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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEVY LARKIN BROWN,

APPELLANT

APPELLATE CASE NO. 2021-000485

INITIAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

On March 21, 2019, appellant was indicted by a Beaufort County grand jury for armed robbery. R.* Appellant was tried April 21-23, 2021 before the Honorable Carmen T. Mullen and a jury. Tr. 1. Melissa Duque and Courtney Gibbs represented appellant. Tr. 1. Jared Shedd, assistant solicitor, and Samantha Molina, assistant solicitor, represented the state. Tr. 1.

The jury found appellant guilty of armed robbery. Tr. 327. Judge Mullen sentenced appellant to sixteen years' imprisonment. Tr. 335.

This appeal follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing *Means*, 348 S.C. at 166, 558 S.E.2d at 924).

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

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

Relevant facts

On July 15, 2018 two masked individuals entered a McDonald's in Beaufort County, one of them held the manager on duty, Susannah Krebs, at gunpoint and ordered her to empty the safe while the other led employees at gunpoint into the walk-in refrigerator. Tr. 148, l. 11-149, l. 6; 158, l. 15-160, l. 16. After Krebs emptied the safe, she was also led to the walk-in refrigerator and the two individuals fled the scene. Tr. 161, l. 17-161, l. 5; At least three employees called 911, including Shaquelia Smalls an employee who was outside the McDonald's during the incident. State's exhibit 1, recording of 911 calls.¹

Officer Mikhail Kopylov was the first to arrive on the scene. Tr. 98, ll. 4-18. The area where the McDonald's is located is considered a commercial area. There are multiple businesses surrounding and an apartment complex within walking distance. Tr. 112-113. When Kopylov arrived at the scene he first spoke to Smalls and Timothy Garvin who were standing outside the restaurant. Kopylov cleared the building and began speaking to the employees about the incident. Tr. 98, l. 22-100, l. 10. The employees described that the intruders were covered head to toe, dressed all in black and had no visible identifying characteristics. Tr. 108, ll. 2-23.

¹ State's exhibit 1, recording of 911 calls, is on file with this Court.

At some point the Beaufort County Sheriff's Department Bloodhound Team was called to the scene to track the suspects that reportedly left on foot. Tr. 173, ll. 6-20. When dog handler, David Tafoya, arrived he said there were already members of both the city police department and county sheriff's office on the perimeter. Tr. 174, ll. 2-5. Tafoya left the scene, went to the kennels, and returned with Copper, a bloodhound trained to track scent by article or last-known area. Tr. 174, l. 11-175, l. 4.

Copper was taken to what had been determined to be the last-known location of the suspects where officers had discovered a ten-dollar bill in the McDonald's parking lot. Close to the ten-dollar bill there was a do-rag and a pair of sandals. Tr. 176, l. 21-177, l. 4. Tafoya gave Copper the tracking command and Copper went towards the do-rag and put his nose to it. Then Copper tracked through a cut-through to the nearby apartment complex. Copper began circling one of the buildings in the apartment complex. Tr. 178-79. Appellant was standing with Dequan Blue outside on the third story breezeway of that apartment building. Officers spoke to appellant and Blue but ultimately did not arrest them at that time. Tr. 202, l. 19-203, l. 16.

Defense counsel argued pretrial the dog tracking evidence should not be admitted for three reasons. First, Jeremiah Fraser did not meet the requirements to be qualified as an expert under Rule 702, SCRE. Counsel pointed out that Fraser had only attended a course in 2003 and then another in 2010 and had not completed any other training or certification. Tr. 30, 19-25. Counsel also argued that Copper was not reliable based on the fact that out of a total of twelve calls he went on he only located two subjects. Additionally, counsel pointed out that in this case the dog did not actually identify appellant who was standing outside and that there are eight apartments in the building that the dog was circling, and it could have been anyone in that building that the dog was alerting to. Tr. 37-40. Lastly counsel argued that the trail was contaminated. Tr. 48, ll. 5-19.

In response to defense counsel's motion the state proffered Fraser's testimony pretrial. Tr. 24-36. Fraser testified that he had been a member of the bloodhound tracking team for the last eighteen years and as the head of the team he participated in training the dogs. Tr. 24, l. 20-25, l. 9. Fraser testified he attended "the dog training academy in 2003," and the national police bloodhound association in 2010 but did not have a certificate for the 2010 course. Tr. 26, l. 3-27, l. 22. When asked if he had testified as an expert before Fraser responded, "I want to say twice, but I know once for sure." Tr. 25, ll. 10-18.

Fraser also testified regarding Copper's reliability. Tr. 29-30; 31-36; 41-47. Defense counsel asked Fraser questions about specific calls from the time that Copper began until the time of this incident and Fraser testified that Copper began going out on calls in 2017. Tr. 32, ll. 4-7. The record reflects Copper went on twelve different calls and of those twelve it appears that Copper successfully found two individuals. Tr. 37, ll. 1-13; 39, ll. 17-23. Fraser claimed Copper had shown to be "generally reliable." Tr. 29, ll. 5-12. Fraser also testified that finding the individual is not the only measure of success on a track and that it is important that the dog located evidence in some of these tracks. Tr. 45, l. 21-46, l. 16.

At the conclusion of the pretrial hearing the court qualified Fraser as an expert in bloodhound tracking based on the length of time he had been working with dogs and his training. Tr. 31, ll. 10-13; 49, ll. 5-13. The court ruled that "the experience shown, by Copper in this case [was] reliable." Tr. 52, ll. 10-11. Lastly, the court ruled there was no evidence that the trail was contaminated. Tr. 52, ll. 14-24.

