

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
GREGORY SCOTT HOPKINS,	:	
	:	
Appellee	:	No. 1776 WDA 2012

Appeal from the Suppression Order entered on November 5, 2012
in the Court of Common Pleas of Beaver County,
Criminal Division, No. CP-04-CR-0000580-2012

BEFORE: FORD ELLIOTT, P.J.E., OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED OCTOBER 4, 2013

The Commonwealth of Pennsylvania appeals from the Order granting the Motion to preclude the expert report and testimony of Cyril Wecht, M.D., J.D. ("Dr. Wecht"), filed on behalf of Gregory Scott Hopkins ("Hopkins"). We affirm in part, reverse in part, and remand for trial.

The trial court summarized the relevant history underlying the instant appeal as follows:

[Hopkins] has been charged with one count of homicide stemming from an incident that occurred on or around September 1, 1979, on which date Catherine Janet Walsh ["Walsh"] was killed. He was charged and arrested in January of 2012. It is not disputed that the Commonwealth's case against [Hopkins] rests upon DNA evidence derived from seminal fluid found at the scene of the victim's demise. The Commonwealth asserts and will seek to prove at trial that [Hopkins] was engaged in an intimate relationship with the victim, and had been at the victim's residence on occasions prior to September 1, 1979. Further, the Commonwealth will seek to prove that when the body of the victim was found, she was discovered face

down in her bed with her arms bound behind her back, and had a white rope tied around her wrists; a blue kerchief was tied around her neck. Moreover, the Commonwealth will seek to demonstrate that in accordance with the autopsy report, the manner of death was strangulation. Also, the Commonwealth will seek to prove that pursuant to lab results, [Hopkins's] DNA matches the DNA found on the victim's blue nightgown, the white bathrobe rope tied around her wrists, and the bed sheet that covered the victim's body.

The expert report in question was promulgated and completed by Dr. Cyril Wecht, ... , a forensic pathologist, and was given to defense counsel in early October of 2012. The report sets forth a statement by Dr. Wecht that he has reviewed all of the records and materials, and then sets forth a clinical summary, "medicolegal" questions, and an opinion. The questions Dr. Wecht purported to answer in his report are as follows:

1. How was the seminal fluid DNA, which is compatible with that of [Hopkins], likely deposited?
2. What is the likelihood of [Hopkins's] seminal fluid having been deposited from previous sexual activities with the decedent?

Trial Court Opinion, 11/7/12, at 1-2.

After a hearing, the trial court entered an Order precluding Dr. Wecht's expert report and testimony. Trial Court Order, 11/5/12. In its Opinion accompanying the Order, the trial court concluded that Dr. Wecht had failed to state a scientific basis or the scientific means by which he reached his conclusions. Trial Court Opinion, 11/5/12, at 5. The trial court further stated that Dr. Wecht's assertions are not set forth in a sufficiently specific manner. *Id.* at 5-6. Finally, the trial court stated that "the opinions set forth in [Dr. Wecht's] report are speculative in nature and thus not

admissible.” *Id.* at 6. In reaching this conclusion, the trial court rejected Dr. Wecht’s statement that “it is extremely unlikely” that the seminal fluid was placed in certain locations several weeks earlier, given the locations where the fluid was found, is too vague and imprecise to meet the standard for competent expert medical testimony under Pennsylvania law. *Id.*

The Commonwealth subsequently filed a Notice of appeal of the trial court’s Order precluding the expert report and testimony of Dr. Wecht. In accordance with Pennsylvania Rule of Appellate Procedure 311(d), the Commonwealth certified that the trial court’s Order substantially handicaps its prosecution. Therefore, we will address the claim raised by the Commonwealth.

The Commonwealth presents the following issue for our review: “Whether the trial court erred in precluding [Hopkins’s] expert witness, Cyril Wecht, M.D., J.D., from testifying at trial.” Brief for the Commonwealth at 3. On appeal, the Commonwealth challenges the trial court’s determination that the proffered evidence “does not necessitate the use of scientific, technical or specialized knowledge beyond that possessed by a layperson.” *Id.* (quoting Trial Court Opinion, 11/5/12, at 6). The Commonwealth points out the liberal standard governing the admission of expert testimony. Brief for the Commonwealth at 11. Further, citing Pennsylvania Rule of Evidence 704, the Commonwealth asserts that otherwise admissible opinion testimony

is not objectionable because it embraces the ultimate issue to be decided by the fact finder. Brief for the Commonwealth at 13.

In addressing the Commonwealth's claim, we recognize that

[a]n appellate court may reverse a trial court's ruling regarding the admissibility of evidence only upon a showing that the trial court abused its discretion. Because the trial court indicated the reason for its decision our scope of review is limited to an examination of the stated reason.

Commonwealth v. Horvath, 781 A.2d 1243, 1246 (Pa. Super. 2001).

