear Hattie had received many years of training in regard to tracking a scent beginning from when she was a puppy, and Hattie's training was solely focused on tracking human odor. Additionally, the deputy's testimony coupled with the numerous training records presented to the trial judge established Hattie was reliable even though no evidence was presented establishing she had been certified in an area of tracking. Cf. State v. Morris, 376 S.C. 189, 204, 656 S.E.2d

359, 367 (2008) ("Despite Appellant's argument to the contrary, the status of [the witness's] law license is completely irrelevant to his qualification as an expert. The evidentiary rule governing the qualification of experts says nothing about professional licensing requirements, and a licensing requirement seems wholly incompatible with Rule 702's operational framework."). Specifically, Deputy Carroll indicated Hattie had demonstrated reliability as a tracking dog, and he stated he was able to personally verify Hattie's reliability in tracking Appellant's scent by observing footprints and tracks that confirmed an individual had recently used the path Hattie led him along while she was tracking Appellant's scent. Cf. Childs, 299 S.C. at 477, 385 S.E.2d at 843 (finding expert dog tracking testimony to be admissible where the witness testified he personally found the tracking dogs he used to be reliable). Moreover, the numerous training records presented to the trial judge demonstrated Hattie had been involved in over three-hundred training exercises by the time of trial, and she only failed to successfully track the target in three of those exercises over the years. Furthermore, although Hattie had only participated in one reverse tracking exercise during the course of her training, her training records demonstrated her tracking was successful during that exercise, and Deputy Carroll explained reverse tracking still involved tracking a human scent just like Hattie had been trained to do in other tracking exercises. See State v. Barger, 612 S.W.2d 485, 492 (Tenn. Crim. App. 1980) ("There appear to be no reported cases in which a dog 'tracked in reverse,' i. e., sniffed the suspect or his belongings and then tracked the scent to stolen merchandise. However, if a proper foundation is laid, we see no intrinsic reason why such evidence should be any less reliable than that in a case where the dog has sniffed an article or area where the suspect had been and has tracked the scent to the defendant. Given the satisfaction of the preliminary requirements outlined above, we hold that evidence of the tracking of a scent in either direction is admissible and may be given

whatever weight the jury wishes to accord it."). Finally, Deputy Carroll confirmed Hattie began tracking Appellant's scent within two hours of him being discovered at the scene of the crime, which he indicated was an average time period for Hattie to be able to track a suspect's scent, and testimony was presented establishing Deputy Shealey prevented the suspect's trail from being contaminated before Hattie began tracking by keeping everyone away from the four-wheeler and out of the victim's yard, which were spots where Appellant's scent would not have been if he had not had any contact with the four-wheeler before he was discovered alone in the roadway near the victim's isolated residence before sunrise on the date of the incident. Cf. State v. Brown, 103 S.C. 437, 444, 88 S.E. 21, 23 (1916) (finding dog tracking testimony to be inadmissible because the dogs did not begin tracking until over fifteen hours after the crime, which was outside of the fifteen-hour time window in which the witness testified the dogs could reliably track a scent). Based on the establishment of those foundational factors, the trial judge properly found a sufficient threshold level of reliability had been established and correctly admitted Deputy Carroll's expert testimony in regard to Hattie's tracking of Appellant's scent following the crime. See White, 382 S.C. at 272, 676 S.E.2d at 687 ("[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.").

Because Deputy Carroll's testimony satisfied all of the requirements for the admission of expert testimony in South Carolina, his expert testimony on dog tracking could properly be

introduced during trial, and Appellant could only properly challenge that testimony through cross-examination and by calling the jurors' attention to any defects or deficiencies he believed existed in regard to the knowledge, skill, training, or experience of the agent or of Hattie, which Appellant ably did during the course of the trial. See Wilson v. Rivers, 357 S.C. 447, 453, 593 S.E.2d 603, 605 (2004) ("Any defects in the amount of [an expert's] education and experience, if any, go to the weight of his testimony and not its admissibility."); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); see generally 31A Am. Jur. 2d Expert and Opinion Evidence § 90 ("Such matters as defects in an expert's education or experience, the lack of an expert's specialization or lack of specialized training, the degree of an expert's certainty as to his or her opinion, or the quality of the expert's conclusions go to the weight to be given expert opinion testimony. Furthermore, the mere fact that controversy, or even substantial controversy, surrounds an expert's conclusion or opinion goes to the weight to be given such testimony." (footnotes omitted)). Accordingly, the trial judge did not abuse his broad discretion by qualifying Deputy Carroll as an expert in canine human scent tracking and permitting the agent to present his expert testimony to the jury, and the trial judge's ruling admitting that evidence was in no way arbitrary, unreasonable, or unfair. See Fields, 363 S.C. at 26, 609 S.E.2d at 509 ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair."). Appellant's convictions should be affirmed.

