IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1412-2014**
	:	
RASHAWN WILLIAMS,	**:**	**Opinion and Order deciding Commonwealth's**
Defendant	**:**	**Motion in Limine re Dr. Vey**

OPINION AND ORDER

This matter came before the court on the Commonwealth's motion in limine to preclude the testimony of Dr. Vey.

According to the Commonwealth's motion, the uncontradicted evidence that will be presented at trial will establish that the victim traveled a distance in excess of 125 feet before collapsing and the eyewitness did not realize the victim had been shot.

In his expert report, Dr. Vey notes that the gunshot wound (GSW) sustained by the victim caused a perforation of his left upper and lower lung lobes, but did not cause any damage to his heart. Dr. Vey opines that "[c]ontrary to popular belief, aside from certain GSWs to the brain, physical activity of a person that has been fatally shot does not necessarily cease immediately after injury. GSWs to the heart and lung are often associated with extended activity until blood loss causes shock, followed by death." Dr. Vey notes several examples from the medical literature where individuals were capable of walking upstairs and lying down in bed, returning fire, and dialing an old fashioned rotary telephone after sustaining GSWs to vital organs. He then further opines: "Given the preceding, relatively prolonged physical activity on the part of [the victim], after having been shot, it is

not unreasonable, and it is conceivable that he may have been capable of closing a pocket knife and returning it to his pocket after having been shot, but prior to his collapse." Dr. Vey also opined, based on the absence of soot and powder stippling, that the range of fire in this case was no closer than 18-24 inches. Near the end of his report, Dr. Vey states: "The preceding conclusions are based on my knowledge, training and experience, which encompasses the foregoing discourse, and the medical and scientific journal article citations and treatises pertaining thereto; and are given to a reasonable degree of medical and scientific certainty."

Dr. Vey provided the defense with a second report in which the only change or difference appears to be removal of the word "conceivable" and replacement with the phrase "it may have been possible" in Dr. Vey's opinion regarding the victim's ability to close a pocket knife and return it to his pocket after having been shot, but prior to his collapse.

The Commonwealth seeks to preclude Dr. Vey's opinions on the following grounds: (1) Dr. Vey's testimony will not assist the jury as it is obvious that one who walks a distance of greater than 125 feet is capable of performing physical activity and could fold a knife and put it in his pocket; (2) Dr. Vey's opinion is not an appropriate subject for expert testimony as it is not based on specialized knowledge beyond the knowledge possessed by the average layperson; (3) Dr. Vey's opinion regarding the victim's ability to close a pocket knife and put it in his pocket is speculative and does not meet the standard for expert testimony; and (4) Dr. Vey's opinion regarding the range of fire in this case is cumulative

because it is the same as the testimony that will be provided by the Commonwealth's pathologist.

Defendant asserts that Dr. Vey's opinions are relevant and admissible to his self-defense claim. Furthermore, his opinions are not speculative because Dr. Vey states toward the end of his report that his conclusions are given to a reasonable degree of medical and scientific certainty.

The court will address the Commonwealth's arguments in turn.

The Commonwealth first asserts that Dr. Vey's testimony is not admissible because it will not assist the jury and is not beyond the knowledge possessed by the average layperson. The court cannot agree.

In this case, the court expects that the Commonwealth will present evidence and argument that the victim was shot in a **vital** organ, which shows Defendant's malice or intent to kill such that the jury should convict him of murder. The court also tends to agree with Dr. Vey's opinion that the popular belief is that incapacitation is almost instantaneous when a person sustains a GSW to a vital organ such as the lungs when that may really only be true with certain GSWs to the brain. Without testimony such as Dr. Vey's, there is the risk that the average layperson would equate a GSW to a vital organ with instantaneous significant impairments to the person's mental and physical capabilities. The court recognizes that evidence will be presented that the victim traversed over 125 feet after sustaining a GSW to his lung, but there is the risk that the jury will be confused or mislead by the description of this injury as one to a **vital** organ into believing that this physical

activity was not the result of the victim's continued cognitive abilities and fine motor skills until he lost a sufficient quantity of blood to go into shock, but the result of some reflexive reaction such as a chicken being able to run around and flop on the ground after its head is chopped off. Testimony regarding a person's capabilities following an injury is almost always beyond the knowledge of the average layperson and the proper subject of expert testimony whether it is in the context of a personal injury suit, a worker's compensation claim or a criminal trial. The annals of case reporters throughout this country are replete with cases regarding the need for expert medical testimony when it comes to the capacity or incapacity of an individual following a serious illness or injury.

The Commonwealth next asserts that Dr. Vey's opinion regarding the victim's ability to close a knife and put it in his pocket is speculative and does not meet the standard for expert testimony. Although the court is struck by the apparent inconsistency in the Commonwealth's position that expert testimony is improper because a juror who is an average layperson could reasonably conclude or infer that the decedent had the capacity to close a knife and put it in his pocket based solely on the decedent's other physical activity after he was shot and its position that Dr. Vey's opinion is speculative, the court is constrained to agree with the Commonwealth that Dr. Vey's expert report does not meet the standard of definiteness required for expert reports and testimony. The way the court understands Dr. Vey's opinion, it is *conceivable that the decedent may have been capable* of closing the pocket knife or *it may have been possible* for the decedent to close a pocket knife and return it to his pocket after having been shot, but prior to his collapse. These italicized

terms are too indefinite. To the court, this is no more definite than maybe he could do it and maybe he couldn't. Although an expert need not use "magic words" or hold his opinion to an absolute certainty, an opinion based on mere possibilities is not competent evidence. ***Commonwealth v. Gonzalez***, 109 A.3d 711, 727 (Pa. Super. 2015); ***Gillingham v. Consol Energy, Inc.***, 51 A.2d 841, 849 (Pa. Super. 2012).

The court may be misunderstanding or misconstruing Dr. Vey's report. If Dr. Vey meant that the decedent had the capability of closing a knife and placing it in his pocket for a period of time immediately after being shot and gradually lost that capacity due to blood loss but he cannot pinpoint the exact moment that the decedent lost this capacity or if Dr. Vey meant the decedent could close the knife and place it in his pocket under certain circumstances and he can state what those circumstances would be, he is free to author an amended report stating such. At this point in time, however, the court can only guess or speculate what Mr. Lowry's capabilities were. Therefore, absent further amendment of Dr. Vey's report, the court will preclude Dr. Vey from rendering any expert opinion regarding Mr. Lowry's ability to close a pocket knife and place it in his pocket after he was shot.[1]

ORDER

AND NOW, this ___ day of April 2016, in accordance with the foregoing opinion, the court grants the Commonwealth's motion in limine to preclude Dr. Vey from

[1] The court also notes that the parties did not provide the court with facts or circumstances from which a jury could conclude that Mr. Lowry ever had the knife out of his pocket during the incident.

rendering any expert opinion regarding Mr. Lowry's ability to close a pocket knife and place it in his pocket after he was shot.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire/Martin Wade, Esquire (ADA)
William Miele, Esquire/Nicole Spring, Esquire (PD)
Work file