IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**
	:
vs.	**: No. CR- 1162-2015**
	:
BRANDON HOFFMAN,	**:**
Defendant	**: Omnibus Pretrial Motion**

OPINION AND ORDER

Defendant is charged by Information filed on August 28, 2015 with three counts of aggravated assault, one count of involuntary manslaughter, one count of endangering the welfare of children, one count of simple assault and one count of recklessly endangering another person. On May 5, 2015, Defendant is alleged to have killed a two-year old child by recklessly slamming the child onto a hardwood floor while executing a "WWF" wrestling move.

On September 29, 2015, Defendant filed an omnibus pretrial motion, which includes seven separate motions. A hearing and argument was held before the court on November 9, 2015.

Defendant's first motion is a motion to suppress. Defendant asserts that the statements he made to the State Police soon after he was transported to the Tiadaghton Police headquarters were obtained in violation of his Miranda rights. More specifically, Defendant contends that while at the headquarters, he was subject to custodial interrogation without being administered his Miranda warnings and accordingly, all of his statements to the State Police at that time should be suppressed.

"As a general rule, the prosecution may not use statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel." ***Commonwealth v. Umstead***, 916 A.2d 1146, 1149 (Pa. Super. 2007)(quoting ***Commonwealth v. DeJesus***, 787 A.2d 394, 401 (Pa. 2001)). "A law enforcement officer must administer Miranda warnings prior to custodial interrogation." ***Commonwealth v. Schwing,*** 964 A.2d 8, 11 (Pa. Super. 2008)(citation omitted), appeal denied, 989 A.2d 916 (Pa. 2009).

"Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of his Miranda rights. Custodial interrogation is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" ***Commonwealth v. (Hope) Williams***, 941 A.2d 14, 30 (Pa. Super. 2008)(citations omitted).

The ultimate inquiry for determining whether an individual is in custody for Miranda purposes is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. ***Commonwealth v. Pakacki***, 901 A.2d 983, 988 (Pa. 2006). The focus is on whether the individual being interrogated reasonably believes his freedom of action is being restricted. ***Commonwealth v. (Antoine) Williams***, 650 A.2d 420, 427 (Pa. 1994). "The standard for determining whether an encounter with the police is deemed 'custodial' or police have initiated a custodial interrogation is an objective one based on a totality of the circumstances with due consideration given to the reasonable impression

conveyed to the person interrogated." ***Schwing,*** supra (quoting ***Commonwealth v. Mannion***, 725 A.2d 196, 200 (Pa. Super. 1999)(en banc)).

In looking at the totality of the circumstances, the court cannot conclude that Defendant was in custody. The detention, if any, was not so coercive as to constitute the functional equivalent of a formal arrest.

Chief Nathan DeRemer of the Tiadaghton Police Department responded to the Jersey Shore Hospital Emergency Room on May 5, 2015 to investigate the alleged incident involving Defendant and the minor child. Defendant was visibly upset and crying. It was apparent that the child had suffered injuries and was being life-flighted to Geisinger Medical Center. Defendant, family members and hospital staff went to a private room to await word of the child's condition.

Through contacts with the on-duty Assistant District Attorney and Pennsylvania State Police (PSP), Chief DeRemer became aware that PSP wanted to speak with Defendant. Chief DeRemer told Defendant that PSP wanted to speak with him and that he should "be there" to talk with them.

Chief DeRemer left the hospital. He subsequently spoke with Trooper Jennifer McMunn of PSP who suggested to the Chief that he pick up Defendant and bring him back to headquarters. When Chief DeRemer returned to the hospital, Defendant was sitting outside the emergency room. Because Defendant apparently had no vehicle, the Chief asked Defendant if he preferred to wait at headquarters. If so, the Chief could give him a ride to save some time.

