

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-1435-2018**
 v. :
 :
 FALLON DAVIS, : **OMNIBUS PRETRIAL**
 Defendant : **MOTION**

OPINION AND ORDER

Fallon Davis (Defendant) was arrested on August 25, 2018, on one count of Murder of the Third Degree,¹ Involuntary Manslaughter,² Aggravated Assault by Vehicle,³ and Homicide by Vehicle.⁴ The charge arises from a police investigation of a death that occurred at 4736 Route 14 Trout Run, Pennsylvania 17701. Defendant filed a timely Omnibus Pretrial Motion on February 1, 2019 and a Motion in Limine on April 12, 2019. A hearing on the motions was held by this Court on April 29, 2019.⁵ In her Omnibus Pretrial Motions, Defendant filed a Motion for Discovery, a Motion for Change of Venue/Venire, a Motion to Exclude Inflammatory Photographs, a Motion to Exclude Supporters' Pins, Clothing, Buttons and/or Photographs, a Motion in Limine, a Motion to Suppress Search Warrant, a Motion to Suppress Statement,⁶ a Motion to Display Inflammatory Photographs during Voir Dire, a Motion to Recreate Site Conditions, and a Motion to Amend Omnibus Pretrial Motion. Additionally, Defendant's Motion in Limine filed on April 12, 2019 sought to exclude the statements from Jason Garg's phone call to 911, specifically: "He got fuckin murdered or something, man, something fuckin happened" and "Why did somebody do this to him? Somebody did this to

¹ 18 Pa. C.S. § 2502(c).

² 18 Pa. C.S. § 2504(a).

³ 75 Pa. C.S. § 3732.1(a).

⁴ 75 Pa. C.S. § 3732(a).

⁵ At the hearing, the Court also heard a Motion for Bail Modification that was denied by Order on April 30, 2019.

⁶ Defendant orally withdrew this motion at the hearing.

him. This ain't a fuckin accident." Defendant's Exhibit #3, at 6, 15. Only three issues remain to be determined by this Court: Whether to grant Defendant's Motion in Limine to exclude the video produced by Pennsylvania State Police and shot from the driver's seat of Defendant's vehicle during the day; Whether to grant Defendant's Motion to Suppress Search Warrant; and Whether to grant Defendant's April 12, 2019 Motion in Limine. Both parties were granted an opportunity to brief the issues. Defendant filed her brief on May 28, 2019 and the Commonwealth filed its brief on July 8, 2019. As all three issues do not involve the factual background of the present case this Court shall only address the legal issues, without providing a recitation of the facts.

Whether the Video Made from the Driver's Seat of Defendant's Vehicle is Admissible

The video in question, Defendant's Exhibit #1, demonstrates a walk around of Defendant's vehicle and then one trooper sitting in the driver's seat of the vehicle while another trooper walks around the vehicle. The video was taken at the Pennsylvania State Police Barracks and during the day. The Commonwealth contends the evidence is admissible to demonstrate

[D]efendant would have been able to see the victim from her vantage point in the vehicle, that there were no obstructions blocking her view, and that the victim was not so short that there would have been difficulty in seeing him in front of the vehicle when she was driving toward him, and that she would have known what was causing her vehicle not to be able to move forward.

Commonwealth's Brief in Opposition to Defendant's Omnibus Pre-Trial Motion and Motion in Limine 7/8/19, at 5.

Defendant argues that the video should not be admitted because the incident in question occurred shortly after midnight and occurred at a different location. Defendant additionally submitted a video taken by Pennsylvania State Police at the scene of the incident at night. *See* Defendant's Exhibit #2.

There are three types of evidence admissible in court testimonial, documentary, and demonstrative. *Commonwealth v. McKellick*, 24 A.3d 982, 986 (Pa. Super. 2011).

Demonstrative evidence is permitted “for the purpose of rendering other evidence more comprehensible to the trier of fact.” *Id.* “As in the admission of any other evidence, a trial court may in its discretion admit demonstrative evidence, such as a photograph, if its relevance outweighs any potential prejudice effect.” *Commonwealth v. Reid*, 811 A.2d 530, 552 (Pa. 2002). Additionally “[t]o 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.” Pa. R. Evid. 901. “[P]hotographs, motion pictures, diagrams, and models have long been permitted to be entered into evidence provided that the demonstrative evidence fairly and accurately represents that which it purports to depict.” *McKellick*, 24 A.3d at 987.

