

Trial prep script

3 elements of reckless driving in law

*Irrespective of the maximum speeds permitted by law [CONDITIONS, totality of circs], any person who drives a vehicle on any highway **recklessly** [INTENT / NEGLIGENCE] or at a speed or in a manner so as to endanger the life, limb, or property of any person [PROXIMITY OF OTHERS] shall be guilty of reckless driving. Va. Code Ann. § 46.2-852.*

Accused denied in request to make audio record of hearing, no court reporters available.

Evidentiary hearing- Trooper Frye

- Qualify witness

- Name, time on force
- Years on force
- Are you employed in the field of law enforcement?
- Do you enforce the law everyday?
- Do you study the law regularly?
- Do you regularly read court cases to help you better do your job and enforce the law justly?
- When is the last ruling you read from the courts of appeal regarding commerce and transportation and how the law operates into different sets of facts?

- How often are you paid?
- On Dec. 21, where were you in your pay period?
- What is your shift?
-

- Will you identify the person you accused in this case?
 - You are the person I am accusing.
- What is this person's name
 - Abigail Tulis
- Could you describe this person for Judge?
 - Blond, tall, wearing a blue suit, brown Espadrilles

Witness credibility / competency

Diff between travel, transport

(Abigail — Fry is enforcing **commercial law**. But he asks no questions about commerce to establish he has proper authority, then says on form you “noncommercial.” **CONFLICTING TESTIMONY. incoherent**)

Do you have any evidence you can testify to that you provided the accused with this form, the Virginia Uniform summons?

(Yes, I handed it to you)

Do you have any evidence you can testify to that I was a commercial operator and driver subject to commercial regulation under the VA motor vehicle code?

(Tag on back. Driver license)

Do you have any evidence you can testify to that I was carrying any passengers?

(no)

Do you have any evidence you can testify to that you observed any boxes, packages or contents of my car that you took to be commercial objects, objects in commerce?

(Don't understand)

Do you have any evidence you can testify to that there were objects of transportation and commerce for hire in the car?

Do you have any evidence you can testify to that you believed they were items in commerce, part of a commercial transaction or business?

(Not Sure)

Do you have any evidence you can testify to that you asked me to see any contracts?

(No, I did not ask this question)

Do you have any evidence you can testify to that you asked for or saw

Bills of lading

Waybills

Manifests

Contracts

Do you have any evidence you can testify to that I was exercising a state privilege in a motor vehicle?

(You showed me a driver license

And were clearly operating a motor vehicle

As a driver / operator)

So, you are saying I was under a state privilege, **operating not privately, but commercially**, as a for hire carrier either common or private?

(You had a driver license, and driving is not a right. It is a privilege)

do you have any evidence you can testify to that In Virginia, all use of the road commercial?

(Yes, I enforce the traffic law upon all users of the road, Regardless of their status as shippers or private)

do you have any evidence you can testify to that you enforce the commercial trucking **law under the U.S. department of transportation** on all users of the road, regardless whether they are commercial or private?

(Yes, no one can be on the road apart from a Driver license, registration tag, proof of insurance)

do you have any evidence you can testify to, then, that I was operating commercially, under the badges of commerce, with taxes paid for the privilege of operating a motor vehicle and subject to State of Tennessee department of safety and homeland security?

(You had a TN driver license
You were in a rental car, commercial)

do you have any evidence you can testify to that Va. Code Ann. § Title 46 is the state freight, shipping and transportation code?

(It is what my dept. uses to regulate traffic on the roads
In interest of public safety)

do you have any evidence you can testify to that you stopped me pursuant to the code of Virginia dealing with transportation?

(I am a state trooper and I enforce the traffic laws
I stopped you under Va. Code Ann. § 46.2-852.)

Do you have any evidence you can testify to that, on your state form, you marked through the box that says '**Noncommercial**'?