Defendant indicated that he would take the ride. Defendant rode with the Chief and another officer. Defendant was in the back of the patrol unit. They drove approximately a mile and a half to the Tiadaghton Police Department headquarters. Defendant was not transported against his will nor was he forced to go. He was not placed in any restraints and, although the officers were armed and in uniform and Defendant could not open the backdoor of the unit, there was no show, threat or use of force.

Once at the headquarters, Defendant was accompanied into the building, directed to an interview room on the right and "told to go into the room and have a seat." He was asked to wait in the room until the PSP arrived.

While waiting, Defendant was left alone in the room. He was not restrained. He was not accompanied by any officer. No officer was stationed or present outside the interview room door. The closest officer was approximately 10 to 15 feet away performing other duties. Defendant was free to leave and could have done so simply by getting up and leaving out of the back or front doors.

Trooper McMunn soon arrived. She briefly spoke with Chief DeRemer before speaking with Defendant. Defendant was sitting in the interview room waiting for her. She was in civilian clothes and identified herself as PSP. Defendant was specifically advised that he was not under arrest and he was free to leave. Defendant acknowledged that he was there and agreed to talk with her of his "own free will." He specifically agreed that the interview could be audiotaped by Trooper McMunn.

The court was provided with and listed to the audiotape of the interview.

There was nothing about the interview that was coercive. No statements were made to Defendant which would cause him to reasonably believe that his freedom of action was being restricted. The door was closed but not locked. No one blocked the door. Defendant was not searched. While Trooper McMunn twice exited the room to speak with others about the status of the investigation including the status of the child's health, Defendant was never told anything which would cause a reasonable person to believe that he was under arrest. At one point when Trooper McMunn left the room, she noticed that Defendant was using his phone. Apparently, Defendant was texting. Because of "wiretap concerns", Trooper McMunn asked Defendant to turn off his phone. She was concerned that he might be speaking with others "who may be involved."

On one occasion after leaving the room, Trooper McMunn learned that the child had died. She spoke with the District Attorney and it was determined that charges would be filed against Defendant. Trooper McMunn reentered the room, advised Defendant that he was no longer free to leave and read him his Miranda rights. She reviewed with Defendant a written Miranda Waiver Form. She gave Defendant an opportunity to read it himself and then observed Defendant willingly sign the form. The interview then continued until it concluded.

Under all of the circumstances, the court cannot conclude that the statements made by Defendant to Trooper McMunn, prior to being Mirandized, were a result of custodial interrogation. Accordingly, Defendant's motion to suppress those statements will be denied.

Defendant's second motion to suppress alleges in part that statements made by Defendant to Children & Youth workers, Christie Peck and Shelby Newcomer on June 11, 2015 after he was arrested, preliminarily arraigned and incarcerated in the Lycoming County Prison, must be suppressed for varied reasons including but not limited to the assertion that they were obtained in violation of Defendant's right to counsel.

At the hearing in this matter, the Commonwealth conceded the issue. Accordingly, Defendant's motion to suppress his statements to the Children and Youth workers will be granted.

Defendant's third motion is a motion to compel a response to a request for a bill of particulars.

On September 2, 2015, Defendant submitted to the Commonwealth a request for bill of particulars. On September 28, 2015, the Commonwealth filed a response to the request. In response to each of the specific requests, the Commonwealth stated: "The Request seeks information and/or evidence which are contained in discovery materials; therefore, the Request is improper and no response is required."

A bill of particulars, an anachronism of past procedural rules, serves a narrow purpose. ***Commonwealth v. Champney***, 832 A.2d 403, 412 (Pa. 2003).

> A bill of particulars is intended to give notice to the accused of the offenses charged in the Indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations. It is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a bill of particulars may be directed.

Champney, supra (quoting ***Commonwealth v. Chambers***, 599 A.2d 630, 641 (Pa. 1991) (citations omitted)).

The Pennsylvania Rules of Criminal Procedure state that a request for a bill of particulars "shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested." PA. R. CRIM. P. 572 (B). "When a motion for relief is made, the court may make such order as it deems necessary in the interest of justice." PA. R. CRIM. P. 572 (D).

