

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**RAYMARR ALFORD,
Defendant**

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**No. CR: 1969-2012
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed a Motion in Limine on December 23, 2013. A hearing on the Motion was held February 20, 2014.

Background

On July 9, 2012, at around 7:00 PM, Kevan James Connelly (victim) was shot to death at Flanagan Park, 707 Memorial Avenue. The Commonwealth intends to introduce a surveillance video of Second Street approximately forty-five (45) minutes before the shooting. The video depicts a gray/teal mini-van parallel parking on the street. The driver, who the Commonwealth identified as Shariff Thompson (Thompson), parked the vehicle and left the view of the camera. While passengers of the vehicle could not be viewed, the movements of car doors indicate that there were at least three (3) individuals in the vehicle. Later, Thompson is shown re-entering the front passenger side of the vehicle, opening up an alleged hidden compartment on the front-passenger side of the dashboard, and again exiting. The Commonwealth intends to call Agent Trent Peacock (Peacock) of the Williamsport Bureau of Police to testify that the way Thompson grabbed for the object in the hidden compartment is the manner in which an individual would grab for a firearm. Finally, the surveillance camera shows Thompson re-enter the driver side of the vehicle and drive the vehicle down Second Street and out of view of the surveillance camera.

In addition, the Defendant is opposed to testimony the Commonwealth intends to use for

a surveillance video from a city bus. The video shows many locations inside and outside of the bus. The angle relevant to this Motion is video pointing outward from the front of the bus, which shows the eastern edge of Flanagan Park at the time of the shooting. The video depicts multiple people running away from the park, including two (2) individuals that are each holding one of their hands by their waist as they run. The Commonwealth intends to call Peacock to identify the Defendant and to explain that he and another individual were running and holding their hands as if they were in possession of a firearm.

On December 22, 2013, the Defendant filed a Motion in Limine to Prohibit the Commonwealth's Witnesses From Narrating Surveillance Videos And Specifically From Identifying Items Allegedly Depicted. The Defendant alleges that permitting Peacock's testimony "would violate the mandates of Pennsylvania Rule of Evidence 701 and Pennsylvania Rule of Evidence 901. The Commonwealth disagrees and argues that Peacock will testify regarding non-readily apparent aspects of the videos and that the jury can weigh his credibility.

Whether Peacock may testify regarding details about the surveillance videos

The Commonwealth contends that Peacock does not have any firsthand knowledge of the surveillance videos and will merely be explaining the video to events he did not witness. The Pennsylvania Rules of Evidence states the following relevant sections:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) Rationally based on the witness's perception;
- (b) Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 901. Authenticating or Identifying Evidence

- (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:
 - (1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be.

Pa.R.E. 701, 901.

In support of his position, the Defendant cites to Harris, where a surveillance video was shown to the jury at trial. Commonwealth v. Harris, 884 A.2d 920, 922 (Pa. Super. 2005). The video depicted the defendant pulling an object from his back pocket, standing over the victim, and running down Woodland Avenue. At the time the camera was recording the defendant, two officers heard gun shots and responded to the scene and saw the defendant running down Woodland Avenue. The officers followed and apprehended the defendant.

The issue in that case was whether the trial court erred in denying a Kloiber instruction in regards to the video, which was a nighttime video and not clear enough to make out the features of the assailant. Id. at 932; see Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954) (instructing a jury that an eyewitness' identification should be viewed with caution where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past). Citing Pa.R.E. 901, the Superior Court of Pennsylvania found that a Kloiber instruction was not needed. "Officer Gallen-Ruiz authenticated the contents of the videotape, and the trial court properly admitted the tape into evidence. See Pa.R.E. 901(b)(1). We agree a Kloiber instruction was not necessary in the instance case." Harris, 884 A.2d at 933.

