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Commonwealth v Fow

COMMONWEALTH OF PENNSYLVANIA

v. CHRISTIAN D. FOW, Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania

Franklin County Branch

Criminal Action No. 2201 of 2011

Evidence; Admissability in General; Credibility and Bias.

Evidence; Opinion Evidence; Subjects of Expert Testimony

1. The admission or exclusion of evidence is a matter committed to the sound discretion of the trial court.
2. Any matter tending to show the interest of a witness has been held to aid the jury in properly evaluating credibility, and is therefore relevant and admissable.
3. The admission of expert testimony is within the discretion of the trial court.
4. Expert testimony on the credibility or veracity of witnesses is prohibited, as it is not only within the knowledge of a lay jury, it is their exclusive province.
5. An expert may testify on the ultimate issue to be decided, provided that the testimony will not cause confusion or prejudice. Expert testimony should assist the trier in determining the disputed issues, not merely tell the jury what result it should reach.
6. The Defendant's use of force expert may testify as to customary police procedures and use of force standards, as the subject is generally outside the experience of lay jurors, and indeed, is a matter in which police officers themselves must receive training. The expert may also testify as to whether the actions of the Defendant were consistent with accepted law enforcement practice. The expert may not testify as to whether the force used was excessive or reasonable.

Appearances:

Anthony Forray, Esq., *Deputy Attorney General*

Geoffrey S. McInroy, Esq., *Counsel for the Defendant*

Eric Weisbrod, Esq., *Counsel for the Defendant*

OPINION

Van Horn, J., March 27, 2012

Memorandum and Order

The Defendant, Pennsylvania State Police (PSP) Corporal Christian D. Fow, stands accused of Simple Assault in connection with an incident September 29, 2010, during which he is alleged to have used unreasonable and excessive force while subduing a suspect in custody. Before the Court for disposition are both the Commonwealth's and the Defendant's Motions in Limine. Disposition of the requests for admission and exclusion requires the Court to find the demarcation between evidence bearing on Fow's frame of reference on September 29, 2010, which informed his perception of the reasonableness of his actions^[1], and evidence that would be collateral, irrelevant, and prejudicial.

Indeed, it is the intention of this Court that trial in the above-captioned matter involve a determination of the reasonableness of Officer Fow's use of force against Christopher Broadwater [hereinafter "Broadwater" or "the Victim"] on the date in question. This is not the venue for judgment of the Defendant's career as a police officer, the use of force by law enforcement in general, or other instances where force was utilized to subdue a suspect. To determine whether certain evidence should be admitted, the Court must weigh the relevance and the probative value against the prejudicial impact of such evidence. See *Commonwealth v. Jones*, 683 A.2d 1181, 1193 (Pa. 1996). The admission or exclusion of evidence is a matter committed to the sound discretion of the trial court. See *Commonwealth v. Bozyk*, 987 A.2d 753, 756

(Pa. Super. Ct. 2009).

I. The Commonwealth's Motions in Limine

The Commonwealth first seeks to exclude from trial any mention of the discipline imposed upon the Defendant by the PSP, or any reference to the effect of a conviction upon his employment, arguing such evidence is wholly irrelevant. In response, the Defendant answers that actions by the PSP are indeed relevant, alleging that PSP's treatment of the incident constitutes retaliation against him due to his success in union activities. Specifically, Defendant asserts that Sergeant Randy Kane elected to alter treatment of the incident from an internal investigation with an administrative sanction to an outside inquiry with a criminal sanction due to Fow's actions as a union representative. Fow further argues that the consequences of the use of unreasonable force were known to him at the time of the incident, and therefore formed a part of his mental state. The Commonwealth counters that the determination of whether to charge the Defendant was made solely by the office of the Attorney General, and that Kane did not influence the decision.

The Pennsylvania Rules of Evidence permit the impeachment of a witness for bias. *See Commonwealth v. Rouse*, 782 A.2d 1041, 1044-45 (Pa. Super. Ct. 2001) (citing Pa. R.E. 607(b)). Indeed, any matter tending to show the interest of a witness has been held to aid the jury in properly evaluating credibility. *See id.* As to Sergeant Kane, the Defendant will be allowed to pursue potential avenues of bias or interest, subject to specific objection at the time of trial. However, the Court will not permit speculation regarding the specific consequences or penalties associated with a conviction to be placed before the jury. Such would indeed be prejudicial and inappropriate. The Court will allow the Defendant to disclose to the jury his awareness that penalty could result from the use of excessive force upon a suspect, but will not allow discussion of the specific consequences. The jury's determination of guilt or innocence must be made upon the facts, not according to feelings of sympathy for the Defendant or concern with the possible penalty imposed by the Court for his actions.

