[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 Lackawanna County Court of Common Pleas entered February 12, 2002, at No. 01-CR-260.
v.	:	
MICHAEL SERGE,	:	
Appellant	:	ARGUED: April 13, 2005

<u>CONCURRING OPINION</u>

MR. JUSTICE CASTILLE **DECIDED: April 25, 2006**

I concur in the result since I believe that the admission of the computer generated animation ("CGA") in this case was not an abuse of discretion. The trial court was faced with a novel evidentiary question; it responded in a careful and measured manner, which included issuing detailed cautionary instructions; and my own review satisfies me that there is no basis for awarding appellant relief from his first-degree murder conviction. I also am in general agreement with the approach and analysis in Madame Justice Newman's learned Majority Opinion. However, the question of the admissibility of this sort of evidence as a general matter implicates certain policy and supervisory considerations that I believe

go beyond the narrow confines of the ruling below. On that general question, I have some reservations respecting the necessity, helpfulness, and economic utility of CGA evidence.

With respect to the role of the computer in producing computer-generated animations and/or simulations, and the implications of the computer's "conclusion" as discussed in footnote 1 of the Majority Opinion, I write to emphasize that the fact that the computer creates a drawing or image does not mean the product is inherently neutral or trustworthy. The content of the computer's product, whether it be a CGA or a simulation, always depends upon some very subjective human agency -- in the creation of the computer program, in the human entry of the data, and in the human review, revision and interpretation of the computer's product. The testimony of the person who created the CGA in this case, Randy Matzkanin, testimony which the Majority summarizes at some length, Majority slip op. at 12-16, made clear that the computer product at issue was intended to reflect not the conclusions of the computer, but the conclusions and opinions of the Commonwealth's flesh and blood forensic witnesses, as related to and interpreted by Mr. Matzkanin. Indeed, this was so much the case that the CGA was modified and manipulated by the programmer until the end-product satisfied the Commonwealth's forensic witnesses' assessment of the criminal act.

The point, though it may appear to be minor, is no less essential. A CGA is not an inherently objective or neutral presentation of the evidence or the theory of the case. As with all human endeavors, the process of creating a CGA offers an opportunity for coloring and manipulating the end-product. As the trial court told the jury, if garbage goes into the production, garbage will come out. Thus, the accuracy of a CGA or computer simulation is always subject to challenge for accuracy and bias, no less than any other evidence.

This immutable fact of life, given the current state of technology, should give pause as this Court considers the general admissibility of this type of evidence. In a case where both parties are well-funded, each will have the resources available to hire the computer

professionals necessary to challenge the accuracy of a proffered CGA or to generate a competing animation. In contrast, in a criminal case involving an indigent defendant, the cost of assuring that the defense is able to adequately assess the accuracy of a Commonwealth CGA, or to produce a competing CGA of its own either contesting the accuracy of the Commonwealth's depiction or depicting a defense theory, would have to be borne by the state. If such funding is denied, the burden will fall upon appointed counsel to attempt to school himself in a field in which he most likely is not expert. As this case reveals, the cost of this evidence, in terms of both time and money, is substantial -- the fifteen second CGA here apparently cost $10,000 - $20,000 and a substantial portion of the trial was consumed in examining how Mr. Matzkanin produced it. Having reviewed the essentially benign end-product, I am not convinced that the cost was worth the expenditure of scarce public financial resources. I recognize that ours is an increasingly image-driven culture. However, such trends need not be indulged at every turn in the courtroom. I fully trust that a jury can "get the picture" -- it certainly could have gotten an equivalent picture here -- through more balanced, economical and old-fashioned means, such as testimony and diagrams.

With respect to the question of an indigent defendant's entitlement to funds to produce a competing CGA, or his entitlement to have excluded the Commonwealth's CGA if he cannot afford to rebut the animation, the Majority correctly notes that appellant's argument in this regard is waived as it was not raised below. Majority slip op. at 19-20. Nevertheless, the Majority goes on in *dicta* to address the issue, ultimately suggesting that an indigent defendant has no right to public funds to arrange for his own CGA, and that the question of whether the Commonwealth should be permitted to introduce a CGA in a case where the defense cannot afford a counter-CGA should be left to the discretion of the trial judge. Id. at 20-22. I cannot join in the Majority's extended *dicta* on the point both because it is not properly before this Court and because I, like the Chief Justice, would leave open

the prospect that the interests of justice may require providing an indigent defendant with the funds necessary to respond to a CGA produced by the Commonwealth. See Concurring Opinion (Cappy, C.J.), slip op. at 2.[1] Furthermore, I should note that the fact that this Court holds that CGAs may be admissible in the discretion of the trial judge does not mean that any party has an enforceable right to introduce the evidence. Thus, given the limited value of this sort of evidence, the wisest course for the trial judge might be to exclude such evidence entirely in those situations where the defense cannot secure an equivalent production.[2]

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[1] The Majority contradicts itself by disagreeing with this point, see Majority slip op. at 21-22 n. 12, and then recognizing the propriety of the inquiry in text, as it cites with approval to the Chief Justice's Concurring Opinion. See Majority slip op. at 21-22.

[2] The need to consider closely the proper role of new technological advancements in the courtroom is something I view as prudence, and not "technophobia." Not all technology makes trials more efficient and, where the parties lack equal access to the technology, prudence is certainly warranted.