

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-18-6859
Hon. Kathryn L. Quaintance

Plaintiff,

v.

**ORDER ON SECOND PRETRIAL
MOTIONS IN LIMINE**

Mohamed Mohamed Noor,

Defendant.

The above-entitled matter came on for a pretrial hearing before the undersigned Judge of District Court on March 1, 2019, in courtroom 1953 of the Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota.

Amy Sweasy, Esq., and Patrick Lofton, Esq., appeared on behalf of the State of Minnesota.

Thomas Plunkett, Esq., and Peter Wold, Esq., appeared with and on behalf of Defendant Mohamed Noor ("Noor").

On March 15, 2019, the parties filed and served the motions *in limine* to be addressed at the pretrial hearing. As requested by the Court at the first pretrial hearing, the State also filed its offer of proof with respect to its Leica fly-through video. On March 20, 2019, the parties filed and served responses to opposing motions.

At the hearing, the Court issued abbreviated oral rulings on the parties' new motions *in limine* and on the Court's unopposed proposal to make the juror information in the case confidential. The Court requested additional foundation for the State's Leica fly-through video and took the issue of expert qualifications under advisement after hearing testimony from the

experts. This written Order follows and elaborates upon the Court's abbreviated oral rulings on the motions *in limine* only.

Based upon the files, records and proceedings herein, including the arguments of counsel, the Court makes the following:

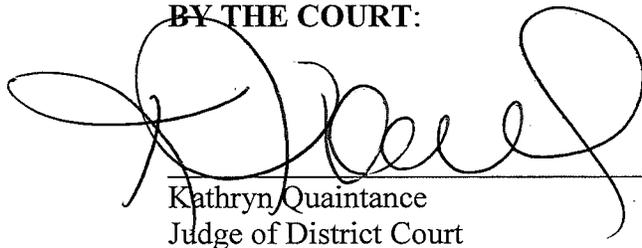
ORDER

1. The State's motion to admit Noor's BWC video without his testimony is **GRANTED**.
2. Noor's motion to limit testimony and argument about the MPD BWC policy is **GRANTED IN PART**.
3. Noor's motion to limit testimony and opinion evidence about officers' experience with people slapping vehicles is **GRANTED IN PART**.
4. Noor's motion to limit testimony and argument about a "blue line of silence" is **GRANTED IN PART**.
5. Noor's motion to exclude evidence regarding pending employment matters regarding Noor and Officer Harranty is **GRANTED IN PART**.
6. Noor's motion for an adverse instruction with respect to fingerprints is **DENIED**.
7. The attached memorandum of law is incorporated herein.

Dated:

4/4/19

BY THE COURT:



Kathryn Quaintance
Judge of District Court

MEMORANDUM OF LAW

In preparation for trial, the parties have filed the following motions *in limine* on the admissibility of certain evidence. The Court's rulings on the motions *in limine* are subject to change based on the evidence that comes in at trial.

AUTHENTICATION OF NOOR'S CAMERA VIDEO

The State requests that Noor's body-camera video be admitted without his testimony. Noor did not respond to the State's motion. The Court **GRANTS** the motion, provided that the procedure in *Matter of Welfare of S.A.M.*, 570 N.W.2d 162 (Minn. Ct. App. 1997), is followed.

For an item of evidence to be admissible, it must be authenticated, meaning evidence must be presented that the item is what it is purported to be. Minn. R. Evid. 901(a). For purposes of proving content, a videotape is classified as a photograph. Minn. R. Evid. 1001(2). Noor's body-camera video is not self-authenticating, as it does not fall within one of the provisions of Minnesota Rule of Evidence 902. However, it may be admitted through the testimony of other witnesses pursuant to either the "pictorial witness" or the "silent witness" procedure set forth in *Matter of Welfare of S.A.M.*, 570 N.W.2d 162 (Minn. Ct. App. 1997), or a combination thereof. The pictorial witness procedure allows the videotape to be authenticated through the testimony of a witness who observed the events depicted on the video. *Id.* at 164 (citing Minn. R. Evid. 901(b)(1)). The silent witness procedure allows the videotape to be authenticated through testimony as to the reliability of the process through which the videotape was made and its chain of custody. *Id.* at 165.