The Defendant contends that Harris holds that “a jury’s viewing of a surveillance video was preferable to a witness with no first-hand knowledge testifying to what they believed the video depicted . . .” The Court does not agree with the Defendant’s argument and at the very least the case does not preclude an individual from testifying about a video without firsthand knowledge. The Superior Court was dealing with whether a Kloiber instruction was warranted and in doing so stated that “a cautionary instruction with regard to the videotape was not necessary in the instant case.” Id.

Moreover, the Defendant argues that Shabazz further prohibits the Commonwealth from having Peacock testify regarding the surveillance videos. In Shabazz, a co-conspirator that was at the scene of a robbery identified the defendant in a surveillance video. United States v. Shabazz, 564 F.3d 280 (3rd Cir. 2009). The defendant argued that the jury was capable of determining for themselves whether he was the man in the surveillance footage. Id. at 287. The Third Circuit of Appeals stated that this was not an occasion “where a witness is asked to identify the defendant in an incriminating photo or video based simply on general familiarity with the defendant’s appearance.” Id. The co-conspirator narrated the video for only the incidents he was an eyewitness for and therefore it was found that he was admissible as an ordinary fact witness.

Once again, the Court is not persuaded by the Defendant’s argument that Shabazz held that only fact witnesses can testify regarding surveillance videos. The Third Circuit merely found that the co-conspirator was a fact witness, in that he testified to only facts that he saw. Importantly, the Third Circuit cited to cases where witnesses were asked to identify the defendant in an incriminating video “based simply on general familiarity with the defendant’s appearance.” Id. In these cases, which the Defendant also argued, the federal courts would

consider four (4) relevant factors:

(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

United States v. Dixon, 413 F.3d 540, 544 (6th Cir. 2005). "Other important factors are the degree of clarity of the surveillance photograph and the quality and completeness with which the subject is depicted in the photograph." Id.

In LaPierre, an officer investigating bank robberies testified that the individual pictured in bank surveillance photographs was the defendant. United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993). The Ninth Circuit found that officer's testimony was not proper under FRE 701 because the defendant looked the same at trial as at the time of the robbery, the officer had never met the defendant until his investigation, and that the officer based part of his opinion on *witness statements*. The Ninth Circuit stated that there must be a reason to believe that the witness is more likely to correctly identify the person than the jury, whether it is from past contacts or whether the defendant's appearance had changed.

The main problem with the Defendant's argument, however, is that it relies heavily on federal law. The Commonwealth, focusing on Pennsylvania law, argues that the testimony would be admissible if it is helpful to the jury and not readily apparent. In McKellick, an officer pulled over the defendant's vehicle for traffic violations, suspected a possible DUI, conducted Standardized Field Sobriety Tests, and arrested the Defendant for DUI. Commonwealth v. McKellick, 24 A.3d 982 (Pa. Super. 2011). The officer was subsequently killed in an unrelated incident. At trial for the DUI, the Commonwealth had one officer testify about downloading the

video of the incident from the recording equipment in the police vehicle. A second officer testified regarding the video, identified the defendant, described the field sobriety tests, and narrated the defendant's performance of the tests. Id. at 989. The Superior Court found that the testimony and video were properly admitted at trial:

In light of the aforementioned testimony, we find that the Commonwealth sufficiently authenticated the videotape. Corporals Riehl and Hothouse demonstrated they were persons with knowledge of what the evidence was proclaimed to be, Appellant's traffic stop, and the trial court, as the finder of fact, was free to believe or disbelieve Corporal Hothouse's depiction of the events thereon and whether the videotape accurately and fairly represented Trooper Miller's contact with appellant on November 12, 2008.

Id. The Superior Court did not apply a specific test in determining the admissibility but did note that the witnesses had knowledge and that the jury was free to believe or disbelieve the testimony.

In addition, the Commonwealth cites to Spencer, where a witness viewed a surveillance tape and testified that the gait of the individual was the same as the defendant. Commonwealth v. Spencer, 639 A.2d 820 (Pa. Super. 1994). The Superior Court applied the following approach:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Id. at 824. The witness was the defendant's parole officer and had known him for a year. Further, the witness testified that the defendant had a distinctive and easily recognized gait when he walked. The Superior Court found that "the witness's opinion that the gaits of the robber and appellant were similar was rationally based on her perception and was essential to a clear understanding of her testimony." Id.

