

[J-37-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 150 MAP 2004
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered December 3, 2003, at No.
	:	423 MDA 2002, affirming the Order of the
v.	:	Lackawanna County Court of Common
	:	Pleas entered February 12, 2002, at No.
	:	01-CR-260.
MICHAEL SERGE,	:	
	:	
Appellant	:	
	:	ARGUED: April 13, 2005
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: April 25, 2006

I join the majority opinion. I write separately to address three points and offer that trial courts need to take the following into consideration upon the Commonwealth's request to admit a CGA in criminal matters.

First, in all future criminal cases, I endorse and would require the Commonwealth to follow the procedure that was followed in this case when it wants to present a CGA as demonstrative evidence. Specifically, I would require the Commonwealth to file a pretrial motion *in limine* seeking permission to present the CGA. The trial court should then hold a pretrial hearing, during which the Commonwealth would authenticate the CGA, and the court would preview the CGA. At this pretrial stage, the court should pay close attention to ensuring that the admission of such evidence will actually "assist the trier of fact to

understand the evidence or determine a fact in issue,” Majority slip opinion at 8, and to the CGA’s potential for prejudice.

Second, I understand that the issue as to whether a defendant should be given the opportunity to present his own computer generated animation (CGA) was waived and therefore, is not properly before us. Nevertheless, I offer the following thoughts. I agree with the majority that the admission of the CGA will be guided by the considerations that normally govern demonstrative evidence, including authentication, relevancy, and weighing the probative value versus the prejudicial impact of that evidence. In reviewing the probative/prejudice prong, I emphasize that the trial court needs to consider whether giving the defendant the opportunity to present his own CGA will mitigate the prejudicial impact of the evidence. In many cases this will require the trial court to give money to the defense to procure a CGA. This monetary disparity between the Commonwealth and defense in obtaining a CGA is a relevant factor when considering the prejudice to the defense. Ultimately, I agree with the majority that this is a discretionary question, best left to the determination of the trial court, but this question cannot be divorced from the inquiry into the prejudicial impact of the CGA.

Lastly, I agree with the majority that in this instance, the trial court properly ensured that the jury understood the purpose of such evidence through its instructions given before the animation was presented and during the jury charge prior to deliberation. I write separately to express my belief that in future cases, such a limiting instruction should be included in all cases involving the admission of a CGA.