

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :

v. :

JONATHAN PAUL DEPRENDA, :
Defendant :

CR-245-2014

CRIMINAL DIVISION

FILED
LYCOMING COUNTY
SUZANNE M. FEDEL
PROTOST NOTARY &
CLERK OF COURTS
2015 JUN 29 PM 2:00

OPINION AND ORDER

On August 29, 2014 and December 23, 2014, the Defendant filed Motions in Limine. On December 31, 2014, the Commonwealth filed its own Motion in Limine. A hearing on the motions was held on May 13, 2015.

I. Defendant’s Motion on Mr. Craig Hevalow’s Presumed Testimony.

The Commonwealth plans to elicit testimony from Mr. Craig Hevalow, a Police Education Training Specialist in the Municipal Police Officers’ Education and Training Commission. Mr. Hevalow designed a Mandatory In-Service Training (MIST) course that the Defendant took before the collision. Mr. Hevalow produced a report that consists of the following:

- (1) An opinion that the Defendant’s “actions are in contrast to the driving principles taught in this Mandatory In-Service Training (MIST) program”;
- (2) The text of the MIST course and transcription of the course’s audio; and
- (3) A page in which Mr. Hevalow notes pieces of information about the Defendant’s driving and the collision. After each piece of information, Mr. Hevalow notes at least one driving principle from the MIST course. This page will be referred to as the last page of the report.

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The Defendant argues that Mr. Hevalow should be precluded from testifying because the driving principles in the MIST course are not relevant. He argues that the driving principles are not relevant because they do not establish the standard of conduct for the Defendant. He asserts that the Williamsport Police Bureau's Policies and Procedures Manual establishes the standard of conduct for the Defendant. The Defendant also contends that probative value of the driving principles is outweighed by the danger of unfair prejudice. In addition, he argues that Mr. Hevalow's report is not admissible because "there is no information provided in his report that explains the basis for the opinions."

"All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. "This Commonwealth defines relevant evidence as 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Commonwealth v. Serge, 896 A.2d 1170, 1177 (Pa. 2005) (quoting Pa.R.E. 401). "Evidence is relevant when 'the inference sought to be raised by the evidence bears upon a matter in issue in the case and . . . whether the evidence renders the desired inference more probable than it would be without the evidence.'" Commonwealth v. Kim, 888 A.2d 847, 854 (Pa. Super. 2005) (quoting Commonwealth v. Enders, 595 A.2d 600, 603 (Pa. Super. 1991)). "[T]o be relevant and admissible, 'evidence need not be conclusive.'" Commonwealth v. Foley, 38 A.3d 882, 890 (Pa. Super. 2012) (quoting Commonwealth v. Crews, 640 A.2d 395, 402 (Pa. 1994)).

The following is the definition of recklessly:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to

him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Commonwealth v. Fabian, 60 A.3d 146, 154 (Pa. Super. 2013) (quoting 18 Pa.C.S. § 302(b)(3)).

Here, the content of Mr. Hevalow's testimony will presumably be the driving principles that were in the MIST course. The MIST course was mandatory for all Pennsylvania municipal police officers. At the time of the collision, the Defendant was a municipal police officer in Pennsylvania, so the jury could find that the driving principles in the MIST course contribute to the standard of conduct that a reasonable person would observe in the Defendant's situation. Under the definition of recklessly, the Commonwealth must prove a gross deviation from the standard of conduct, so Mr. Hevalow's testimony bears upon the issue of whether the Defendant was acting recklessly. Therefore, Mr. Hevalow's testimony is relevant.

"Relevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Serge, 896 A.2d at 1177 (quoting Pa.R.E. 403). "[A]ll of the prosecution's evidence is intended to 'prejudice' the jury, and simply because it is damaging to the defense is no reason to exclude the evidence." Commonwealth v. Rigler, 412 A.2d 846, 852 (Pa. 1980). "Rather, exclusion of evidence on this ground 'is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.'" Foley, 38 A.3d at 891 (quoting Commonwealth v. Page, 965 A.2d 1212, 1220 (Pa. Super. 2009)).

Mr. Hevalow's testimony has high probative value because the jury must be aware of some standard of conduct to determine whether there was a deviation from the standard. Since the jury must be aware of some standard of conduct, Mr. Hevalow's testimony will not inflame

the jury to make a decision based on something other than the legal propositions relevant to this case. Therefore, Mr. Hevalow's testimony will not be excluded on this basis.

The Defendant argues that the Williamsport Police Bureau's Policies and Procedures Manual establishes the standard of conduct for the Defendant. The jury could find that the manual contributes to the standard of conduct that a reasonable person would observe in the Defendant's situation. However, the manual could not lower the standard of conduct below the driving principles in the MIST course because the Defendant, as a municipal police officer in Pennsylvania, was required to take the course.

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field." Pa.R.E. 702. "If an expert states an opinion the expert must state the facts or data on which the opinion is based." Pa.R.E. 705. "[T]he substance of the testimony presented by the expert must be reviewed to determine whether the opinion rendered was based on the requisite degree of certainty and not on mere speculation." Commonwealth v. Miller, 987 A.2d 638, 656 (Pa. 2009).

In his report, Mr. Hevalow provides an opinion that the Defendant's actions were in contrast to the driving principles in the MIST course. On the last page of the report, Mr. Hevalow provides information about the Defendant's driving and the collision. This information is the facts and data upon which Mr. Hevalow's opinion is based. Therefore, the requirement of Pa.R.E. 705 has been met. However, the Court will wait to rule on the admissibility of the

opinion until Mr. Hevalow testifies, so the Court can examine the substance of Mr. Hevalow's testimony to determine whether the opinion is based on the requisite degree of certainty.

II. Defendant's Motion on the MIST Documents.

When the Court refers to the MIST documents, it is referring to the text of the MIST course and the transcription of the course's audio. The Defendant argues that the MIST documents are not relevant. He argues that even if they are relevant, their probative value is "substantially outweighed by danger to the Defendant of unfair prejudice, confusing the issues, and ultimately misleading the jury regarding what constitutes the accepted standard of conduct of an emergency vehicle operator, responding to an emergency call." The Defendant also argues that the MIST documents are hearsay. Additionally, he argues that the documents' admission would violate the Defendant's rights under "the confrontation clauses of both Article 1 § 9, of the Pennsylvania Constitution and the 6th Amendment to the United States Constitution."

"An expert witness may offer testimony other than opinions. Pa.R.E. 702 provides that an expert witness may testify 'in the form of an opinion **or otherwise.**' An important function of an expert witness is to educate the jury on a subject about which the witness has specialized knowledge but the jury does not. To help perform the function of educating a jury, an expert witness may use various forms of demonstrative evidence." Serge, 896 A.2d at 1177 (citation omitted). Here, the MIST documents are illustrative of Mr. Hevalow's testimony and as such, may aid the jury in understanding and evaluating his testimony. Therefore, the MIST documents are admissible if the Court determines that Mr. Hevalow is an expert.

III. Defendant's Motion on Sergeant J.T. Velvin's Testimony.

The Commonwealth plans to elicit testimony from Sergeant J.T. Velvin, who was the Defendant's driving training instructor at the Central Virginia Criminal Justice Academy. Sergeant Velvin taught emergency response operation to the Defendant. According to Sergeant Velvin, the Defendant was taught that due regard for the safety of persons must be exercised during an emergency response. Sergeant Velvin produced a report in which he concludes that the Defendant acted inconsistently with his training and was not using due regard for the safety of persons at the time of the collision.

The Defendant argues that Sergeant Velvin should be precluded from testifying since the training the Defendant received at the Central Virginia Criminal Justice Academy is not relevant. The Defendant contends that the training is not relevant because it does not establish the standard of conduct. In addition, the Defendant argues that Sergeant Velvin should be precluded from testifying because he concludes that the Defendant was not using due regard for the safety of persons at the time of the collision. The Defendant contends that evidence that he failed to act with due regard is not relevant since it is evidence of negligence, and the Commonwealth must prove that he acted recklessly.

Here, because the Defendant received training in emergency response operation, the jury could find that the training contributes to the standard of conduct that a reasonable person would observe in the Defendant's situation. The definition of recklessly requires that the Commonwealth prove a gross deviation from the standard of conduct, so Sergeant Velvin's testimony bears upon the issue of whether the Defendant was acting recklessly. Therefore, Sergeant Velvin's testimony is relevant.