His charging instrument = exhibit

Do you have any evidence you can testify to that **you** declared that I was not in a commercial vehicle?
(On the citation and summons, I said you were not commercial
You were not hauling goods or people for hire, that I could tell,
And were not a commercial operator)

Let me understand. **Do you have any evidence you can testify to** that on your form you state that I was **not** a commercial driver but you are testifying today that you are applying the commercial law upon me?
(yes)

MOTION FOR DISMISSAL

Witness is incompetent, or a perjurer.

He doesn't know what he is doing.

He says he didn't look for or ask about evidence of commercial activity.

Yet he testifies he is enforcing the commercial motor vehicle statute.

He says I am presumptively in commerce,

says presumptively I am commercial because I produced a TN driver license,
but writes noncommercial on the form.

I move for dismissal for incompetence, and there being no means the state and its witness can evoke this court's subject matter jurisdiction in this case

"When the privilege ends, the power of regulation ceases." Munn v. Illinois, 94 U.S. 113, 147
(1876)

A licensee = tax receipt for state commercial privilege

Evidence 'essential elements'

Road conditions

Do you have any evidence you can testify to it is possible to be going 20 miles an hour on a highway and that be reckless driving?
(yes)

Could you please explain

(Noland v. Fowler 179 VA 19 "irrespective of the maximum speed, VA code 852

So, safe driving takes into account **conditions**?

(yes)

Do you have any evidence you can testify to that there was much traffic on the road

(Spencer v. City of Norfolk 271 Va. 460. Conditions essential element)

Do you have any evidence you can testify to that there were pedestrians nearby

(No. None)

Do you have any evidence you can testify to that anyone's property was near by

(No. None)

Do you have any evidence you can testify to that passed anybody with property who was pulled over on the side of the road with his or her property

(No. None)

Do you have any evidence you can testify to that i passed anyone driving on the highway

(You did not pass anyone on the roadway)

(No. It was dark, No oncoming traffic,
No tail lights of other cars nearby)

Do you have any evidence you can testify to that Rain was falling?

(No rain)

Do you have any evidence you can testify to that the highway was wet?

(No. None)

Do you have any evidence you can testify to that conditions included wind buffetting travelers

(No. None)

Do you have any evidence you can testify to as to lighting -- overhead neon lamps?

(No overhead streetlamps. This is the countryside)

Do you have any evidence you can testify to as to any sort of lighting ahead of me on the road (red taillights)

(Traffic was far ahead, a least half a mile)

Do you have any evidence you can testify to as to proximity of other people — either private travelers or commercial trucks — on the road?

(Yes, at some distance)

Could you be specific.

(Less than a mile ahead)

Do you have any evidence you can testify to that other travelers were traveling at approximately the same speed?

Sheckler v. Anderson 182 Va. 701 29 SE 2d 867. Speed that is unwarranted and person wrong side of road)

Do you have any evidence you can testify to of my speed

Do you have any evidence you can testify to that conditions required me to account for the speed of others?

Do you have any evidence you can testify to that Interstate 81 is a roadway with two-way traffic

(No, it was a one-way highway, two lane)

Do you have any evidence you can testify to that you were early in your shift?

(It was past the midway point in my shift)

Do you have any evidence you can testify to about your shift hours?

Do you have any evidence you can testify to that about the number of traffic stops that night?

Do you have any evidence you can testify to about which number of transportation enforcement stop I was?

Do you have any evidence you can testify to about whether you were ahead or behind in your supervisor's expectations for revenue and safety enforcement?

(I am under no expectation
But to keep the highways safe)

Drunkenness element of reckless

Do you have any evidence you can testify to that you are trained as a state trooper to understand the rules of travel traffic and transportation in the interest of public safety?

(Yes)

In Virginia law, is it possible to be traveling down a road in a car, foot on pedal, hands on wheel and traveling down the highway **WHILE DRUNK** — and that NOT be charged with reckless driving?

(No, if you are drunk you are reckless)

So, as you understand the law, a person who is proven to be drunken while driving is driving recklessly?

(I'm not a lawyer, but I would say it is impossible to drive properly if you are drunk. Never seen it, heard of it)

(Thompson v. Commonwealth 27 Va.app. 270 501 SE 2d438. Evidence of intoxication does not of itself, prove reckless driving. One may be both drunk and reckless. Or reckless though not drunk or under the influence of intoxicants and yet driver carefully."

You say recklessness depends on conditions?

(Yes)

Complete control

Mr. Frye, based on your training, does the law impose the duty upon a driver to keep his automobile under complete control at all times?

(Yes.)

Wrong - witness incompetent

The law does not impose the duty upon a driver to keep his automobile under complete control at all times Gale v. Wilber, 163 Va. 211, 221, 175 S.E. 739, 743 (1934)

Speed element of reckless

In your training, is it possible to be **speeding** and not to be driving recklessly?

(Yes)

(Spencer v. City of Norfolk, 271 Va. 460, 628 SE 2d 356)

Do you have any evidence you can testify to that I violated a law?

(Yes, ma'am, 852. The reckless driving law of the commonwealth. I saw you driving recklessly)

Objection

Your Honor, direct the witness to **present facts, not conclusion of law**. To testify the accused was driving recklessly is to testify to an ultimate fact or a legal conclusion, not a fact.

REPEATING: Do you have any evidence you can testify to that I violated a law?

(I saw you weaving in your lane)

Do you have any evidence you can testify to that this a copy of the law (hand copy)

(Yes)

Do you have any evidence you can testify to that you are familiar with this law?

Do you have any evidence you can testify to as to when you last laid your eyes on this law and read it?

(Six months ago I took a refresher and read the law)

Do you have any evidence you can testify to about time of day you made the arrest of your 10th traffic stop of the night?

(Errrr, not remembering. Around 11 p.m)

Do you have any evidence you can testify to, Officer Frye, about your dash cam or body cam?

(We are equipped with dash cams and body cams)

Do you have any evidence you can testify to about car dash cam?

(Yes. My car has a dashcam)

Do you have any evidence you can testify to that there **was a video** on your dashboard on the night in question?

(Ma'am, it sits in the middle of my dash board)

Do you have any evidence you can testify to as to **your training** in the use of video equipment?

(I am trained at the State police academy on the use of equipment.
there's a switch on the left side of the box that I flip)

Do you have any evidence you can testify to that your training serves to teach you how to reach over to that switch and **turn on** the camera?

(I am trained at the academy and use these cameras
On my job. I know where the switch is)

Do you have any evidence you can testify to that you located the switch on your dash cam on the night in question and **actually turned that switch** to operate your camera?

(I just forgot. It was a minor incident, not serious
I didn't feel it necessary to run the camera)

Do you have any evidence you can testify to as to why you did not follow procedure?

(Ma'am, I do not have video of your encounter)

EXHIBIT

Letter from patrol office saying no video.

Motion to dismiss

Conditions evidence

Do you have any evidence you can testify to that I passed anyone while you were behind me?

(No, you did not)

Do you have any evidence you can testify to that no other traveler or no other commercial operator on the roads was near me as I traveled west on the interstate?

Do you have any evidence you can testify to as to what movement or activity you witnessed regarding my car?

(You were **weaving** in lane)

Do you have any evidence you can testify to as to the legal definition of weaving?

(Weaving is moving back and forth from left to right, in a motion.
It's highly unsafe)

Do you have any evidence you can testify to , based on training, as to the difference between drifting VS reckless

Do you have any evidence you can testify to based on your training, as to whether defendant was jerking the car about? State v. Garcia, TN 2003, No. M2000-01760-SC-R11-CD

(I wouldn't say that. You were weaving.
That's why I pulled out over and charged you)

Do you have any evidence you can testify to that the accused made slight adjustments within the lane?

(You're just parsing words.
Not sure what you mean)

Do you have any evidence you can testify to that the car was wobbling?
State v. Garcia

Do you have any evidence you can testify to that my car was swerving?

Do you have any evidence you can testify to that either left tires or right tires touch the white line?

(No, not that I remember)

Do you have any evidence you can testify to as to distance or time you traveled behind the accused?

(It was about 6 minutes, about 2 miles)

Do you have any evidence you can testify to as to whether the defendant left the road and went into the tire-changing lane or the grass beyond?

(Your gyrations weren't that bad)

Code pleading Crest v. Commonwealth, 40 Va App. 165 "The essence of the offense *** is not in the act of operating a vehicle, but in the manner and circumstances of its operation." "The mere happening of an accident does not give rise to the inference of reckless driving."

Adjusting, weaving, swerving etc ESSENTIAL ELEMENT

Do you have any evidence you can testify to that there was anything beyond momentary movement and variation in lane.

Do you have any evidence you can testify to that this stop was, from its inception, a criminal investigation, and not a welfare check?

Do you have any evidence you can testify to that you had probable cause to stop this traveler for having committed a crime?

(Movements of the car appeared dangerous)

Do you have any evidence you can testify to that the accused was sober and alert when you spoke with her?

(I determined she was sober by manner of speech,
No odor of alcohol)

Pleading Conrad v. Commonwealth 29 Va App. 661 Dozing off several times = notice, and keeping going while tired = reckless driving. Essential element.

Do you have any evidence you can testify to the car appeared to be adjusting its course within the lane? Is adjusting its course accurate?

(No, I would say weaving or swerving are more accurate)

Are “slight variations of direction” accurate words to describe what you saw?

Garcia

(well, maybe. Slight variations -- maybe)

Do you have any evidence you can testify to that slight variations within a lane perilous or dangerous at the moment they occur in all cases?

(No, not always)

Do you have any evidence you can testify to that there was an accident in which I was involved?

(No)

Do you have any evidence you can testify to that injured anybody the night of Dec. 21?

(No injury)

Do you have any evidence you can testify to that you, as an agent of the commonwealth of Virginia, was injured?

OBJECTION BY DA

Trivial and time consuming questions

ANSWER

Goes to standing. The state must show an injury, which is an essential Element in standing to sue

Do you have any evidence you can testify to that adjustments in the lane ion an empty highway made the state of Virginia suffer in any way, or its people?
You violated the law by being reckless, ma'am
That's why I stopped you. You were being reckless

A CORRECTIVE -- "YOUR HONOR

Direct the witness to stop this custom of testifying to legal conclusions and ultimate facts. He is a fact witness and needs to leave to your honor ultimate legal conclusions and findings of law.

Do you have any evidence you can testify to that you obtain points, merits, credits, increased pay, commissions for stopping people on the people's roads in Virginia?

(No. I follow the law, obey my trooper manual)

Please answer the question, Mr. Fry. **Do you have any evidence you can testify to** that you obtain points, merits, credits, increased pay, commissions for stopping people on the people's roads in Virginia?
(no)

Do you have any evidence you can testify to that your department operates a system of expectations?

Does a system of expectations, esp. at month's end, give you incentive to stop people and file criminal charges against them?

(no)

What is the date on which you stopped me?

(Errrr, Dec. 21)

Do you have any evidence you can testify to that you get any extra pay, rank, benefit of administrative credit or merit point for my arrest?

(no)

Do you realize that you are under oath, and that if you lie you are a perjurer and a criminal?

(I am telling the truth, and I took the oath)

DA objects to questions

State the grounds

Me — I have a right to **pursue my theory of the case** and put the burden of proof on the state's only witness and my accuser. I have a right to understand the **nature and cause** of these criminal accusations and I am evaluating the evidence.

I am **asserting my rights to due process** and to understand charges and to bring into evidence facts that pertain to my **accuser's personal motives** in criminally charging me.

Insufficient charging instrument

Essential elements NOT ON FORM

Do you have any evidence you can testify to that the Uniform State Trooper summons offers a convenience for you in your job?

Do you have any evidence you can testify to that because it offers one line of space to describe the charge that that it is lawful to write three words by way of narrative —

Do you have any evidence you can testify to that having one line of space in which to write the description saves time and adds efficiency to your job as trooper?

Do you have any evidence you can testify to the form forbids you from alleging facts in a criminal case in terms of the statute?

Do you have any evidence you can testify to that this form gives the accused sufficient awareness of her alleged crime?

(These questions are beyond my pay grade)

Your honor, make the witness answer

Do you have any evidence you can testify to your words on this form gave her notice of the essential elements of the crime so that she might defend against your accusation of having broken a law?

(I'm not a lawyer. I don't know)

Do you have any evidence you can testify to that there are other charging instruments in this case?

(no, this summons is the accusation)

So, do you have any evidence you can testify to that this summons constitutes **the entirety** of the **charging instrument** in this case?

(yes it is. This is a misdemeanor)

Do you have any evidence you can testify to that the charging instrument ***relates the charge to the facts***

Do you have any evidence you can testify to that your charging instrument narrates the alleged facts in terms of the statute?

Please look at the form. **Do you have any evidence you can testify to** of what it says right here?

It says “describe charge.”

Do you have any evidence you can testify to that you did that?

(Yes ma’am, it says, “46-2-852, reckless driving, general”)

Do you have any evidence you can testify to that writing “46-2-852, reckless driving, general” is describing the charge?

(Yes, I would. It tells you exactly what you did)

Do you have any evidence you can testify to, sir, that you know the difference between naming and describing?

(It’s basic English. 2 diff. words)

Did you not enter into evidence that the accused name is Abigail Tulis?

(Yes ma'am, I gave your name)

Do you have any evidence you can testify to, sir, that if I asked you to describe me that you would say "Abigail Tulis"?

(I really don't know where you're going with this.)

If I asked you to describe me, would you say, "Abigail Tulis"?

(No, ma'am, I'd say you were a blonde)

Move to dismiss

Your honor, this witness is **incompetent**. **Naming the statute** is not "describing" the charge. How, given my right to due process, can the accused **understand, evaluate / defend** against the state's accusations without the commonwealth narrating the alleged evidentiary facts as a crime and placing me in the shadow of the statute?

I demand you dismiss this case on grounds of incompetence and failure to fulfill his duty to DESCRIBE the charge, not just name it

(I don't understand)

Do you have any evidence you can testify to, sir, that in your training serving this state that you **don't have to notify** your defendant of what she did to violate the law?

Is she supposed to read your mind?

Badgering OBJECTION

This line of questioning is badgering the officer

REBUTTAL

The witness is being asked about his job and his accusations of a crime. Questions about the **charging instrument and alleged factual evidence behind** it are entirely appropriate in the interest of due process.

Questions seek the fact witness to explain why he and his employer have thought so little of the people that they can for their own convenience use paperwork that **fails to state the essential elements of the charge and plead their alleged facts in terms of the statute.**

Continuing:

Your honor, I am no an attorney and am not practiced in courts. So I can understand Officer Fry, please let me continue as to **nature and cause —**

Officer Fry, **Do you have any evidence you can testify to, sir,** do accused people have a right to have charges against them given in writing?

(Yes, they do)

What are the essential elements of the crime of reckless driving?

(threat to people, careless actions)

Do you have any evidence you can testify to, that your document is sufficient to let me prepare my defense?

(Citing the name of the statute is sufficient notice of the offense, ma'am)

Do you have any evidence you can testify to, that I am capable of reading your mind as to what your facts are regarding violation of law?

(You have a properly filled out summons
I did my job correctly)

Are you trained to name laws as opposed to allege facts of a supposedly criminal act?

(This case is like all others I prosecute for the commonwealth)

Do you have any evidence you can testify to that you intend to **inform** me of the alleged facts of the crime alleged under your oath and signature?

(This is a simple reckless driving case.)
YOu are making a mountain out of a molehill)

(No factual elements connecting the statute to the alleged facts

Garcia case is about tire touching the line and whether that is probable cause