Next, the Commonwealth requests the Court find the defense cannot argue to the jury that failure to call the Victim to testify precludes conviction of Simple Assault. The Defendant agrees that the Commonwealth is not required to call Broadwater, who is mentally ill, but maintains he can highlight to the jury the Victim's failure to provide testimony. The two sides are in substantial agreement to this point. The defense will be permitted to highlight to the jury the Victim's absence during argument, but cannot maintain this is a fatal flaw to the Commonwealth's case.

In its third motion, the Commonwealth seeks to preclude the Defendant from questioning any law enforcement officers regarding their use of pepper spray or other methods of force on prior occasions, arguing such evidence would be wholly irrelevant. The defense counters that the reasonable belief of similarly trained and experienced officers is indeed relevant to determination of the reasonableness of Fow's actions. Testimony from different officers, regarding prior incidents having no similarity to that in question, against differently situated suspects, involving a variety of methods of force employed to various degrees and for differing purposes, is not relevant and would tend to confuse the jury. Lacking sufficient similarity, such evidence would not be helpful to the jury in passing judgment upon the reasonableness of Fow's actions on September 29, 2010, and is therefore prohibited.

The Commonwealth further seeks to prevent the Defendant from testifying regarding prior use of force investigations against him, or the results of those investigations, arguing prior investigations have no relevance to Fow's actions on September 29. Fow argues his past experience with use of force investigations, both personally and involving the past actions of other officers, has a direct bearing on his perception of reasonableness. The Defendant's past experiences involving use of force investigations do indeed create a frame of reference for his actions in the present, and are therefore relevant to the incident of September 29, 2010. Investigations involving other troopers are irrelevant, and testimony thereabout would create a danger of confusion of the issues for the jury, and again, would not be helpful. The Defendant may testify regarding past use of force investigations in which he has been personally involved.

As to the Commonwealth's fifth motion, the parties have agreed the Defendant shall be precluded from testifying to his honors and awards at trial, but that testimony regarding Fow's training and experience is likely relevant. As agreed at the time of oral argument, the defense shall provide a list of Defendant's training and experience to which he wishes to testify to the Commonwealth in advance of trial. Should the Commonwealth have objection to any items of the proposed testimony, the Court will rule at time of trial.

Finally, the Commonwealth seeks to exclude the testimony of the Defendant's proposed "use of force" expert, Clifford W. Jobe, Jr. [hereinafter "Jobe"]. A former Pennsylvania State Trooper, Jobe has acted as an investigator, trainer, and use of force expert for the PSP, and has recently begun providing testimony as a private consultant and expert witness. (See Exhibit A, Expert Witness Resume (Curriculum Vitae), Clifford W. Jobe, Jr.) In his extensive report, Jobe offers conclusions regarding the use of force by Fow against Broadwater, the reasonableness and substance of Fow's beliefs and knowledge

on the date in question, the actions of the Victim, credibility, the objectivity of investigators and the inquiry by the Attorney General, and the legal standards by which the incident must be evaluated. (See Exhibit B, Expert Report.) The admission of expert testimony is within the discretion of the trial court. See *Commonwealth v. Davies*, 811 A.2d 600, 603 (Pa. Super. Ct. 2002).

The testimony of an expert witness is admissible to the dictates of Pennsylvania Rules of Evidence 702, to assist the trier of fact in understanding the evidence or determining a fact in issue. See Pa. R.E. 702. Expert testimony on the credibility or veracity of witnesses is prohibited, as it is not only within the knowledge of a lay jury, it is their exclusive province. See *Commonwealth v. Crawford*, 718 A.2d 768 (Pa. 1998). An expert may testify on the ultimate issue to be decided, provided that the testimony will not cause confusion or prejudice. See *Commonwealth v. Brown*, 596 A.2d 840, 843 (Pa. Super. Ct. 1991). Indeed, an expert opinion will not be permitted where it is attempted to substitute for the jury's prerogative in the case. See *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

While portions of the expert opinion, as expressed in the thirty-five (35) page report, shall be permitted, most of the proposed testimony would be impermissibly encroach on the province of the jury. Jobe may testify as to customary police procedures and use of force standards, as the subject is generally outside the experience of lay jurors, and indeed, is a matter in which police officers themselves must receive training. The expert may further testify that the actions of the Defendant were consistent with accepted law enforcement practice. However, Jobe may not testify as to whether the force used by this Defendant was excessive or unreasonable. A jury must make the determination of whether the force used in this instance was reasonable given the facts as they find them. The Court notes Jobe's prior experience does not include providing expert testimony on the issue of reasonableness in the context of a criminal action brought against a member of the PSP. (See Exhibit A.) Indeed, there is no need for the expert to express an opinion on the ultimate issue; rather, such testimony would cause confusion and would be impermissibly prejudicial.