An opinion that the Defendant did not act with due regard is an opinion that the Defendant did not act consistently with his training and may well go whether there was a deviation from the standard of conduct that a reasonable person would observe in the Defendant's situation. The definition of recklessly requires that the Commonwealth prove a gross deviation from a standard of conduct, so evidence that the Defendant did not act with due regard bears upon the issue of whether the Defendant was acting recklessly.

IV. Defendant's Motion on Pre-Collision Speed and Speed at the Time of the Collision.

The Commonwealth seeks to introduce evidence of the speed of the Defendant's vehicle at the time of the collision and five seconds before the collision. The Defendant argues that evidence of his vehicle's speed is not relevant because he did not know how fast he was driving. He argues that the Commonwealth must show recklessness, and recklessness requires a conscious disregard of a substantial and unjustifiable risk.

The following are some of the driving principles to which Mr. Hevalow will presumably testify:

An officer in an emergency response should stop or slow down when proceeding through an intersection. An officer in an emergency response must drive at a speed to maintain effectiveness of sirens and preemptors. An officer in an emergency response should exceed the posted speed limit only with light traffic, good roads, good visibility, and dry pavement.

If the jury determines that Mr. Hevalow's testimony establishes the standard of conduct, the jury will have to determine whether the Defendant grossly deviated from that standard. The speed of the Defendant's vehicle five seconds before the collision and at the time of the collision bears upon the issue of whether there was a gross deviation from the alleged standard of conduct and may well go to towards a determination of recklessness. Therefore, the speed of the Defendant's vehicle at the time of the collision and five seconds before the collision is relevant.

The Defendant argues that the probative value of the speed is outweighed by the danger of unfair prejudice because “the jurors would simply convict [the Defendant] because he was driving at a high rate of speed and an accident occurred.” The speed of the Defendant’s vehicle is highly probative in the determination of whether there was a gross deviation from the Commonwealth’s alleged standard of conduct. See Commonwealth v. Bullick, 830 A.2d 998, 1005 (Pa. Super. 2003) (noting that proof that a driver was exceeding the speed limit does not necessarily prove reckless driving). Since the jury may have to determine whether there was a gross deviation from the alleged standard of conduct, evidence of speed would not inflame the jury to make a decision based on something other than the legal propositions relevant to this case. Therefore, evidence of the speed of the Defendant’s vehicle will not be excluded.

V. Defendant’s Motion on the Dip in the Road.

Before the collision, the Defendant was driving east on East Third Street. There is a dip in the road slightly less than 300 feet to the east of the location of the collision. The Commonwealth seeks to introduce evidence that the Defendant would have lost control of his vehicle in the dip. The Defendant argues that evidence of the dip is not relevant and should be precluded.

The Commonwealth must prove that the Defendant was violating a standard of conduct at the time of the collision. Mr. Hevalow will presumably testify that an officer in an emergency response should be in control and remain in control of the vehicle. However, evidence that the Defendant would have lost control of his vehicle is not evidence that the Defendant violated this driving principle. Therefore, the evidence that the Defendant would have lost control does not bear upon the issue of whether the Defendant violated the alleged standard of conduct at the time of the collision.

However, evidence of the Defendant's pre-collision knowledge of the dip and his lack of consideration of the dip does bear upon whether the Defendant violated a standard of conduct at the time of the collision. Mr. Hevalow will testify that an officer in an emergency response should pay particular attention to slopes. Sergeant Velvin will testify that an officer in an emergency response should rely on foresight rather than hindsight. Evidence that the Defendant was not considering the dip is evidence that the Defendant was violating these driving principles. Therefore, evidence of the Defendant's pre-collision knowledge of the dip and his lack of consideration of the dip bears upon the issue of whether the Defendant violated the alleged standard of conduct at the time of the collision.

VI. Commonwealth's Motion

The Commonwealth seeks to preclude the Defendant from introducing evidence that "other officers in other incidents have responded to or been engaged in pursuits of individuals while driving at similar speeds." The Commonwealth argues that such evidence "is not relevant to whether the conduct of the Defendant at the time and place of this incident was reckless" Furthermore, it argues that even if the evidence is relevant, "its probative value is outweighed by the danger of unfair prejudice, or confusing the issues, or misleading the jury." The Commonwealth contends that evidence of other emergency responses would shift the focus "to pursuits in general rather than the facts of the specific case and would confuse the issues, cause undue delay, and waste time." It asserts that "the standard of what is not reckless or grossly negligent cannot be established simply by having others testify that they performed in a certain manner." It argues that expert testimony is required to establish standard of conduct.