III.

**The trial judge properly awarded Appellant credit for all the time he served in pre-trial detention in connection to the offenses for which he was charged in the case sub judice in compliance with the mandates of S.C. Code Ann. § 24-13-40.**

Appellant contends the trial judge erred by failing to award him with all the credit for time served he believes he should have received. In support of that contention, Appellant acknowledges he received credit for the time he served in pre-trial detention following his arrest for the charged offenses prior to being released on bond. Appellant further acknowledges he received credit for the time he served as a pre-trial detainee in connection to the charged offenses after he was returned to York County following the completion of a prison sentence he received on an unrelated offense. However, Appellant contends the trial judge erred by not also awarding him with credit for the period in time he was held as a pre-trial detainee in connection to other charges after he was re-arrested for new offenses committed while he was out of custody on bond in connection to the charges involved in the case sub judice.[29] Importantly, because Appellant was held in custody on unrelated charges committed while he was out on bond, which nothing in the record suggests was ever revoked, and not on the charges involved in the matter currently before the appellate court, Appellant was not serving any time on the charges involved in his appeal while he was incarcerated on the other charges and, thus, was not entitled to any credit towards his sentence for that time. Accordingly, the trial judge committed no error in only awarding Appellant with the credit for time served he was entitled to under the mandates of S.C. Code Ann. § 24-13-40. Appellant's convictions and sentence should be affirmed.

[29] In making that argument on appeal, Appellant contends the solicitor indicated during the sentencing proceedings he had previously offered Appellant a "time-served sentence" if he was willing to plead guilty to the charged offenses. (App. Br. p. 33). Contrary to that contention, nothing in the record from the sentencing proceedings establishes the solicitor ever made such an offer. (R. pp. 357-369). Instead, the record establishes a **circuit court judge** who later recused himself from Appellant's case indicated he was inclined to sentence Appellant to time served on the charged offenses if he was willing to plead guilty. (R. p. 366).

Based on South Carolina law, "[t]he requirement that a prisoner receive credit for time served is mandatory." Hayes v. State, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015), cert. dismissed as improvidently granted, 418 S.C. 362, 792 S.E.2d 907 (2016); see also State v. McCord, 349 S.C. 477, 487, 562 S.E.2d 689, 694 (Ct. App. 2002) ("[T]his matter is not discretionary with the trial court."). Specifically, pursuant to Section 24-13-40 of the South Carolina Code of Laws, "full credit against the sentence must be given for time served prior to trial and sentencing" when computing the time served by a criminal defendant. See S.C. Code Ann. § 24-13-40 ("In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spend under monitored house arrest."). However, under the mandates of that statutory provision, "credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense." Id. "Thus, a prisoner will receive credit for time served unless either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense." Hayes, 413 S.C. at 560, 777 S.E.2d at 10.

Notably, in Allen v. State, 339 S.C. 393, 394, 529 S.E.2d 541, 541 (2000), the South Carolina Supreme Court addressed an appellate challenge to the denial of credit for time served. In that case, Allen was arrested for three offenses and imprisoned for eighteen days before he was released on bond. Id. Thereafter, while out on bond, Allen committed two additional offenses, was re-arrested and imprisoned on those charges, had his bond revoked on the original three charges, and remained imprisoned on all five charges for a number of months until he pled

guilty to all the charges. Id. Following his guilty plea, Allen unsuccessfully sought post-conviction relief on the basis he was not given credit for time served on his original three charges for the time period beginning with his re-arrest on the other two charges and ending with his guilty plea. Id. On appeal, the Supreme Court reversed. Id. In reversing, the Supreme Court analyzed Section 24-13-40 and noted it "mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist: 1) either the prisoner was an escapee or 2) the prisoner was already serving a sentence on one offense." Id. at 395, 529 S.E.2d at 542. After considering the language of that statutory provision, the Supreme Court found neither exception was applicable to Allen's case in light of the fact he was not an escapee or serving any sentence at the time of his re-arrest. Id. Furthermore and importantly, the Supreme Court continued its analysis and specifically noted "Allen's bond was revoked on the first set charges[,]" and, therefore, Allen was "clearly in custody on **all** charges" from the date of his re-arrest until the date of his guilty plea."[30] Id. at 396, 529 S.E.2d at 542 (emphasis in original). For those reasons, the Supreme Court found Allen was entitled to credit for the time he served following his re-arrest on the additional charges. Id.