At trial, Fraser explained to the jury how bloodhounds track by scent. Fraser testified that our bodies "are constantly giving up skin cells." The dog is tracking the skins cells that our body

is losing. Tr. 194, ll. 1-7. When asked if there are factors that affect how many skin cells a person might shed Fraser answered:

Absolutely. Take, for instance, an armed robbery. When somebody has committed an armed robbery, adrenaline is pounding, their breathing is substantially harder. As you breathe, you're kicking out more skin cells, kicking out more scent for that dog to follow. We call that fear scent. So what happens is your body starts expelling more skin cells than it would normally sitting in a calm environment.

Tr. 194, ll. 15-25.

Fraser claimed that Copper would not have gone up the steps to identify appellant. He explained that it would be unlikely that a dog would go up the stairs, but the dog circling was indication enough. Tr. 204.

At trial it was revealed that appellant was frequently in the area where the robbery occurred because he worked at the McDonald's and spent time at the nearby apartments. The manager on duty that evening, Susannah Krebs, testified that she was close with appellant and that he was a trainee in the management program. Tr. 162, ll. 6-9; 163, ll. 3-6; 166, l. 24-167, l. 8; 167, l. 21-168, l. 17. Neither Krebs nor any of the other employees that had worked with appellant recognized either of the suspects to be appellant during the incident. Tr. 149, l. 22-151, l. 6; 165, l. 13-166, l. 21.

Appellant called two witnesses in his defense. First was Officer John Jambriska who testified that he responded to the scene that day. He testified that when he arrived police were setting up a perimeter and he was sent to the apartment complex. Tr. 272. Defense Exhibit 2, Jambriska's dash camera video, was admitted during his testimony.² The video shows Jambriska stopping his car to approach a car parked in the woods in the area of the perimeter. In the video

² Defense exhibit 2, Jambriska's dash camera video, is on file with this Court.

Jambriska told the two individuals in the car to move somewhere else. Jambriska claimed that while he could not recall what the description of the suspects was, he knew at the time that the people in the car did not match the description and if they had he would have detained them. Tr. 274, ll. 10-21.

Discussion

Dog tracking evidence is only reliable (and thus admissible) if all six prongs of *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), are met. The trial court erred when it qualified Fraser as an expert witness in bloodhound tracking because Fraser did not have the requisite knowledge, skill, experience, training, or education to be qualified as an expert witness. The trial court erred when it admitted dog tracking evidence because the state failed to show the dog used to track had by experience been found reliable and because the trail was contaminated.

Rule 702, SCRE provides, “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.”

In “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.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). 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.” *Id.* Next, “the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* “Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.* “If these preliminary requirements are not met, as a matter

of law, the trial court may not permit the jury to consider the evidence.” *Id.* at 456, 699 S.E.2d at 180.

In explaining the “reliability foundational requirement” particular to dog tracking evidence, the South Carolina Supreme Court adopted the following evidentiary framework in *State v. White*, 382 S.C. at 270, 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) *the dog has been 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.*”

(emphasis added).

Here, the state failed to show that Fraser satisfied the qualifications of an expert under Rule 702, SCRE. *See State v. Harris*, 318 S.C. 178, 456 S.E.2d 433 (Ct.App.1995) (party presenting expert must show witness possesses, either through study or experience, specialized knowledge that makes him better qualified than jury to form opinion on particular subject). While Fraser had worked with the bloodhound tracking team for several years, he had only ever been to two trainings in that time and only received certification from his training in 2003. Additionally, Fraser seemed unsure whether he had been qualified as an expert before stating that he thought he had been qualified two times prior but maybe it was only one time.

The trial court erred finding that Copper was reliable. According to the report used by Fraser during the pretrial hearing at the time of the incident Copper had been working for approximately two years and had only successfully tracked two people out of twelve different incidents. While it is true that Fraser testified that finding a suspect is not the only indication of success it is also true that Copper was an inexperienced dog in especially in comparison to the

situation in *White* where the dog had been on over seven hundred and fifty tracks over the course of seven years. *White* at 271, 676 S.E.2d at 687.


The trial court erred in finding there was no evidence of contamination. The area where this occurred was a commercial area with business and an apartment complex nearby. It was an incredibly high traffic area that was impossible to completely perimeter. The testimony presented by Officer Jambriska at trial demonstrated that there were individuals inside the perimeter after it had been set and those individuals along with others could have contaminated the trail.

Appellant does not contest that he was in the area that day and evening and surveillance video from earlier in the day that proves that appellant was there. Evidence showed that appellant worked at the McDonalds and spent time with individuals that lived in the nearby apartment complex. Accordingly, it would not be unusual for items belonging to him to have been in that area. Petreia Lesene testified at trial that appellant walked with her from the apartments to McDonald's after the robbery, therefore it is unsurprising that his scent would be fresh in that area. Tr. 128, l. 4-129, l. 22.

These errors were not harmless in this case where all the evidence linking appellant to the robbery was circumstantial. The improperly admitted evidence went directly to the issue before the jury: whether appellant was the person who robbed the McDonald's. *See State v. Tapp*, 398 S.C. 376, 393, 728 S.E.2d 468, 477 (2012) (Pleicones, J., dissenting) ("Improper 'expert' evidence which goes to the heart of the case is not harmless").

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his conviction and remand his case for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2022.

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LEVY LARKIN BROWN,

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APPELLATE CASE NO. 2021-000485

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Levy Larkin Brown, #367857, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 7th day of February, 2022.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT