

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**CRANSTON, RITT**

**RHODE ISLAND TRAFFIC TRIBUNAL**

**STATE OF RHODE ISLAND**

:

v.

:

**C.A. No. T17-0012  
16001524665**

:

**PHILIP J. CASEY**

:

:

*Consolidated with*

**STATE OF RHODE ISLAND**

:

v.

:

**C.A. No. T17-0013  
16001524668**

:

:

**RYAN P. GENSEL**

:

**DECISION**

**PER CURIAM:** Before this Panel on August 30, 2017—Magistrate Abbate (Chair), Magistrate Goulart, and Magistrate DiSandro sitting—are Philip J. Casey and Ryan P. Gensel’s (Appellants) appeal from a decision of Magistrate Kruse-Weller (Trial Magistrate), sustaining the charged violation of G.L. 1956 § 31-15-12, “Interval between vehicles.” The Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to § 31-41.1-8.

**I**

**Facts and Travel**

On September 8, 2016, Rhode Island State Trooper Neil Kelly (Trooper Kelly) was on a fixed post on Route 95 South in the Town of Richmond when he observed a group of nine motorcyclists following each other with one car length between each row. (Tr. at 12.) Among the nine motorcyclists were Appellants. Officer Kelly conducted a motor vehicle stop of the motorcyclists, which resulted in the issuance of the aforementioned violations.

The Appellants contested the violation, and the matter proceeded to trial on April 20, 2017. At trial, Trooper Kelly testified that he observed the group of motorcyclists following each other with one car length between each row. *Id.* Upon observing the motorcyclists, Trooper Kelly exited his traffic post and pursued the group of motorcyclists. *Id.* at 12-13. He then followed the group for more than two-tenths of a mile and used his cruiser's speedometer to clock the motorcyclists' speed at seventy miles per hour. *Id.* at 13. Trooper Kelly testified that Appellants were creating a hazard on the highway due to their speed and proximity to each other. *Id.* at 27-28.

Trooper Kelly then contacted two other state troopers who assisted in conducting a motor vehicle stop of the nine motorcyclists. *Id.* at 29. Thereafter, Appellants, among others in the group, were cited for following too closely. *See* Summons Nos. 16001524665, 16001524668.

State Trooper Brendon Palmer (Trooper Palmer) also testified at trial. (Tr. at 84.) He testified that he assisted Trooper Kelly in conducting the motor vehicle stop of the motorcyclists. *Id.* at 85. He also described the proximity between the motorcycles as "close." *Id.* at 85-86.

Additionally, State Trooper Amy Jackman (Trooper Jackman) testified at trial as an accident reconstruction expert. *Id.* at 103. Trooper Jackman testified that, given the speeds at which Trooper Kelly clocked Appellants' motorcycles traveling, it would take significantly more than one car length to stop safely in case of emergency. *Id.* at 113-114. She used algebraic formulas designed to calculate stopping distance to reach this conclusion. *Id.* Even though Trooper Jackman was not present during the stop, she utilized information provided to her by Trooper Kelly, along with her training and experience, to develop her opinion regarding the reasonableness of the distance between Appellants and the vehicles in front of them. *Id.*

The final witness to testify at trial was Appellant Ryan Gensel (Mr. Gensel).<sup>1</sup> *Id.* at 142. He testified that he was two to three car lengths behind the vehicle in front of him. *Id.* at 145. Mr. Gensel further stated that unlike the officers who testified, he has significant experience riding motorcycles, and based on that experience, he knew he was operating his vehicle safely. *Id.* at 145-47.

After hearing all of the evidence, the Trial Magistrate sustained the violations against Appellants, concluding that Appellants were traveling with one to three car lengths separating them from the vehicle ahead. Specifically, the Trial Magistrate found each of the troopers' testimony credible. *Id.* at 163-64. The Trial magistrate found that Appellants were traveling around the posted speed limit at the time of the stop. *Id.* at 163. However, the Trial Magistrate determined that based on Trooper Jackman's testimony as to her education, training, and opinion, a reasonable distance between the two vehicles would have been approximately 163 feet. *Id.* This determination was supported by Trooper Jackman's conclusion that 163 feet was the distance needed for Appellants to completely stop in the event that the vehicle in front of them stopped suddenly. *Id.* at 162, 164-65.

Thereafter, Appellants filed a timely appeal of the Trial Magistrate's decision. Forthwith is this Panel's decision.

## II

### Standard of Review

Pursuant to § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

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<sup>1</sup> Appellant Philip Casey did not appear at trial. Tr. at 2. The Trial Magistrate waived his appearance at counsel's request. *Id.*

“The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the judge’s findings, inferences, conclusions or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the judge or magistrate;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error of law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In reviewing a hearing judge or magistrate’s decision pursuant to § 31-41.1-8, this Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact.” *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993) (citing *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). “The review of the Appeals Panel is confined to a reading of the record to determine whether the judge’s [or magistrate’s] decision is supported by legally competent evidence or is affected by an error of law.” *Id.* (citing *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). “In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision.” *Id.* Otherwise, it must affirm the hearing judge’s (or magistrate’s) conclusions on appeal. *See Janes*, 586 A.2d at 537.

### III

#### Analysis

The Appellants raise several issues on appeal. This Panel will address the issues in *seriatim*.

#### A

##### Trooper Jackman's Testimony

First, Appellants contend that Trooper Jackman's testimony amounted to nothing more than impermissible bolstering. Our Supreme Court has held that "[t]he determination of the truthfulness or credibility of a witness lies within the exclusive province of the [trier of fact]." *State v. Adefusika*, 989 A.2d 467, 476 (R.I. 2010) (quoting *State v. Haslam*, 663 A.2d 902, 905 (R.I. 1995)). "A corollary principle is that 'bolstering' or 'vouching' (which occurs when one witness 'offer[s] an opinion regarding the truthfulness or accuracy of another witness' testimony') is impermissible. *Id.* (quoting *State v. Webber*, 716 A.2d 738, 742 (R.I. 1998)). Our Supreme Court will consider "opinion testimony to be inadmissible 'bolstering' or 'vouching' if 'the opinion testimony has the same substantive import as if it squarely addressed and bolstered another witness's credibility[.]'" *Id.* (quoting *State v. Miller*, 679 A.2d 867, 872 (R.I. 1996)). Should this panel conclude that Trooper Jackman's testimony amounted to impermissible "bolstering" or "vouching," it would then be incumbent on this Panel "to determine whether the admission of the testimony constituted prejudicial error with respect to the defendant." *Id.* (quoting *Miller*, 679 A.2d at 873).

Here, while Trooper Jackman's testimony supported Trooper Kelly's conclusions, it did not have "the same substantive import as if it squarely addressed and bolstered another witness's credibility[.]'" *Id.* (quoting *State v. Miller*, 679 A.2d 867, 872 (R.I. 1996)). Trooper Jackman

“neither testified as to [Trooper Kelly’s] credibility nor ‘offer[ed] an opinion concerning the truthfulness of [his] testimony.’” *See* Tr. at 103-114; *State v. Arroyo*, 844 A.2d 163, 170 (R.I. 2004) (quoting *State v. Marr*, 731 A.2d 690, 695 (R.I. 1999)) (concluding that the testimony of a police major did not impermissibly bolster the testimony of another officer where the major conducted a separate assessment of latent fingerprints to determine if they matched the defendant).

Trooper Jackman’s testimony did, however, provide empirical evidence—formulated based upon her experience and education—that assisted the Trial Magistrate in identifying what was reasonable under the circumstances presented by Trooper Kelly. The Trial Magistrate independently concluded that his testimony was credible. (Tr. at 163-64.) Trooper Jackman merely applied her training in accident reconstruction to the factual scenario Trooper Kelly provided to help the Trial Magistrate determine the import of the facts at issue. Accordingly, the Trial Magistrate did not err by permitting Trooper Jackman to testify, as her testimony was not impermissible bolstering.

## **B**

### **Discovery Issues**

The Appellants also argue that the Trial Magistrate erred by considering evidence that had not been provided to Appellants prior to trial. Specifically, Appellants contend that the speedometer calibration report provided to substantiate Trooper Kelly’s measurement of Appellants’ speed should have been excluded, and therefore, Trooper Kelly’s testimony regarding Appellants’ speed should be excluded under the standard established in *State v. Barrows*, 90 R.I. 150, 153, 156 A.2d 81, 83 (1959) (holding that speedometer readings are “admissible in evidence upon a showing that the operational efficiency of the device has been

tested by an appropriate method within a reasonable period of time”). The Trial Magistrate concluded, however, that Appellants were traveling at or about the speed limit. (Tr. at 163.)

Even though Mr. Gensel himself testified at trial that he was traveling at the speed limit, speed is not an element of the violation with which Appellants were cited. *See id.* at 145-46; § 31-15-12. Rather, it is the reasonableness of their follow distance that is at issue. *See* § 31-15-12. Notwithstanding the Trial Magistrates finding that Appellants were traveling at the speed limit, the Trial Magistrate ultimately concluded that Appellants were following too close. (Tr. at 145-46.) Based on the Trial Magistrate’s determination regarding the distance between the motorcycles, this Panel need not address whether the Trial Magistrate erred in considering the document Trooper Kelly provided—any error would necessarily be harmless under these circumstances, as there was an independent basis for coming to the same conclusion. *See State v. Oliveira*, 961 A.2d 299, 312 (R.I. 2008) (holding that harmless errors are so unimportant as to not require reversal of a decision). Moreover, even if Trooper Jackman’s calculations were based upon the speed limit, sixty-five miles per hour, a scenario presented during her testimony at trial, the required distance between the motorcycles would still be well in excess of what the Trial Magistrate found Appellants to be traveling. (Tr. at 137.)

## C

### **Trial Magistrate’s Questioning of Trooper Kelly**

The Appellants argue for the first time on appeal that the Trial Magistrate’s statement when sustaining Appellants’ objection encouraged Trooper Kelly to provide testimony about his educational qualifications, which he would not have otherwise provided. At trial, the following interaction occurred during Trooper Kelly’s testimony:

“Trooper Kelly:	They did not leave sufficient enough space for a motorcycle and its operator to
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travel between both columns in a safe manner. Traveling at 70 miles per hour, within one car length of the two motorcycles ahead of him, he would come in contact–

“Appellants’ Counsel: Objection, your honor

“Trial Magistrate: Sustained.

“Trooper Kelly: -- with two other motorcycles.

“Appellants’ Counsel: Objection, your honor

“Trial Magistrate: Yeah, it’s – his objection is sustained, because you haven’t – I haven’t heard a sufficient foundation in order for you to make these conclusions.

“Trooper Kelly: Okay.

“Trial Magistrate: So that’s why Counsel keeps objecting.

“Trooper Kelly: Um-hum.

“Trial Magistrate: Because I haven’t heard anything with respect to any training or otherwise, what would allow you to make those conclusions.

“Trooper Kelly: Okay. I was trained in the 2013 Rhode Island State Police Academy in accident reconstruction; that has to do with measuring skid marks, stopping distance, speed and how all those contribute to motor vehicle accidents.” *Id.* at 25-26.

In light of the fact that this issue was first raised on appeal, Appellants failed to timely object to the Trial Magistrate’s statement. Therefore, this Panel’s review of the issue has been waived. *See State v. Nelson*, 982 A.2d 602, 613 (R.I. 2009) (holding that a timely objection to a judge’s questing at trial must be made to preserve the issue for appellate review). As such, this Panel need not opine as to the merits of this argument.



## D

### Collateral Estoppel

The Appellant’s further argue that the State was barred from relitigating the same issues that were presented in an earlier trial—involving the citations issued to other motorcyclists in Appellants’ group—under the doctrine of collateral estoppel. According to Appellants, prior to their trial, the court heard a separate trial involving citations issued to the other motorcyclists that were charged with the same violation.<sup>2</sup> The motorcyclists involved in the prior trial were found not guilty.

Our Supreme Court has determined that “the doctrine of collateral estoppel prevents the relitigation of an issue actually litigated and determined between the same parties’ or those in privity with them.” *Lee v. Rhode Island Council 94*, 796 A.2d 1080, 1084 (R.I. 2002) (quoting *Wilkinson v. The State Crime Laboratory Commission*, 788 A.2d 1129, 1141 (R.I. 2002)). In Rhode Island, “collateral estoppel is applicable when there is ‘an identity of issues, the prior proceeding has resulted in a final judgment on the merits, and the party against whom the collateral estoppel is sought must be the same as or in privity with the party in the prior proceeding.’” *Id.* (quoting *Commercial Union Insurance Co. v. Pelchat*, 727 A.2d 676, 680 (R.I. 1999)) (internal alterations omitted). Our Supreme Court has held that “[p]arties are in privity when ‘there is a commonality of interest between the two entities’ and when they ‘sufficiently

