18CA0641 Peo v Davis 06-22-2023

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA0641
Gilpin County District Court No. 17CR73
Honorable Dennis J. Hall, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

William Allen Davis,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE GROVE
Fox and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 22, 2023

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¶ 1 Defendant, William Allen Davis, appeals his convictions for vehicular eluding (class 5 felony), reckless driving (class 2 misdemeanor), and driving under restraint (misdemeanor). We previously reversed Davis's convictions, holding that the trial court improperly denied his request for a trial continuance. *See People v. Davis*, (Colo. App. No. 18CA0641, Apr. 22, 2021) (not published pursuant to C.A.R. 35(e)) (*Davis I*). After granting the People's petition for a writ of certiorari, the supreme court reversed our ruling and remanded the case for further proceedings. *See People v. Davis*, 2023 CO 15, ¶ 26.

¶ 2 We now address the remaining issues that Davis raised on appeal: that the trial court improperly (1) allowed expert testimony in the guise of lay testimony and (2) denied his challenge for cause to a juror who ultimately sat on the jury. Because we conclude that the trial court did not err, we affirm.

I. Background

¶ 3 The relevant facts are outlined in *Davis I*. In brief, evidence at trial showed that Davis was arrested and charged after he eluded a police officer attempting to conduct a traffic stop and then led that officer and others on a chase in rural Jefferson County.

¶ 4 Once Davis was in custody, the officers discovered that his driver's license had been revoked and suspended. Davis had formerly been convicted of two revoked-license-related driving offenses. For this series of events, Davis was charged with and convicted of vehicular eluding, reckless driving, and driving under restraint.

II. Lay Witness Testimony

¶ 5 Colorado Parks and Wildlife Officer Mueller was the first officer to attempt to stop Davis for speeding. Testifying as a lay witness, he estimated for the jury Davis's driving speeds when he first tried to initiate the stop and at various points throughout the chase. In a pretrial motion, defense counsel moved to preclude this testimony, arguing that "a lay person [cannot] simply look at a vehicle and tell how fast it is going and then have a legitimate opinion in that regard." Accordingly, defense counsel objected "based on the lack of expert disclosures, endorsements or any discovery relating to how it is that [Mueller] formed that opinion."

¶ 6 The trial court overruled Davis's objection and allowed the testimony to proceed, ruling that an "average lay witness" is capable

of making "visual speed estimates." Davis contends that this ruling was an abuse of discretion. We disagree.

A. Applicable Law and Standard of Review

¶ 7 CRE 701 defines the scope of lay witness opinion testimony. Under Rule 701, lay witness testimony in the form of opinions or inferences must be "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [CRE] 702."

¶ 8 CRE 702, on the other hand, concerns the admissibility of expert testimony. Under this rule, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." CRE 702.

¶ 9 The critical factor in distinguishing between lay and expert opinion testimony is the basis for the witness's opinion. *People v. Dominguez*, 2019 COA 78, ¶ 40. To determine whether the testimony in question is testimony that an ordinary person could

give, courts consider whether ordinary citizens can be expected to know certain information or to have had certain experiences. *Id.* Expert testimony is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have. *Venalonzo v. People*, 2017 CO 9, ¶ 22 (citing *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005)).

¶ 10 We review a trial court's evidentiary decision for abuse of discretion. *Venalonzo*, ¶ 15.

B. Analysis

¶ 11 Colorado courts have long held that estimating the speed of a car is appropriately in the purview of a lay witness. *Sherry v. Jones*, 133 Colo. 160, 164, 292 P.2d 746, 748 (1956). Because an ordinary citizen, without any specialized knowledge or training, may testify as a lay witness to the speed of a vehicle, an officer may do so as well. *See People v. Ramos*, 2012 COA 191, ¶ 14 (finding that "a police officer may only offer [lay] opinion testimony . . . when the basis of that opinion arises from experiences or information common to the average lay person"), *aff'd*, 2017 CO 6.

¶ 12 Simply having some training on estimating the speed of passing vehicles does not disqualify Mueller from giving lay

testimony. Mueller's testimony was not dependent upon his specialized knowledge, and therefore, it was not expert testimony. *See People v. Warrick*, 284 P.3d 139, 146 (Colo. App. 2011) (observing that because the police officer's testimony was not based on a "process of reasoning which can be mastered only by specialists in the field," it was properly considered lay testimony). As a result, the trial court did not err by allowing Mueller to testify as a lay witness under CRE 701.

III. Challenge for Cause

¶ 13 Davis contends that the trial court erroneously denied his challenge for cause to Juror G. We disagree.

¶ 14 During voir dire, Juror G said that he was the former neighbor to Undersheriff Bayne, who testified at trial. Davis, who had exhausted all of his peremptory challenges, challenged Juror G for cause. After questioning Juror G, the trial court denied the challenge and Juror G served on the jury.

A. Applicable Law and Standard of Review

¶ 15 Due process requires a fair trial, which necessarily includes the right to challenge a juror for cause. *People v. Wilson*, 114 P.3d 19, 21 (Colo. App. 2004). To protect a defendant's right to a fair

trial with an impartial jury, a trial court must excuse biased or prejudiced persons from the jury. *Id.*; *see* § 16-10-103(1)(j), C.R.S. 2022 (stating the court must sustain challenges for cause where "[t]he existence of a state of mind in the juror evinc[es] enmity or bias toward the defendant or the state"); *see also* Crim. P. 24(b)(1)(X). Thus, we reverse a trial court's denial of a challenge for cause "if a prospective juror is unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions." *People v. Hancock*, 220 P.3d 1015, 1016 (Colo. App. 2009).

