

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-2020-2015
 :
 DWAYNE HALL, : Opinion and Order re Commonwealth's
 Defendant : Motion in Limine

OPINION AND ORDER

Before the court is a motion in limine filed by the Commonwealth to preclude and/or limit expert eye witness identification testimony.

Beginning with the Pennsylvania Supreme Court's decision in *Commonwealth v. Walker*, 625 Pa. 450, 92 A.3d 766 (2014), expert testimony regarding eye witness identification was no longer per se inadmissible. The admissibility of such expert testimony is left to the discretion of the trial court, within the parameters set by the Pennsylvania Supreme Court, of course.

This Opinion and Order shall address the exercise of this court's discretion under the circumstances as presented in the instance case.

The Defendant has specifically proffered the expert testimony of Margaret Reardon as set forth in her expert report dated April 13, 2017. The Commonwealth objects on the following grounds: (1) the report is arguably untimely; (2) the areas addressed are not beyond the knowledge possessed by a lay person; (3) the testimony is not relevant under the circumstances of this case because one eye witness already knew the Defendant; and (4) the testimony does not specifically address how the proposed factors specifically impacted the identification.

While the court reserves the right to review this decision and potentially change it once the trial starts and testimony begins, except as set forth herein, the court denies the Commonwealth's motion to preclude such testimony.

Walker was a clear departure from prior Pennsylvania precedent on the use of expert testimony in connection with eyewitness evidence. The Opinion, however, is well constructed and provides clear guidelines for the lower courts.

In *Walker*, the proposed expert would have explained to the jury how the mind works and would have explained to the jury "scientifically proven facts" relating to eyewitness identification. These findings were as follows:

(1) the phenomenon of 'weapons focus'; (2) the reduced reliability of identification in cross-racial identification cases; (3) the significantly decreased accuracy in eyewitness identifications in high stress/traumatic criminal events; (4) increased risk of mistaken identification when police investigators do not warn a witness, prior to viewing a photo array or lineup, that the perpetrator may or may not be in the display; and (5) the lack of strong correlation between witness statements of confidence and witness accuracy.

92 A.3d at 773.

The Court agreed that making jurors aware of the variables that impact eyewitness accuracy is critical to a fair adjudication of the truth. The Court stressed that eyewitness evidence may be extremely probative of guilt and is often times crucial to the Commonwealth's case against the Defendant, and, thus, indispensable to the proper functioning of our criminal justice system. It is arguably the most powerful form of evidence.

Id. at 779.

The Court recognized the fallibility of eyewitness identifications and concluded that "[o]ne way in which factfinders may be assisted in making more accurate and

just determinations regarding guilt or innocence at trial is through the admission of expert testimony.” *Id.* at 780. In setting the parameters of such expert testimony, the Court noted initially that it must be beyond the knowledge possessed by a lay person and assist the trier of fact to understand the evidence or determine a fact in issue. *Id.* Expert testimony may address the array of variables that are most likely to lead to a mistaken identification. *Id.* at 782. The testimony must relate to relevant psychological factors which may impact eyewitness identification but not directly speak to whether a particular witness was untrustworthy or even unreliable. *Id.* at 784. The expert is not rendering an opinion on whether a specific witness is accurate in his or her identification. “Rather, such testimony teaches – it provides jurors with education by which they assess for themselves the witness’s credibility.” *Id.* In further specifying the expert’s function, the court noted that the expert would not speak “specifically to the legitimacy of the identification or pass directly on the veracity of a particular witness.” *Id.* at 785. Rather, such “expert testimony would merely assist the jury in understanding the factors impacting eyewitness identification testimony.” *Id.*

The Court also discussed the initial threshold of relevancy. While not precisely defining the relevancy, the Court noted that “generally speaking,” expert testimony would be permitted “where the Commonwealth’s case is solely or primarily dependent upon eyewitness testimony.” *Id.* at 787.

The Commonwealth’s timeliness objection is without merit. The Commonwealth never filed a motion or request for discovery in this case. Therefore, the

Commonwealth failed to comply with the Rules of Criminal Procedure regarding discovery and technically was not entitled to the report at all let alone when it was provided. See Pa. R. Crim. P. 573(C). Furthermore, the court did not issue an order setting deadlines for the exchange of expert reports in this case. Finally, the defense attorneys provided the expert report to the Commonwealth shortly after they received it.

Regarding the Commonwealth's second argument that the areas addressed by the expert are not beyond the knowledge possessed by a lay person, the Court agrees with respect to the portion of the report entitled "view." The potential fallibility of eyewitness identification in connection with one's view is within the knowledge possessed by the average lay person.

On the other hand, the other factors at issue including the presence of weapon, stress, race, prior exposure, possible co-witness contamination, system variables and eyewitness confidence, "all are topics which the average juror may know little about." *Walker*, 92 A.3d at 789.

Regarding the Commonwealth's argument that the testimony is not relevant under the circumstances of this case because one eyewitness already knew the Defendant, said argument also is without merit. As the court noted in *Walker*, while it may be "counter-intuitive," prior "exposure" is a concern identified by researchers and other courts, and expert testimony on the subject could potentially assist the jury to understand the evidence or determine a question of fact at issue.

Finally, the Commonwealth argues that the testimony does not specifically

address how the proposed factors specifically impacted the identification. This argument, however, belies the entire reasoning as set forth in *Walker*. Experts are not permitted and will not be permitted to address the credibility of a particular witness. The expert is not rendering an opinion on whether a specific witness is accurate. The expert “teaches.” The expert “provides jurors with education by which they assess for themselves the witness’s credibility.” *Id.* at 784.

The court finds that the Defendant has made an on-the-record detailed proffer including an explanation of precisely how the testimony is relevant to the eyewitness identifications under consideration and how it will assist the jury in its evaluation. Under the circumstances, this court has determined that such expert testimony is appropriate as set forth in the Order below.

On May 11, 2017, the Commonwealth filed a supplemental motion in limine seeking to preclude the expert witness from presenting testimony as to factors that might affect the identification made by Seth Allison, because the Defendant was not a stranger to him. One portion of the report states, “Most research on eyewitness identification accuracy focuses on memory for never-before-seen individuals.” The Commonwealth notes that testimony will be presented to establish Mr. Allison “was acquainted with the defendant for a significant period of time through his employment as a bartender, and having seen the defendant on a regular basis as a customer in the bar.” Another portion of the report, however, states: “This report focuses on research examining factors affecting identification accuracy of a stranger – someone not well known to the eyewitness prior to the witnessed

event and identification.”

The court will defer ruling on this motion until the time of trial. Immediately before the expert is called to testify, the court will conduct a brief in camera hearing with the expert to determine whether her opinions would apply to an identification by someone like Mr. Allison, to whom the Defendant was not a complete stranger but, according to the Commonwealth’s own statements during oral argument on its original motion, was not so familiar as to know the Defendant by name.

ORDER

AND NOW, this 11th day of May 2017, the court DENIES the Commonwealth’s motion in limine except with respect to the proposed expert testimony regarding “view.”

As it is not clear to the court how the expert would define a “stranger” – whether that is a person “never-before-seen” or just someone “not well known” – and whether Mr. Allison’s familiarity with the Defendant’s appearance would remove his identification from the opinions expressed in her expert report, the court defers ruling on the Commonwealth’s supplemental motion in limine until the time of trial.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)

Nicole Ippolito, Esquire (ADA)
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The Honorable Marc F. Lovechio