The Defendant argues that "testimony of other officers regarding the circumstances of other pursuits, including speeds travelled, manner of driving, accidents that occurred, and

specifically, the lack of disciplinary action taken by the Williamsport Police Department is extremely relevant evidence of what constitutes the reasonable and accepted ‘standard of conduct’ of a Williamsport Police Officer engaged in an emergency response.” “[T]he Defense intends to present evidence of the *other* officers’ driving coupled with evidence that the police supervisors and the police administration were aware of those officers’ driving, and by not reprimanding the conduct, they were condoning the behavior as part of the accepted ‘standard of conduct.’” (emphasis added).

The Court agrees with the Commonwealth that evidence of how other officers responded in emergency responses is not relevant. As the Commonwealth writes, “how officers operate their vehicles at other times, places and under different circumstances does not bear upon the issue . . . [of] whether the Defendant’s operation of his vehicle . . . [in] this case was reckless” The issue in this case is not how other officers drove in emergency responses. Even if other emergency responses were relevant, their probative value is outweighed by the danger that the jury would confuse the issues or be misled. Evidence of other responses would lead the jury away from this case’s issue, which is whether Defendant was acting recklessly.

The Defendant argues that evidence of other officers’ emergency responses is relevant because it establishes the standard of conduct for the Defendant. Although the Defendant does not say it, he in effect argues that every officer in the Williamsport Bureau of Police has a standard of conduct lower than the driving principles in the MIST course. It would not benefit him to introduce evidence that Williamsport police officers have a standard of conduct higher than the driving principles in the MIST course. The Court rejects the Defendant’s argument. Officers in the Williamsport Bureau of Police are, of course, municipal police officers in Pennsylvania. The MIST course was mandatory for all Pennsylvania municipal police officers,

so a jury could not find that the standard of conduct for Williamsport police officers is lower than the driving principles in the course.

VII. Conclusion

Mr. Hevalow's testimony is relevant because it bears upon the issue of whether the Defendant was acting recklessly. The probative value of Mr. Hevalow's testimony is not outweighed by the danger of unfair prejudice. If the Court determines that Mr. Hevalow is an expert, the MIST documents will be admissible as illustrative aids. Sergeant Velvin's testimony is relevant because it bears upon the issue of whether the Defendant was acting recklessly. Evidence that the Defendant was not acting with due regard to the safety of persons is relevant because it bears upon the issue of whether the Defendant was acting recklessly. Evidence of the speed of the Defendant's vehicle at the time of the collision and five seconds before the collision is relevant because it bears upon the issue of whether the Defendant was acting recklessly. The speed's probative value is not outweighed by the danger of unfair prejudice. Evidence that the Defendant would have lost control of his vehicle in the dip is not relevant, but evidence of the Defendant's pre-collision knowledge of the dip and lack of consideration of the dip is relevant because it bears upon the issue of whether the Defendant was acting recklessly at the time of the collision. Evidence of other officers' emergency responses is not relevant because it does not bear upon the issue of whether the Defendant was acting recklessly.

ORDER

AND NOW, this 23 day of June, 2015, based on the foregoing opinion, the Defendant's Motion in Limine filed on August 29, 2014 is hereby DENIED. If the Court determines that Mr. Hevalow is an expert, the Commonwealth may introduce the MIST documents as illustrative aids. The Defendant's Motion in Limine filed on December 23, 2014 is hereby GRANTED in part and DENIED in part. The Commonwealth may not introduce evidence that the Defendant would have lost control of the vehicle in the dip. The Court will wait until Mr. Hevalow testifies to determine the admissibility of his opinion. In all other respects, the motion filed on December 23, 2014 is DENIED. The Commonwealth's Motion in Limine filed on December 31, 2014 is hereby GRANTED. The Defendant may not introduce evidence of how other officers drove in emergency responses.

By the Court,



John B. Leete, Senior Judge

cc: ~~Michael Dinges, Esq.~~
~~Eric Linhardt, Esq.~~