Defendant's first request addresses Count 1, aggravated assault. Defendant asks for the specific conduct allegedly committed by Defendant that shows he acted under circumstances manifesting an extreme indifference to the value of human life.

Unlike Count 2, aggravated assault, and Count 3, aggravated assault, wherein the Commonwealth asserts in the Information that Defendant slammed a young male child recklessly onto a hardwood floor resulting in death, there is no such language with respect to Count 1.

Obviously, Defendant is entitled to know what conduct he allegedly committed which constitutes the crime of aggravated assault as set forth in Count 1. This is necessary so that Defendant may prepare a defense and avoid surprise.

Accordingly, the court will grant Defendant's request to compel a response with respect to request No. 1.

Defendant's second request for particulars relates to the involuntary manslaughter count. In reviewing the Information, it simply lists the victim as a young male

child. It does not include “To Wit” language. In order that Defendant may prepare a defense and avoid surprise, the court will direct that the Commonwealth comply with the request as follows:

“Describe the act that the Defendant did that resulted in the victim’s death; describe the conduct of the Defendant that the Commonwealth claims was reckless or grossly negligent; and describe whether the Commonwealth claims whether said act or acts were lawful or unlawful.”

Defendant’s third request relates to the endangering welfare of children charge. In order that Defendant may prepare a defense and avoid surprise, the Commonwealth shall be required to advise Defendant of what act or acts Defendant committed which knowingly endangered the welfare of the child.

Defendant’s fourth request relates to the simple assault charge. In order that Defendant may prepare a defense and avoid surprise, the Commonwealth shall be required to provide Defendant with a description of the act or acts it claims Defendant committed which demonstrate an attempt to cause or an intentional, knowing or reckless causing of bodily injury to another.

Request No. 5 concerns the recklessly endangering another person charge. The Commonwealth shall be required to describe for Defendant what act or acts it claims Defendant engaged in which placed or may have placed another person in danger of death or serious bodily injury.

In all other respects, Defendant’s motion to compel a response to the bill of

particulars shall be denied.

Defendant's next motion consists of a motion for formal discovery. At the argument in this matter, the parties agreed that all of the requested items were or would be provided. There was, however, a dispute with respect to an autopsy that was performed by "a second forensic pathologist." The Commonwealth conceded that a Dr. Vey did a "record review" but did not do an actual autopsy or examination of the decedent. According to the Commonwealth, Dr. Vey reviewed photographs, the autopsy report and a transcript of the interview with Defendant.

Dr. Vey did not submit a written report although he had a "conversation" with Commonwealth representatives. Concluding that Dr. Vey's opinions may be relevant and perhaps constitute ***Brady*** material, the court directed that the Commonwealth authorize Dr. Vey to discuss his opinion and findings with defense counsel.

There was no other discovery matter at issue for the court to resolve.

Defendant's next motion is a motion in limine.

Defendant claims that when he was initially interviewed by PSP, they asked him if he would pass a polygraph. Defendant apparently indicated that he would. Defense also contends that while Defendant was being transported to the PSP barracks, he "exhibited no remorse." Defendant argues that any reference to the polygraph, as well as the lack of remorse, be precluded.

While transporting Defendant following his May 5, 2015 interview with Trooper McMunn, Trooper James Doane was conversing with Defendant. They were

discussing numerous unrelated matters.

Trooper Doane did not “feel there was any remorse” by Defendant and accordingly “noted it” in his report.

The admissibility of evidence is within the discretion of the trial court. ***Commonwealth v. Johnson*** 42 A.3d 1017, 1027 (Pa. 2012). The determinative standard is relevancy. See PA. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by law.”). Evidence is relevant if it tends to prove or disprove a fact at issue. See PA. R. EVID. 401 (Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence).