¶ 16 A trial court has broad discretion when considering a challenge for cause, and we review its ruling for an abuse of that discretion while examining the entire voir dire of the prospective juror. § 16-10-103; *Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999); *Hancock*, 220 P.3d at 1016. Because the trial court is in the best position to determine a prospective juror's credibility, demeanor, and sincerity in explaining his or her state of mind, we defer to the trial court's ruling on a challenge for cause. *Hancock*, 220 P.3d at 1016 (stating that appellate courts rarely reverse a trial

court's ruling because "it is recognized that, where a juror's recorded responses are unclear or ambiguous, 'only the trial court can assess accurately the juror's intent from the juror's tone of voice, facial expressions, and general demeanor'" (quoting *People v. Young*, 16 P.3d 821, 825-25 (Colo. 2001))).

B. Relevant Facts

¶ 17 At the outset of the trial, the court explained to both the attorneys and the prospective jurors that because the community in Gilpin County is so small, and because many people know the law enforcement officers, the court cannot dismiss a juror simply because he or she knows one of the law enforcement officers who is testifying. Instead, the question is: "[I]s there anything about your relationship with [a witness] that would keep you from hearing that person's testimony with an open mind?"

¶ 18 As the court predicted, multiple prospective jurors knew some of the witnesses. Some were excused for their inability to be impartial, such as the husband of one of the witnesses.

¶ 19 During voir dire, Juror G explained that he had been the next-door neighbor of one of the witnesses, Undersheriff Bayne, for six years, and that they had gone snowmobiling together. However,

when asked if Bayne's testimony would "automatically get weight over anybody else['s]," Juror G responded, "Oh no. I guess, it's just like [another prospective juror] said there, that people have different perspectives on what's [sic] happens, you know." When pressed further about whether Juror G could be "fair listening to [Bayne's] testimony like anybody else's," Juror G responded, "Yes."

¶ 20 After voir dire was completed, Davis challenged multiple jurors for cause, including Juror G. The court granted some of the challenges, but with respect to Juror G and a few others, it said, "I'm going to inquire of others; and depending on their answers, I will either grant or deny the challenge and we then we [sic] can make a complete record later when we have a chance."

¶ 21 Addressing the prospective jurors again, the court explained, "[M]ost people know Undersheriff Bayne so I can't excuse someone just because they know [him]. Do you think you would be able to hear the undersheriff's testimony with an open mind and give it whatever weight you think it deserves?" The court continued: "[T]he bottom line for me is I read that instruction on the credibility of witnesses. When the undersheriff testifies, would [you] be able to apply that instruction to his testimony?" Juror G responded, "Yes."

¶ 22 Davis's attorney used his peremptory challenges on several other jurors. However, he remained concerned about Juror G. Davis's attorney explained:

> [Juror G], on the other hand, had a relationship with Undersheriff Bayne to include recreational activities where the two of them would go out snowmobiling together. He said that they were neighbors for approximately six years, and [Juror G] moved out of that home but he still owns the home next to Undersheriff Bayne and asked him –- so Undersheriff Bayne is keeping an eye on your house, and he said yes, he is.
>
> And so that there is a relationship between [Juror G] and Undersheriff Bayne that is significant enough in nature that I also believe he's unable to adequately determine or question Undersheriff Bayne's credibility as a witness; but instead, I believe that [Juror G] has already concluded that Undersheriff Bayne will be a credible and honest witness in this case and will take everything he says as the truth without doing a further determination that we would expect of a juror.
>
> But again, given the other jurors that were currently on the panel at that point in time, I was forced to make a strategy call; and of the possible jurors remaining, left [Juror G] on the panel.

¶ 23 The court responded:

> I think it was [Juror C] that said that ten different people could see an event differently

> and it doesn't mean that anyone is lying and that she would be able to hear testimony with an open mind and give it whatever weight it deserved.
>
> And [Juror G] used the same example when I inquired of him. I think it [is] important to note and I have noted this before that we are a small community here. The population of Gilpin County is less [than] 6,000 and there are people in government like Undersheriff Bayne who pretty much knows everybody and it's just something that you have to deal with in a small community. . . .
>
> I don't think that [Juror G] will have any trouble evaluating the testimony of someone he knows. He seems like a bright gentleman and he understands his job as a juror so I don't think — and it is more of a (inaudible) in this one that the grounds weren't established that would justify a challenge for cause.

¶ 24 With that, the court denied Davis's challenge of Juror G for cause, and Juror G remained on the jury.

C. Analysis

¶ 25 Juror G did not express any hesitation about his impartiality. When asked if he would believe Bayne over other witnesses, he responded "[o]h no" and elaborated about why he could believe those witnesses with different perspectives from Bayne. Later, when Juror G was asked directly if he could remain impartial

despite his relationship with Bayne, he answered "yes" without qualification. An attorney's speculation about a juror's bias, despite the juror's clear articulation of his ability to be impartial, is insufficient to remove the juror for cause. *See* § 16-10-103(1)(j) ("[N]o person summoned as a juror shall be disqualified . . . if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.").

¶ 26 Therefore, we conclude that the trial court did not abuse its discretion when it declined to remove Juror G for cause.

IV. Conclusion

¶ 27 The judgment is affirmed.

JUDGE FOX and JUDGE HARRIS concur.