The Commonwealth cites *Commonwealth v. Mangini* in support of their position to admit the video. In *Mangini*, the trial court denied the defendant’s request to view the scene of the murder at nighttime, when the murder took place. *Commonwealth v. Mangini*, 386 A.2d 482, 488 (Pa. 1978). The trial court instead permitted a daytime jury viewing, because it “would be difficult to reconstruct the exact amount of lighting given the numerous variables.” *Id.* The Pennsylvania Supreme Court found that the defendant did not meet his burden of showing that the trial court had abused its discretion. *Id.* This Court finds *Mangini* unhelpful due to multiple distinctions. First, *Mangini* involved a request for a jury viewing of the room as opposed to photographs or a video. *Id.* Although not discussed by the Court in the opinion, arranging a nighttime viewing for a jury by itself would create multiple logistics issues. Second, the demonstrative evidence in *Mangini* was being used to demonstrate the validity of

the eyewitness's credibility that he could identify the defendant. *Id.* Lastly, the Court merely found that the trial court did not abuse its discretion in reaching its conclusion, in which a court is granted vast liberties when it comes to a jury view. *Id.*; *see also* Pa. R. Crim. P. 643(a). In comparison, in *Commonwealth v. Gidaro* the Pennsylvania Supreme Court evaluated whether a trial court abused its discretion by allowing the admission of daytime photographs when the crime occurred at night. 70 A.2d 359, 360-61. The Court found that the trial judge did not abuse his discretion because the purpose of the photographs was to "show[] the physical characteristics of the surroundings where the alleged killing was to have taken place" and the trial judge clearly cautioned the jury that the pictures were taken in daylight and for that reason the pictures could only be used for that specific purpose. *Id.* at 361. The Court clarified though that "[h]ad the photographs been admitted for the purpose of proving visibility at the time of commission of the offense, there would be some basis for objection." *Id.*

The Court finds that video is highly relevant, but the probative value is outweighed by the potential for unfair prejudice and to mislead the jury. *See* Pa. R. Crim. P. 403. As admitted by the Commonwealth, it wishes to introduce the evidence to show what Defendant saw from her driver's seat on the night in question. The problem is when viewing the differences between Defendant's Exhibit #1 and Defendant's Exhibit #2 it is clear to the Court that the Commonwealth's video is not a fair and accurate representation of what the Commonwealth is purporting to represent. Visibility and what Defendant saw from her driver's seat on the night of the incident are clearly disputed issues in this case. Based on the Pennsylvania Supreme Court's dicta in *Gidaro* and the strong potential of unfair prejudice and to mislead the jury the Court precludes the Commonwealth from using the video, Defendant's Exhibit #1.

Whether Information on HUM Application on Defendant's Phone should be Suppressed

Defendant submits that information seized by police from her HUM application was impermissible because the language “[a]ny and all data” in the application for a search warrant was overbroad. Defendant also admittedly does not dispute the validity of the search warrant in regards to text messages, call logs, and Facebook Messages. The Commonwealth provided the Court with two applications for search warrants used in the case, as Commonwealth’s Exhibits #1 and #2. The second search warrant indicates that the first search warrant obtained was not executed because “additional data, such as Facebook messaging was not included in the language of the warrant.” Commonwealth’s Exhibit #2, at 3. The full list of items to be searched and seized were: “Any and all data, saved Facebook messages, outgoing and incoming text messages, phone calls, and pictures physically on Fallon Davis’s cell phone 2300 hrs 08/24/18 thru 0230 hrs 08/25/18.” *Id.* at 1.