MPD BODY-WORN CAMERA POLICY

Noor requests that the Court exclude or limit testimony and argument relating to the Minneapolis Police Department's policies with respect to the use of body-worn cameras

(“BWCs”) and whether the then-existing Minneapolis Police Department policy was followed before or during the shooting and its subsequent investigation, arguing that it is impermissible 404(b) evidence. The State responds that evidence of the policy would be relevant as to the knowledge Noor and his partner Officer Harrity possessed at the time of the incident. The State further argues that the policy provides context for the investigating officers’ use of their BWCs and why relevant evidence may be missing. The Court **GRANTS** Noor’s motion in part and limits the argument that can be made with respect to the Minneapolis Police Department’s BWC policy.

None of the BWC evidence would constitute 404(b) evidence. Noor’s use of his BWC in the context of the policy would constitute intrinsic evidence relevant to the knowledge he possessed at the time. *State v. Hollins*, 765 N.W.2d 125, 132 (Minn. Ct. App. 2009) (evidence of a defendant’s prior act is admissible in a criminal prosecution without regard to Minnesota Rule of Evidence 404(b) if it arose out of the same transaction as the charged crime and is relevant to an element of an offense or necessary to complete the story of the circumstances of the charged crime). Because it would constitute intrinsic evidence relevant to his knowledge at the time of the charged offense, evidence that he had discretion on the use of his BWC is admissible.

Officer Harrity’s use of his BWC in relation to the policy does not constitute 404(b) evidence because it is not being offered to show action in conformity with character, but instead his knowledge at the time of the charged offense. Evidence that he had discretion on the use of his BWC is admissible.

The investigating officers’ use of their BWCs in relation to the policy does not constitute 404(b) evidence because it is also not being offered to show action in conformity with character, but instead why relevant evidence may be missing.

However, the Court finds it would be prejudicially distracting to have several mini-trials as to whether a policy that afforded discretion was followed by other officers. *See* Fan, Mary D., *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 Ga. L. Rev. 57, 96-97 (2017). The relevant issue with respect to the investigating officers' use of their BWCs is that evidence may be missing, not whether a discretionary policy was followed. The parties may examine and cross-examine those officers with respect to the fact that relevant evidence may be missing as a result of the BWCs being off and the reasons why without discussion of the policy. If the State calls those officers, such examination may be subject to the rules on hostile witnesses.

TESTIMONY ABOUT SLAPPING VEHICLES

Noor requests that the Court exclude testimony from lay officers regarding their personal experiences with and opinions about persons slapping, striking, or approaching their vehicles. The State responds that testimony from other officers would be helpful to the jury in determining how police encounter citizens and that only the expert witnesses would offer an opinion as to the manner the squad car was approached in the charged offense. The Court **GRANTS** Noor's motion in part.

Minnesota Rule of Evidence 701 provides that if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

This evidence is presumably offered on the issue of the reasonableness of Noor's response to his squad car being slapped, struck, or approached.

Police officers are generally competent to testify about routine practices and policies of their departments based on their personal knowledge and experience. However, the relevance of an individual lay officer's experience with the slapping of cars and his or her individual response is not of great help to the jury in determining Noor's reasonableness in his situation because the other officer's response may or may not be reasonable. Without evidence of a standard, training, or protocol, the officers' experience testimony or any opinion offered has the potential to be highly prejudicial.

The parties have expert witnesses who may be qualified to testify regarding industry standards and practices and offer opinions based on those standards.

BLUE LINE

Noor requests that the State be precluded from suggesting a blue line (or wall, code, or shield) of silence and from eliciting testimony about officers' communications with the Minneapolis Police Federation in anticipation of meeting with the County Attorney or their decisions not to meet with the County Attorney. The State responds that it does not seek to elicit testimony with respect to the Minneapolis Police Federation, but that it should be entitled to present evidence, including extrinsic evidence, as to potential bias in witness testimony, based on Minnesota Rule of Evidence 616 and *State v. Waddell*, 308 N.W.2d 303 (Minn. 1981). The Court **GRANTS** Noor's motion in part.

The State is entitled to present evidence of bias in witnesses, subject to the rules with respect to hostile witnesses.

However, the State providing argument regarding a general "code of silence" among police officers based on the officers' behavior at the crime scene in this case may go beyond

reasonable inferences drawn from the facts. *See State v. Ancona*, 854 A.2d 718, 738-39 (Conn. 2004). The Court cautions the State to confer with the bench before making such argument.

EMPLOYMENT

Noor requests the exclusion of any testimony regarding pending administrative or employment matters regarding Noor or Officer Harrity as being unduly prejudicial because those investigations and decisions would be based on a lower burden of proof than a criminal case. The State responds that it only plans to elicit the following employment consequences related to the incident in this case: 1) that Noor and Harrity were placed on paid administrative leave; 2) that Officer Harrity returned to work; and 3) that Noor is no longer employed by the Minneapolis Police Department. The Court **GRANTS** Noor's motion in part.

With respect to the State's reason for offering evidence that Noor and Harrity were placed on paid administrative leave, the Court does not see how the Minneapolis Police Department's policies governing officer-involved shootings are relevant to the charges in this case. Noor's employment status is of limited relevance to the issues in this case, given that it may be the result of investigations and decisions about which evidence will not be offered and based on a lower burden of proof than in a criminal case. It has the potential to invite unhelpful and prejudicial speculation on the part of the jury. The State may simply refer to Noor as "former Officer Noor." If the State wishes to elicit testimony that Officer Harrity works for the Minneapolis Police Department as part of his background and experience, it may.

FINGERPRINT INSTRUCTION

Noor requests that the Court instruct the jury that he is entitled, as a due process remedy or discovery sanction, to an inference that the decedent's fingerprints were found on the squad car because it was washed and returned to service after the Bureau of Criminal Apprehension

(“BCA”) processed it for prints but before he had conducted an independent investigation of the squad with respect to prints.

Noor argues that the fingerprint evidence is subject to analysis under the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The Court rejects that argument because the exculpatory value of evidence is not apparent and material when “no more could be said than that [the evidence] could have been subjected to tests, the results of which might have exonerated the defendant.” *State v. Hawkinson*, 829 N.W.2d 367, 372 (Minn. 2013) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). At most, further fingerprint analysis of the vehicle would have been “potentially useful” to Noor.

To establish a due-process violation based on the destruction of evidence that lacks apparent and material exculpatory value, Noor must show that the evidence was destroyed in bad faith. In evaluating Noor’s claim, the Court considers whether the State purposefully destroyed the evidence in order to hide it and whether the State failed to follow standard procedures when destroying the evidence.

Noor has not presented evidence that the State had motive to hide potential fingerprint evidence by returning the squad car to its owner, the Minneapolis Police Department. The BCA dusted the car for prints, lifted those prints off of the car, and took them back to the lab for analysis. Those prints have been preserved. The BCA returned the car after it had completed its processing with respect to fingerprints. Noor does not argue that this is a departure from the BCA’s standard procedures with respect to a crime scene.

Noor’s counsel requested preservation of the car after it had been processed for fingerprints and returned to the Minneapolis Police Department. Because the evidence was not

destroyed in the face of a request to preserve, that request does not enter into the Court's bad-faith analysis. *Cf. Hawkinson*, 829 N.W.2d at 374-77.

Noor has a Confrontation Clause right to examine witnesses, not physical evidence. *Id.* at 378.

With respect to Noor's alternative request for the Court to consider a discovery sanction, Minnesota has not adopted an analysis separate from *Brady/Youngblood* with respect to the destruction of evidence in a criminal case. With respect to discovery sanctions for failure to disclose for other reasons, the Court has broad discretion. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Should that standard apply in this case, the Court declines to issue Noor's requested instruction without a showing of bad faith. *See id.* (courts consider reason why disclosure was not made in fashioning a sanction).

However, the Court notes that as with any missing BWC evidence, the parties may examine and cross-examine those officers with respect to the fact that relevant evidence may be missing as a result of the squad car being returned to service and the reasons why.

In making its ruling, the Court has not considered the evidence Noor submitted by email, to which submission the State objected.

K.L.G.
