

Evidence. *State v. Webber*, 716 A.2d 738 (R.I. 1998). Under Rhode Island Rule of Evidence 702, even though expert testimony may be helpful to the trier of fact, such testimony still requires a foundation in order to be admissible.

In *State v. Webber*,¹ the Rhode Island Supreme Court was faced with determining the necessary foundation for the admissibility of testimony from an arson detecting dog, the state's expert at trial. The court held that adequate foundation for testimony concerning the dog's arson-detecting abilities required the state to establish the expertise of the dog's curator, produce evidence regarding the dog's background and training, and testimony regarding the dog's accuracy during investigations.²

FACTS AND TRAVEL

On September 13, 1990, at approximately 1:30 p.m., Christine Webber (Webber) returned to her home in Coventry, Rhode Island from a business meeting she attended in Massachusetts that morning.³ After attending to some personal matters, she left her residence and proceeded to drive to her place of business, C. Webber Chevrolet.⁴ Webber, while a short distance away from her home, encountered her son, Frederick Webber (Frederick) and his friend, Jeffrey Raymond (Raymond).⁵ After a brief conversation, the parties continued on their respective ways.⁶

Frederick and Raymond, as they approached the house, noticed smoke rising from the roof.⁷ A neighbor informed them that the fire department had already been notified.⁸ Apparently, someone also placed a call to Webber, informing her of the situation at her home.⁹ After receiving this phone call, she turned her car around and arrived at her home just moments after the fire trucks.¹⁰

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1. 716 A.2d 738 (R.I. 1998).
 2. *See id.* at 741 (citing *State v. Buller*, 517 N.W.2d 711, 714 (Iowa 1994)).
 3. *See id.* at 739.
 4. *See id.*
 5. *See id.*
 6. *See id.*
 7. *See id.*
 8. *See id.*
 9. *See id.*
 10. *See id.*

It was later concluded by those investigating the incident that "the fire had been caused by a deliberate human act."¹¹ Further investigation also revealed the presence a flammable substance, apparently used to ignite the fire in two separate locations within the home.¹² Investigators also noticed that the home's fire-detection system had been manually deactivated.¹³

Subsequently, Webber was indicted by a grand jury, charging her with one count of first-degree arson.¹⁴ At trial, the state presented two expert witnesses in the field of fire cause and origin, John B. Fiore (Fiore) and Thomas Haynes (Haynes).¹⁵ Fiore testified that, on the day following the fire, a member of the Connecticut State Police, along with his dog, Matty, assisted in the investigation.¹⁶ Fiore further testified that Matty "was trained to detect the presence of flammable substances used as fire accelerants."¹⁷ Neither the dog's trainer, nor the Connecticut State Police officer testified at trial.¹⁸

Webber never contested the investigator's conclusion that the fire was deliberately set through the use of accelerants.¹⁹ Instead, she argued that the presence of these accelerants had no direct relevance without first establishing a connection between her and the fire.²⁰ Therefore, the decisive moment in the trial occurred when the state attempted to link Webber with the accelerants.²¹

That decisive moment occurred when Fiore testified about an incident he witnessed approximately twenty hours after the fire originated.²² According to Fiore, the following day the investigators asked Webber to consent to a search of her automobile, which

11. *Id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.* At the time of trial, Fiore was an investigator for the Rhode Island State Fire Marshall's office, while Haynes was a certified fire marshal and a chief on the Coventry Fire Department. *See id.* Webber stipulated that both individuals were qualified as experts in the field of fire cause and origin. *See id.*

16. *See id.* This testimony went without objection from Webber. *See id.*

17. *Id.* Fiore testified that upon detecting flammable accelerants, Matty would alert his handler by sitting down and scratching the area where the accelerants were. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 739-40.

she did.²³ Shortly thereafter, Fiore testified that Matty, upon entering the automobile, alerted his handler to the presence of accelerant on the driver-side front floor mat in Webber's vehicle.²⁴ It was at this point that counsel for Webber strenuously objected to the introduction of any evidence concerning the dog's reaction to the floor mat.²⁵

The trial justice permitted Fiore to further testify concerning Matty's reaction, determining that the probative value outweighed its potentially prejudicial effect.²⁶ Furthermore, the trial justice permitted Fiore to testify that "after Webber observed Matty's alert to the floor mat she became emotional and cried."²⁷

After trial, the jury deliberated and found Webber guilty of first-degree arson.²⁸ Webber was sentenced by the trial justice to fifteen years at the Adult Correctional Institutions, five years to serve and ten years suspended, and ten years probation upon her release.²⁹ Webber filed a timely appeal to the Rhode Island Supreme Court.

23. *See id.* at 740.