While the Court could locate no Pennsylvania state cases directly addressing the admissibility of expert testimony on the reasonableness of law enforcement use of force, our conclusion mirrors that of Pennsylvania District Courts. See, e.g., *Jackson v. City of Pittsburgh, Pa*, 2010 WL 3222137 (W.D. Pa. 2010) (allowing use of force expert to testify to opinion if offered in response to hypothetical questions founded on facts in evidence if phrased so as not to testify on ultimate issue of whether force used by officers was reasonable); *Burger v. Mays*, 176 F.R.D. 153, 157 (E.D.Pa. 1997) (holding that use of force expert may testify as to whether an officer's actions "were in line with standard police procedures," but prohibiting testimony that the officers's actions were "unreasonable"); *Tschappat v. Groff*, 2004 WL 5509087 (M.D. Pa. 2004) (use of force expert permitted to testify if defendant police officer's conduct was in conformance with standard police procedure, as to prevailing use of force standards in field of law enforcement, but not as to whether use of force was unreasonable or excessive). See also *City of Pittsburgh v. Jodzis*, 607 A.2d 339, 349-350 (Pa. Commw. Ct. 1992) (expert testimony on "nationwide standards for police pursuits, when the use of a roadblock is proper and the proper method for setting up a roadblock" was properly admitted by the trial court; expert did not directly testify that the defendant's roadblock was improper).

Expert testimony should assist the trier in determining the disputed issues, not merely tell the jury what result it should reach. See *Williams v. Weaver*, 2011 WL 4923607 (E.D. Pa. 2011). In much of the report, Jobe acts as a factfinder, resolving disputed factual issues in the case and evaluating the credibility of various witnesses. Cf. *Jackson v. City of Pittsburgh, Pa*, 2010 WL 3222137 (W.D. Pa. 2010). Such testimony usurps the function of the jury and would be wholly improper. Nor is it proper for an expert to opine on the actions of other officers responding to the incident, or on the quality or tenor of the investigation by the Attorney General. Thus, only the first of the seven (7) opinions offered in the Synopsis section of the expert report will be permitted. The remainder of the proposed expert testimony shall be excluded.

II. The Defendant's Motions in Limine

In his first motion, the Defendant requests a ruling from the Court permitting him to present evidence of the Victim's reputation for assaultive behavior, including any "actual," "rumored," or "threatened" assaults. The Commonwealth asserts the defense is attempting to disparage the character of the Victim. Only the Defendant's personal knowledge of the Victim's actions or explicit threats, as existing at the time of the incident on September 29, 2010, is relevant. The Defendant shall not, as to this or any other such evidence, supplement his testimony with information gleaned after the incident through discovery or any other source. Such information did not help form his frame of reference when confronting the Victim, and therefore is not relevant, while being extremely prejudicial. Just as trial is this matter shall not be a determination of the Defendant's career in the PSP, neither will it be a judgment on the character of the Victim.

Similarly, Defendant seeks to admit through the testimony of Trooper Kevin Goss, statements by mental health workers, callers, or by Goss himself, who communicated with the Defendant prior to the incident, regarding their concerns about

the Victim. The Commonwealth agrees that matters within the Defendant's personal knowledge at the time are relevant, and he may testify to such matters. The Court additionally finds that testimony may be elicited from Trooper Goss as to what he relayed to the Defendant prior to the incident. Recordings of mental health workers communicating with the State Police, or matters subsequently learned by the Defendant which were unknown to him at the time he confronted the Victim, are both inflammatory and irrelevant. Evidence is relevant where it tends to establish the facts of the issue. See *Commonwealth v. Perry*, 453 A.2d 608, 609 (Pa. Super. Ct. 1982). The standard by which the use of force must be adjudged is by the action of a reasonable police officer in the same circumstances. Those facts which were unknown to Fow at the time of the incident did not inform his actions or choices on that date.