“[N]o warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be.” Pa. Const. Art. I § 8. Therefore a search warrant “must name or describe with particularity the property to be seized and the person or place to be searched.” *Commonwealth v. Orié*, 88 A.3d 983, 1002 (Pa. Super. 2014). A warrant is impermissibly overbroad if it authorizes the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. *Commonwealth v. Rivera*, 816 A.2d 282, 290 (Pa. Super. 2003). “However, search warrants should be read in a common sense fashion and should not be invalidated by hypertechnical interpretations. This may mean, for instance, that when an exact description of a particular item is not possible, a generic description will suffice.” *Commonwealth v. Kane*, -- A.3d --, 2019 WL 2042034 at *5 (Pa. Super. 2019) (quoting *Commonwealth v. Rega*, 933 A.2d 997, 1012 (Pa. 2007)). Because the

requirements are more stringent under Article I Section 8 of the Pennsylvania Constitution if its requirements are satisfied the federal Constitution is also satisfied. *Orie*, 88 A.3d at 1003. Pennsylvania courts have found the description of items to be searched and seized, “Acer Aspire Model 6930 laptop computer and the hard drive contents contained therein,” as not overbroad when the accompanying affidavit was thorough. *Id.* at 1005; *see also Commonwealth v. Iannelli*, 634 A.2d 1120, 1130-31 (Pa. Super 1983) (The nature of the charges can also affect whether a search warrant is overbroad). Additionally the breadth of an officer’s request is important as it could mean the language is or is not overbroad. *Commonwealth v. Dougalewicz*, 113 A.3d 817, 828 (Pa. Super. 2015). “A search warrant cannot be used as a general investigatory tool to uncover evidence of a crime,” but a warrant is not overbroad if there is probable cause to search all the items. *Rega*, 933 A.2d at 1011.

The Affidavit of Probable Cause in Commonwealth’s Exhibit #2 states “The argument reported by [Defendant] prior to the incident and the cell phone call and contact with Larson after the incident suggests the possibility there is more information contained on [Defendant’s] Apple I-Phone in a red Otter box concerning the events prior to and after [Victim’s] death.” Commonwealth’s Exhibit #2, at 3. As stated above the full list of items to be searched and seized were: “Any and all data, saved Facebook messages, outgoing and incoming text messages, phone calls, and pictures physically on Fallon Davis’s cell phone 2300 hrs 08/24/18 thru 0230 hrs 08/25/18.” *Id.* at 1. The information requested only spans three and a half hours, which holds only a limited and specified amount of information. *See Dougalewicz*, 113 A.3d at 828. Here police were not using the search warrant as an investigatory tool, but instead as a limited search surrounding the use of Defendant’s phone from the time of an alleged altercation until police arrived on the scene. By limiting the frame of documents that could be searched by

the time frame in which they were created, officers properly hindered themselves from getting into information unrelated to the crime under investigation. Therefore the information taken from the HUM application will not be suppressed.

Whether the Statements Made by Jason Garg Should be Admitted into Evidence

Defendant argues that the statements “[h]e got fuckin murdered or something, man, something fuckin happened” and “[w]hy did somebody do this to him? Somebody did this to him. This ain’t a fuckin accident” should be precluded as it does not help to clarify his testimony and it requires specialized knowledge. Defendant’s Exhibit #3, at 6, 15.

Alternatively, Defendant claims that the probative value of the statements is outweighed by the prejudicial value. The Commonwealth contends the statement is proper lay opinion testimony and alternatively that it is a present sense impression and therefore should be allowed in regardless.

At the outset, the Commonwealth’s contention that the statement is a present sense impression and therefore must be admissible is a misunderstanding of the legal principal. A present sense impression is an exception to the hearsay rule. *See* Pa. R. Evid. 803(1). The case the Commonwealth cites, *Coleman*, dealt with an issue of whether hearsay was permissible, which the deciding court found because declarant simultaneously perceived the events as she made the statement to the testifying witness. *Commonwealth v. Coleman*, 326 A.2d 387, 390-91 (Pa. 1974). It is otherwise irrelevant because even hearsay testimony must meet the requirements of Pennsylvania Rules of Evidence 401, 402, 403, 701, 702, and 703. Lay witness testimony giving an opinion is limited and must be “rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of

Rule 702.” Pa. R. Evid. 701. The Court may allow a lay witness to “express personal opinions related to their observations on a range of subject areas based on their personal experiences that are helpful to the factfinder.” *Commonwealth v. Berry*, 172 A.3d 1, 3-4 (Pa. Super. 2017). It is well established that a lay witness may testify to a wide variety of matters. *See William Schuette & Co. v. Swank*, 109 A.3d 531, 533 (Pa. 1920) (“lay witnesses may state their opinions of beliefs, like those of sanity, handwriting, personal identity, values, etc.”).