In the case sub judice, Appellant was held in pre-trial custody for the indicted offenses from the date of his arrest for those crimes – July 17, 2013 – until he was released on bond on those charges on August 27, 2013. Similarly, Appellant was again held in pre-trial custody for the indicted offenses for a period of ninety-nine days after he was returned to York County upon

[30] Significantly, if the revocation of Allen's bond on the first set of charges was irrelevant to the analysis in regard to his entitlement to credit for time served, there would have been no reason for it to be discussed in the Supreme Court's opinion in Allen's case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331, n. 4, 730 S.E.2d 282, 286 (2012) ("For as former Chief Judge Alex Sanders famously wrote, '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' " (citation omitted and brackets in original)); see generally Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("This Court is bound to presume that the framers of the constitution had some purpose in inserting every clause and every word contained in the document. It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning.").

completion of a prison sentence imposed on March 31, 2015, for a shoplifting conviction. Unquestionably, because he was held as a pre-trial detainee on the charges involved in this appeal during that time period, he was entitled to credit for that time served pursuant to the mandates of Section 24-13-40, and the trial judge correctly awarded Appellant with credit for the time he served during that time period.

Regarding the period of time Appellant was held in custody beginning with his re-arrest on new charges and ending with the imposition of his term of incarceration for the shoplifting conviction, Appellant – like the defendant in Allen – was not an escapee and was not yet serving any sentence during that time period. Thus, none of the exceptions delineated in Section 24-13-40 were applicable in Appellant's case regarding that particular period of time. See S.C. Code Ann. § 24-13-40 (mandating "credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense"); cf. Allen, 339 S.C. at 395, 529 S.E.2d at 542 ("Here, neither exception applies as Allen was neither an escapee nor was he serving any sentence at the time of his June 26th arrest. On the contrary, Allen was awaiting trial and sentencing on all offenses from June 26th through Sept. 12th.").

Nonetheless, regardless of the inapplicability of the statutory exceptions delineated in Section 24-13-140, Appellant was not entitled to credit for time served for the time period beginning with his re-arrest and ending with his shoplifting conviction because, unlike in Allen, there is no evidence in the record establishing Appellant's bond on the indicted charges was ever revoked at any point following his re-arrest on the subsequent charges. In light of that critical

fact, Appellant – unlike the defendant in Allen – was **not** "clearly in custody" on all the offenses for which he had been arrested from the time period of his re-arrest going forward. Cf. Allen, 339 S.C. at 396, 529 S.E.2d at 542 ("Moreover, Allen's bond was revoked on the first set of charges. He was, therefore, clearly in custody on **all** charges from June 26th through September 12th." (emphasis in original)). Instead, Appellant was **solely** in custody as a pre-trial detainee for the new charges on which he had not been released on bond without revocation. See People v. Arnhold, 115 Ill. 2d 379, 383, 504 N.E.2d 100, 101 (Ill. 1987) ("[A] defendant who is out on bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge until his bond is withdrawn or revoked."). Under those circumstances, Appellant logically was not entitled to credit for time served for the indicted charges during that time period because he was **not** actually serving any time in connection to those charges at that time. See People v. Nesbit, 407 Ill. Dec. 883, 892, 64 N.E.3d 682, 691 (Ill. App. Ct. 2016) ("A criminal defendant is entitled to credit against his sentence for each day he spends in pretrial custody. Our supreme court has clarified that 'a defendant who is out on bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge [for the purposes of custody credit] until his bond is withdrawn or revoked.' Once a defendant in that scenario withdraws or surrenders his bond, he is considered in custody on both offenses and earns credit against each for each day in custody." (citations and footnote omitted and brackets in original)); State v. Pavey, 356 Mont. 248, 257, 231 P.3d 1104, 1110 (Mont. 2010) ("[I]f his bond was never revoked, then he was not incarcerated on the drug possession charge after his release on July 25, 2002, and he thus was not entitled to receive credit against the drug possession sentence for time served after his re-arrest on September 19, 2002."); cf. Clifton v. State, 905 So. 2d 1042,

1043 (Fla. Dist. Ct. App. 2005) ("These logs suggest that Mr. Clifton was released on bond in May 2002 and that the bond was never revoked when he was returned to jail in July 2002. If that is the case, then he is only entitled to jail credit on these two cases from the date when the bond was revoked.").

Because the trial judge awarded Appellant with credit for all the time he served as a pre-trial detainee in connection to the charged offenses, Appellant received the sentencing credit he was entitled to under the law, and the trial judge committed no error of any kind in regard to Appellant's sentence. See S.C. Code Ann. § 24-13-40 ("In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spend under monitored house arrest."); see also Allen, 339 S.C. at 396, 529 S.E.2d at 542 (considering the fact Allen's bond on his first set of charges was revoked in finding he was entitled to credit for time served as a pre-trial detainee after that bond had been revoked). As a result, there is no basis to disturb Appellant's sentence on appeal. See State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("[T]his Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive."). Appellant's convictions and sentence should be affirmed.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 26, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from York County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2015-002563

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THE STATE,

Respondent,

vs.

JOHN KENNETH MASSEY, JR.,

Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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