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<sup>2</sup> It is noteworthy that Appellants have not provided a transcript of the other trial that they claim binds this Panel’s decision. Our Supreme Court has made clear that “[t]he deliberate decision to prosecute an appeal without providing the Court with a transcript of the proceedings in the trial court is risky business. Unless the appeal is limited to a challenge to rulings of law that appear sufficiently on the record and the party accepts the findings of the trial justice as correct, the appeal must fail.” *731 Airport Assocs. v. H & M Realty Assocs., LLC ex rel. Leef*, 799 A.2d 279, 282 (R.I. 2002).

represent' each other's interests." *Lennon v. Dacommed Corp.*, 901 A.2d 582, 591 (R.I. 2006) (quoting *Duffy v. Milder*, 896 A.2d 27, 36 (R.I. 2006)).

Here, collateral estoppel is inapplicable because the parties are not the same and the issues are not identical. It is entirely possible for two individuals to be cited for the same behavior in which only one had actually engaged. The issue in the other trial was whether those individuals on trial violated § 31-15-12 by following too close. In Appellants' trial, the issue was whether Appellants' violated § 31-15-12 by following too close. Different facts are necessary to come to a conclusion about these different issues. While the same legal standard applies in both cases, they are discrete and separate issues requiring separate analyses because Appellants' behavior may have been different from their peers on the road that day.

Moreover, as the identity of the parties also differs, collateral estoppel cannot apply. *See Lee*, 796 A.2d at 1084. The Appellants contend that they are in privity with the other motorcyclists, but make no substantive argument as to how "there is a commonality of interest" amongst the group or how they "sufficiently represent each other's interests." *See Lennon*, 901 A.2d at 591. There is no legal relationship between Appellants and the other motorcyclists of which this Panel is aware, and Appellants have not provided any evidence to support a finding of privity. Accordingly, this Panel concludes that collateral estoppel is inapplicable in this case.

## E

### **Weight of the Evidence**

The Appellants further argue that the Trial Magistrate's decision is clearly erroneous in view of the evidence within the record. It is well-established that this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact." *Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d

at 537). An appeals panel cannot review witness credibility as a Trial Magistrate may, since a Trial Magistrate “has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record.” *A. Salvati Masonry Inc. v. Andreozzi*, 151 A.3d 745, 749 (R.I. 2017) (quoting *State v. Van Dongen*, 132 A.3d 1070, 1076 (R.I. 2016)). As this Panel did not observe live testimony, this Panel can neither assess the demeanor of a testifying witness, nor can it disturb a Trial Magistrate’s findings of credibility. *A. Salvati Masonry Inc.*, 151 A.3d at 749 (quoting *Van Dongen*, 132 A.3d at 1076); *Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537). Accordingly, this Panel will not question the Trial Magistrate’s assessment of the witnesses’ veracity during trial.

Based on a review of the record, this Panel finds that the Trial Magistrate’s decision is supported by legally competent evidence. *Link*, 633 A.2d at 1348. The Trial Magistrate made clear that she found each of the troopers’ testimony credible. (Tr. at 163-64.) The issues before the Trial Magistrate were (1) the distance between the motorcycles and (2) whether that distance was reasonable under the circumstances. After hearing the expert testimony, the Trial Magistrate concluded that a reasonable following distance between the motorcycles was approximately 163 feet. *Id.* at 62. Both Trooper Kelly and Mr. Gensel testified that the distance between the motorcycles was less than the distance the Trial Magistrate found to be reasonable under the circumstances of this case.<sup>3</sup>

As this Panel cannot substitute its judgment for that of the Trial Magistrate “concerning the weight of the evidence on questions of fact,” or any reasonable inferences drawn by the Trial

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<sup>3</sup> Mr. Gensel testified that he was two to three car lengths behind the vehicle in front of him. (Tr. at 145.) While he did not fully articulate his definition of a “car length,” it is clear that the length of three cars—any three cars—is less than 163 feet.

Magistrate sitting as the factfinder, this Panel will not disturb the Trial Magistrate's determination. *Id.*

In consideration of the evidence in the record and reasoning stated above, this Panel finds that the Trial Magistrate's decision was not "affected by . . . error of law" or "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* § 31-41.1-8(f)(4)-(5).

## IV

### Conclusion

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Magistrate's decision was not in violation of constitutional or statutory provisions, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or made upon unlawful procedure. The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Magistrate Joseph A. Abbate (Chair)

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Magistrate Alan R. Goulart

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Magistrate Domenic A. DiSandro, III

DATE: \_\_\_\_\_