Defendant concedes that the opinion rendered is rationally based on the witness's perception. Defendant's Brief in Support of Defendant's Omnibus Pre-Trial Motion and Motion in Limine 5/28/19, at 2-3. This Court finds that the statement “[w]hy did somebody do this to him? Somebody did this to him. This ain't a fuckin accident” is admissible under the Pennsylvania Rules of Evidence 701. Mr. Garg reached his opinion based on his own perception, it helps clarify a fact at issue, and it is not based scientific, technical or specialized knowledge. An individual can survey a scene of an incident and reach a personal opinion about whether something occurred as a result of an accident or intentionally. This is not outside the realm of possibilities for a lay witness's opinion. Similarly the Court does not believe that the statement's probative value is outweighed by unfair prejudice. The jury will be able to weigh the evidence accordingly and understand that Mr. Garg rendered his opinion based on his perception of events, as a lay person, who was not present at the actual time of the incident. As for the statement “[h]e got fuckin murdered or something, man, something fuckin happened,” this Court finds that it is not admissible. Specifically, the word murder in this context requires a specialized knowledge of the legal field. The Court does not agree with the Commonwealth that it can be separated and submitted as the way a layman would view the term murder. Even if it could, this Court finds the probative value of the statement is outweighed by the potential

of prejudice and the potential to mislead the jury. At the end of the trial the jury presumably will be told the definition of each applicable degree of murder charged and be asked to render a determination on that definition. Allowing the jury to hear Mr. Garg use the term has a potential for prejudice and to mislead the jury, when Mr. Garg does not have specified knowledge of the legal field to properly reach that opinion.

Conclusion

This Court finds the search warrant was sufficiently specific and therefore valid under the Pennsylvania Constitution and that the use of Mr. Garg's statement that the incident was not an accident is permissible under the Pennsylvania Rules of Evidence 701. As for the video produced by the Pennsylvania State Police from Defendant's vehicle during the day and Mr. Garg's statement that the victim was murdered, both are impermissible and those Motions in Limine are granted.

ORDER

AND NOW, this 31st day of July, 2019, based upon the foregoing Opinion, this Court **ORDERS AND DIRECTS** the following relief:

- 1) Defendant's Motion for Discovery was resolved amongst the parties prior to the start of the hearing on April 29, 2019.
- 2) Defendant's Motion for Change of Venue/Venire has been stayed and judgment has been deferred until jury selection.
- 3) Defendant's Motion to Exclude Inflammatory Photographs has been stayed and judgment has been deferred until the Commonwealth determines which photographs it intends to introduce at trial.
- 4) Defendant's Motion to Exclude Supporters' Pins, Clothing, Buttons and/or Photographs is hereby **GRANTED** as it is the common practice in this county to avoid unfair juror prejudice. It is **ORDERED** and **DIRECTED** that any supporters' pins, clothing, buttons, photographs, or similar materials shall be excluded from proceedings in this matter.
- 5) Defendant's Motion in Limine requesting the exclusion of the Commonwealth's video from the driver's seat of Defendant's vehicle is hereby **GRANTED**. It is **ORDERED** and **DIRECTED** that the video marked Defendant's Exhibit #1 shall be precluded from trial.
- 6) Defendant's Motion to Suppress Search Warrant is hereby **DENIED**.
- 7) Defendant's Motion to Display Inflammatory Photographs during Voir Dire has been stayed and judgment has been deferred until Defendant selects photographs prior to the start of voir dire.
- 8) Defendant's Motion to Recreate Site Conditions has been found to be not feasible due to subsequent changes in the area since the incident occurred.

9) Defendant's Motion in Limine filed on April 12, 2019 to preclude Jason Garg's statements during his 911 call is hereby **GRANTED** in part and **DENIED** in part. It is **ORDERED** and **DIRECTED** that the Motion as to Mr. Garg's statement: "Why did somebody do this to him? Somebody did this to him. This ain't a fuckin accident" the Motion is **DENIED** and the evidence shall be admissible at trial and the Motion as to Mr. Garg's statement: "He got fuckin murdered or something, man, something fuckin happened" the Motion is **GRANTED** and the evidence is precluded from trial as it represents improper opinion evidence.

By the Court,

Nancy L. Butts, President Judge

cc: DA
PD