Both the Commonwealth and the Defendant wish to play for the jury the footage from the Mobile Video Recorder (MVR) installed in the police car in which the Victim was sitting prior to and during the incident. However, the defense seeks to exclude the audio portions of the tape, arguing that because the officers outside the car could not hear Broadwater's statements with the door closed while he sat inside the vehicle, the jury should be shown only what the officers themselves could hear. The Court notes it is unclear what could actually be heard from outside the vehicle, or whether redaction could be accomplished so as to retain the audio portion of the MVR only during those portions where the doors were open. The jury must, in light of all the relevant evidence, determine whether the actions of the Defendant were reasonable, and is entitled to all the evidence in making this determination. Doubtless the parties will each argue the proper characterization of the MVR footage, as each desires the admission of the recording. Indeed, the defense has stated that it desires admission of the entirety of the MVR if the Court so rules rather than its total exclusion. The defense citing no caselaw in support of such editing, the jury shall have the benefit of the entirety of the footage in making its determination. Finally, evidence is not prohibited merely because it may harm the defendant, and it is well established that the Court is not required to sanitize the trial for the benefit of the defense. See *Commonwealth v. Page*, 965 A.2d 1212, 1220 (Pa. Super. Ct. 2009).

In his final motion in limine, Fow seeks to exclude any reference to fabrication of the Escape charge filed against the Victim. The Commonwealth agrees that reference to the filing and disposition of an Official Oppression charge against Fow premised on Broadwater's initial charging with Escape should be excluded. However, the Commonwealth does wish to introduce the Defendant's statements, both at the scene and via e-mail, regarding Broadwater's actions which are allegedly inconsistent with the MVR. While evidence of the charges filed against Broadwater and the Defendant would be prejudicial and should be excluded, the Court will allow the prior inconsistent statements.

ORDER OF THE COURT

Now therefore, this 27th day of March, 2012, it is hereby ordered that the Commonwealth's Motions in Limine are granted in part and denied in part as follows:

1. As to discipline imposed by the PSP or the effect of conviction:
 - a. Defendant may explore potential sources of bias or influence of Sergeant Randy Kane, subject to specific objection at trial.
 - b. While he may testify to a prior awareness that use of excessive force could result in administrative or criminal sanctions, Defendant shall not be permitted to offer evidence regarding the effect of conviction upon his employment with the PSP or as to possible specific legal penalties.
2. The parties agree that the testimony of the victim is unnecessary for the Commonwealth to prove the Defendant is guilty of Simple Assault, but that the defense can highlight the absence of the victim's testimony to the jury in argument.
3. The Defendant shall not be permitted to question any law enforcement officers regarding their use of pepper spray or other methods of force on prior, unrelated occasions.
4. The Defendant may testify regarding prior use of force investigations against him. The defense shall not be permitted to offer evidence regarding use of force investigations against other troopers known or unknown to the Defendant.
5. As to testimony regarding Defendant's honors, awards, and career experiences:
 - a. The parties have stipulated that testimony regarding Defendant's honors and awards is inadmissible.
 - b. The Defendant shall provide to the Commonwealth a list of the career experiences to which he wishes to testify. The Defendant shall be permitted to testify to such career experiences subject to specific objection at trial.
6. The Defendant's use of force expert, Cliff Jobe, shall be permitted to testify regarding accepted law enforcement practices, training and standards regarding the use of force. Jobe may also testify that the Defendant's actions were consistent with standard practice. The remainder of the proposed testimony shall be excluded.

The Defendant's Motions in Limine are granted in part and denied in part as follows:

- A. The Defendant may present evidence or testimony to such of Mr. Broadwater's prior alleged assaultive or threatening behavior as was known to him at the time of the incident.
- B. The Defendant may elicit testimony from Trooper Kevin Goss regarding the information actually related to Fow prior to the incident about Mr. Broadwater's actions on September 29, 2010, including threats to resist and not cooperate with the troopers.
- C. The Defendant has withdrawn his request to play audio recordings of the Victim's threats against a garage owner.
- D. The MVR recording shall be played unredacted.
- E. As to the "trumping up of escape charges":
 - a. The parties have agreed that evidence regarding the filing and resolution of the Official Oppression charge shall be excluded.
 - b. Any statements made by the Defendant which are inconsistent with or contradictory to the MVR evidence are admissible.

[1]A police officer in making an arrest is justified in the use of any force "he believes to be necessary to effect the arrest." 18 Pa. C.S.A. § 508. The proper test for evaluating the use of excessive force is objective reasonableness, paying careful attention to the facts and circumstances of the case, including: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to the safety of officers and others, and (3) whether the suspect is actively attempting to resist arrest or escape. See *Mosley v. Yaletsko*, 275 F. Supp.2d 608 (E.D. Pa. 2003) (applying Pennsylvania law). See also *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). Objective reasonableness takes into account the facts and circumstances confronting the officers that were known to them, without regard to their underlying intent or motivation. See *Graham*, 490 U.S. at 397.