Our Pennsylvania Supreme Court has explained that

[a] trial court's decision to allow expert testimony can be reversed only in the event the court abused its discretion or committed an error of law. ***Commonwealth v. Miner***, 562 Pa. 46, 753 A.2d 225, 229 (2000). Expert testimony is proper where it will aid the jury regarding subject matter "beyond the knowledge or experience of an average lay person." ***Id.*** at 230. The law is clear that an expert's conclusions need not be stated as beyond a reasonable doubt. ***Commonwealth v. Stallworth***, 566 Pa. 349, 781 A.2d 110, 122 (2000). "Whether an expert's testimony is persuasive beyond a reasonable doubt is a matter for the jury's consideration." ***Id.***

Commonwealth v. Hetzel, 822 A.2d 747, 761 (Pa. 2003); ***see also*** Pa.R.E. 702 (stating that "[i]f knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify thereto in the form of an opinion or otherwise.").

When a witness is offered as an expert,

the first question the trial court should ask is whether the subject to be addressed by the witness is so distinctly related to some science, profession, business or occupation that it is beyond the understanding of the average layperson. If the

answer to that question is “Yes,” the trial court must then ascertain whether the proposed witness has sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in [the] search for truth.

Bergman v. United Servs. Auto. Ass’n, 742 A.2d 1101, 1105 (Pa. Super. 1999) (citation and some internal quotation marks omitted).

“A qualified expert may be permitted to assert a relevant fact not generally known but known to him because of his special training and experience.” **Minerd**, 753 A.2d at 230 (quoting **Steele v. Shepperd**, 192 A.2d 397, 398 (Pa. 1963)). However, expert testimony cannot be used to bolster the credibility of a witness or when the issue involves a matter of common knowledge. **Commonwealth v. Constant**, 925 A.2d 810, 822 (Pa. Super. 2007); **see also Minerd**, 753 A.2d at 230. “Whether the expert’s opinion is offered to attack or to enhance, it assumes the same impact - an unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.” **Constant**, 925 A.2d at 822 (citation and internal quotation marks omitted).

Finally, we observe that

“magic words” need not be uttered by an expert in order for his or her testimony to be admissible. Rather, the substance of the testimony presented by the expert must be reviewed to determine whether the opinion was rendered based upon the requisite degree of certainty and not on mere speculation.

Commonwealth v. Miller, 987 A.2d 638, 656 (Pa. 2009).

In his report, Dr. Wecht stated that Hopkins's DNA was identified on the back of the victim's nightgown, on the white rope tied around the victim's wrists, and on the bed sheet. Expert Report at 4. Dr. Wecht further opined that "[i]dentification of [Hopkins's] deposited seminal fluid DNA, in these locations, place him on the bed on top of the decedent's back at/around the time of her demise." ***Id.*** According to Dr. Wecht's report,

[i]t is extremely unlikely that [Hopkins's] seminal fluid was deposited in those locations during the two or three previous sexual encounters [that Hopkins] admitted to have engaged in during the summer 3 weeks to a month prior to the victim's death.

The location of the seminal fluid in both areas where the fluid was later identified is further consistent with the decedent's position when found.

Id. Ultimately, Dr. Wecht's report set forth the following conclusion:

Following the review of all submitted documents[,], including the transcripts of depositions taken in 2012, over 32 years after her death, it is my professional opinion that [Walsh] died from strangulation during sexual activity hours before her body was discovered by her parents. The DNA of [Hopkins's] seminal fluid would have been deposited around the time of her death[,], based on the locations where it was identified.

There is no evidence of a third party having been present insofar as the DNA analyses of the seminal fluid are concerned....

Id.

Upon review, we conclude that Dr. Wecht's report regarding the location of seminal fluid, its time of deposit, and the lack of DNA evidence of a third party meets Pennsylvania's liberal standard for expert testimony. Specifically, Dr. Wecht's report asserts facts "not generally known but known

to him because of his special training and experience.” **Minerd**, 753 A.2d at 230. Further, Dr. Wecht’s expert opinion is stated with the requisite degree of certainty. **See Miller**, 987 A.2d at 656. Accordingly, we conclude that the trial court abused its discretion in precluding Dr. Wecht’s expert report and testimony as to the location of seminal fluid and its time of deposit. We therefore reverse the trial court’s Order as to the preclusion of this evidence.

At the conclusion of his report, Dr. Wecht rendered the following expert opinion: “Furthermore, the absence of any signs of struggle or forced entry into her apartment is a strong, logical argument that [Walsh’s] assailant was someone she knew, and who would have been allowed entry into her apartment.” Expert Report at 4. We cannot conclude that the trial court abused its discretion in precluding Dr. Wecht’s expert report and testimony on the issue of whether the victim knew her assailant.

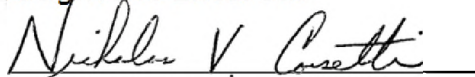
The issue of whether the victim knew her assailant appears to be within the common knowledge of a lay person and not “so distinctly related to some science, profession, business or occupation[.]” **See Constant**, 925 at 822; **Bergman**, 742 A.2d at 1105. We cannot conclude that the trial court abused its discretion in precluding expert testimony from Dr. Wecht as to whether the victim knew her assailant. We therefore affirm the Order of the trial court as to the preclusion of Dr. Wecht’s testimony on the subject of whether the victim knew her assailant.

J-A20041-13

Order affirmed in part and reversed in part in accordance with this Memorandum; case remanded for trial; Application to expedite denied as moot; Superior Court jurisdiction relinquished.

Ford Elliott, P.J.E., files a Concurring and Dissenting Statement.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 10/4/2013