Based on all the law reviewed, this Court will substantially rely on the Pennsylvania law and specifically the approach used in Spencer. However, Pennsylvania law is very limited on

the issue at hand. This Court was unable to find any cases on point besides the ones provided by the Commonwealth. Therefore, this Court will still consider the federal law as far as it provides guidance with Pennsylvania law.

The first issue is whether the testimony from Peacock will be rationally based on his perception. The testimony proposed by the Commonwealth is unique depending on the video and what Peacock proposes to testify. The video of Thompson reaching for an object in the hidden compartment of his van garners testimony from Peacock that is based on his training and experience. Peacock would testify that Thompson is reaching for the object the same way someone would reach for a firearm. Similarly, the testimony regarding the Defendant running with his hand on his waist is also based on training and experience. This testimony is based on the perception of the witness and this Court believes is consistent with McKellick and Spencer.

The testimony of Peacock identifying the Defendant on the bus surveillance video, however, is a hybrid of his perception and the perception of others. The Commonwealth provided a proffer to this Court that Peacock's identification of the Defendant would be based on his prior contacts with the Defendant and a description of the Defendant from other witnesses. Based on the case law, descriptions made by other witnesses are not the perception of Peacock. If the officer's identification was made solely on his prior contacts with the Defendant this Court would find it admissible. However, as Peacock's testimony is based partially on the perception of others, this Court finds that the testimony proffered by the Commonwealth is not admissible. See Pa.R.E. 701 ("rationally based on the witness's perception."). Whether Peacock would still make the same identification based only on his previous contacts with the Defendant is still a

possibility and not being precluded by this Court's Opinion.¹

The second factor analyzed by the Superior Court in Spencer was whether the witness' testimony was helpful to the clear understanding of the testimony or the determination of a fact in issue. As argued by the Commonwealth, this Court agrees that the testimony of Peacock clarifies facts that are not readily apparent by just plainly watching the surveillance videos. When Thompson returned to the van he appears to open up a compartment and grab an object. Without the testimony of Peacock, it would not be clear that the compartment was hidden, which officers further discovered after a search warrant of the vehicle. Also, the testimony would further explain what Thompson was possibly gathering from the compartment based not only on how he reached for it but also the experience and training of Peacock. Similar arguments can be made about the bus surveillance video of two (2) people running while keeping a hand on their waist in a particular way. The relevant portion of the video would not be apparent because of the low quality of the video and that it shows numerous other people running.

Finally, the jury will be allowed to determine the credibility of Peacock's testimony. The basis for Peacock's opinions will be stated to the jury. Further, defense counsel has an opportunity to cross-examine him and attack the basis for his opinions. Therefore, this Court believes that there is little to no prejudice against the Defendant for Peacock's testimony regarding the surveillance videos.

ORDER

AND NOW, this _____ day of March, 2014, after a hearing and based upon the

¹ Federal law also focuses on the perception of the witness. In LaPierre, addressed above, the Ninth Circuit found that an officer's identification based on witness reports and pictures of the defendant after the robbery was not admissible at trial. While Peacock's testimony is partially based on witness reports, the Court does not know whether his identification can be made solely on his previous contacts with the Defendant.

foregoing Opinion, Defendant's Motion in Limine is hereby GRANTED in part and DENIED in part. The Court finds that the identification of the Defendant in the city bus surveillance video is cumulatively based on the perception of the officer and of other witnesses and therefore is inadmissible as proffered by the Commonwealth. The Court, however, finds that all additional testimony by Peacock regarding Shariff Thompson reaching for an object inside his van as well as two individuals running from the scene of the shooting on the bus surveillance video is of his own perception and helpful to the trier of fact.

By the Court,

Nancy L. Butts, President Judge

xc: Eric Linhardt, Esq.
Ken Osokow, Esq.
Donald Martino, Esq.