24. *See id.* Fiore recalled how Matty stopped, sat, and scratched the front floor mat, thereby alerting his handler of the presence of fire accelerant. *See id.*

25. *See id.* In part, Webber's counsel stated:

It's a twofold problem involved with Mr. Fiore. This is not his dog. It's a dog brought in by [Trooper Lancellotti]. My argument concerning Mr. Fiore concerns the fact not only is this request not proffered by him or initiated as a result of his investigation, he merely happens to be just a bystander to this fact. So insofar as Mr. Fiore is concerned, I would assert that particular point. And restricting him from testifying as to what this dog may or may not have done—keep in mind that we're getting the connection now to the automobile and the house. What happened in the house, and whatever accelerants were discovered, to me has no direct relevance insofar as Christine Webber is concerned, except for the fact that there may be a nexus to the car and the mats.

That brings us to the second part of the problem that I discussed at the outset of this case—contamination of the evidence. That is the general difficulty I have with allowing this witness . . . to testify that on September 14 . . . 22 hours after individuals had arrived at the scene and [had access to Webber's car, including Fiore] some period of time after the fire, bearing witness not as the handler of the dog, not as the expert, but someone who bore witness as to what the dog did, and what the dog may have disclosed. I think it's too remote for this particular witness on [sic] this context to be able to testify.

Id. at 740.

26. *See id.*

27. *Id.*

28. *See id.*

29. *See id.*

ANALYSIS AND HOLDING

On appeal, Webber contends that the trial justice erred in allowing Fiore to testify concerning Matty's actions, and defendant's reaction, to the dog's alerting its handler to the presence of fire accelerant.³⁰ According to the Court, the issues presented by Webber on appeal require an interpretation of Rule of Evidence 702.³¹

The problem with the testimony regarding Matty's reactions rests upon the foundation the State provided.³² Under Rule of Evidence 702, a foundation is required in order to qualify any witness as an expert, thereby allowing them to provide their opinion regarding the matter at issue.³³ Both Fiore and Haynes were qualified as experts by the state in the field of fire cause and origin; however, according to the court, both "exceeded their area of expertise" when they testified regarding Matty's reactions.³⁴

In order for the State to present evidence concerning Matty's activities, the court determined that it was necessary to "establish the expertise of Matty's curator, Matty's background and training, and Matty's general accuracy during investigations."³⁵ Only Matty's trainer or curator could provide such testimony, therefore, the state's failure to call Trooper Lancellotti precluded any such testimony.³⁶ Therefore, according to the court, "[t]he state's failure to establish this foundation constitutes prejudicial error and provides a sufficient basis" for a reversal of Webber's conviction.³⁷

While the state's failure to provide foundational basis for Matty's activities was sufficient within itself to warrant a reversal of Webber's conviction, the court also raised two related issues it deemed important.³⁸ The first related issue concerns Fiore's testi-

30. *See id.*

31. *See id.* at 741. Rhode Island Rule of Evidence 702 states:

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 fact or opinion.

Id.

32. *See Webber*, 716 A.2d at 741.

33. *See id.* (citing *Rodriguez v. Kennedy*, 706 A.2d 922, 924 (R.I. 1998); *State v. Wheeler*, 496 A.2d 1382, 1388 (R.I. 1985)).

34. *Id.*

35. *Id.* (citing *State v. Buller*, 517 N.W.2d 711, 714 (Iowa 1994)).

36. *See id.*

37. *Id.*

38. *See id.*

mony regarding Webber's emotional outburst upon witnessing Matty detect accelerant on the floor mat in her automobile.³⁹ According to both the trial justice and the supreme court, whether to allow such testimony under Rule of Evidence 403, was "a close call."⁴⁰ This ruling is difficult due to the inferences created by the outburst.⁴¹ Although the state contended it introduced the testimony to demonstrate Webber's state of mind, the court was of the opinion that "this testimony also had the effect of establishing the fact that a flammable accelerant was present on the driver's floor mat and, furthermore, that Webber was responsible for its presence."⁴² Thus, concluded the court, when considering all the circumstances of this case, the probative value of such testimony was outweighed by the inference theory the state attempted to prove.⁴³

The second related issue the court chose to discuss before remanding the case to the superior court was Webber's claim that Haynes had bolstered testimony regarding the dog.⁴⁴ At trial, Haynes testified that "the dog was more sensitive than the gas chromatograph" that was later used at the University of Rhode Island crime lab and failed to detect the presence of any accelerant.⁴⁵ This, according to Webber, constitutes a bolstering of Matty's actions, and encroaches on the finder of fact's exclusive territory of determining a witness' credibility.⁴⁶ The court agreed with Webber's contention that such testimony amounted to impermissible bolstering.⁴⁷

CONCLUSION

As a result of *State v. Webber*, in order to present testimony of any arson-detecting dog, a proper foundation must be laid pursuant to Rhode Island Rule of Evidence 702. In order to lay such a proper foundation, it is necessary for the dog's curator or handler

39. *See id.*

40. *Id.*

41. *See id.*

42. *Id.*

43. *See id.* Of particular importance to the court was that when the driver's floor mat was sent to the University of Rhode Island crime lab, it tested negative for fire accelerant. *See id.* at 742.

44. *See id.*

45. *Id.*

46. *See id.*

47. *See id.*

to testify concerning their own expertise in the field, as well as the dog's background, training and general accuracy during investigations.

Christopher E. Friel