In determining the admissibility of the evidence, the court must also determine if the probative value of the relevant evidence is outweighed by the danger of unfair prejudice. PA. R. EVID. 403. “‘Unfair prejudice’ means the tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” PA. R. EVID. 403, comment; ***Commonwealth v. Page***, 965 A.2d 1212, 1220 (Pa. Super. 2009), appeal denied, 74 A.2d 125 (Pa. 2013). “Evidence will not be prohibited merely because it is harmful to the defendant. Exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.” ***Page***, supra (citing ***Commonwealth v. Owens***, 926 A.2d 1187, 1191 (Pa. Super. 2007)).

The results of polygraph examinations that raise inferences of guilt or

innocence are inadmissible at trial because of the unreliable nature of polygraph examinations. ***Commonwealth v. Watkins***, 750 A.2d 308, 315 (Pa. Super. 2000); ***Commonwealth v. Sneeringer***, 668 A.2d 1167, 1174 (Pa. Super. 1995), appeal denied, 680 A.2d 1161 (Pa. 1996).

The court agrees with Defendant. Any reference to the polygraph would not be relevant. Moreover, it would be entirely and impermissibly prejudicial.

With respect to the conclusion by Trooper Doane that he did not "feel" that Defendant had any remorse while Trooper Doane was transporting Defendant to the PSP barracks, this too shall not be admissible. Under the circumstances, the court fails to see its relevancy. Additionally, it is entirely speculative. Furthermore, it is far too prejudicial. Finally, Trooper Doane's conclusion is apparently based on what Defendant did or did not say. Thus, it would be an impermissible intrusion into Defendant's right to remain silent.

Defendant's next motion is a motion for juror investigation information. Specifically, Defendant requests "equal access to information the Commonwealth obtains when investigating perspective jurors for his case." As specifically requested, Defendant's motion shall be denied. Clearly, the Commonwealth is entitled to the fruits of its work product.

In exercising its discretion to grant or deny a request for discretionary discovery, the court is guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, and the adversary system, provide adequate information for informed pleas, expedite trials, minimize surprise,

afford opportunity for effective cross-examination and meet the requirements of due process. ***Commonwealth v. Thiel***, 470 A.2d 145, 148 (Pa. Super. 1983).

The court will exercise its discretion in favor of Defendant and in order to expedite the trial in this matter, by requiring the Commonwealth to provide to Defendant prior to jury selection the prior criminal record of any and all jurors in the panel drawn for this case.

Defendant's final motion is to exclude inflammatory photographs, as well as inflammatory buttons, pictures and clothing, from trial.

Prior to the jury selection in this matter, the Commonwealth is directed to provide Defendant with color copies of any and all photographs that it intends to use in this trial. If Defendant is of the opinion that any of those photographs are impermissibly inflammatory or should be excluded for any reason, Defendant shall orally make a motion to preclude said photographs. The motion must be made prior to jury selection.

With respect to Defendant's request that spectators not wear at trial any inflammatory buttons, clothing or item depicting the victim, the court will reserve any decision on this until the time of trial. Both parties are directed to discuss the matter with their prospective witnesses and supporters, and if any party has a concern, they are directed to bring it to the court's attention prior to the jury being brought in to be sworn and begin hearing the case.

ORDER

AND NOW, this __ day of December 2015 following a hearing, argument and the submission of briefs on Defendant's omnibus pretrial motion, and in accordance with the foregoing opinion, it is ORDERED and DIRECTED as follows:

The court **DENIES** the motion to suppress contained in Count 1.

The court **GRANTS** the motion to suppress contained in Count 2.

The court **GRANTS** in part the motion to compel response to bill of particulars.

The court **GRANTS** in part Defendant's motion for formal discovery.

The court **GRANTS** the motion in limine.

The court **GRANTS** in part the motion for juror investigation information.

The court **DEFERS** a ruling on the motion to exclude inflammatory photographs and preclude inflammatory buttons, pictures and clothing.

By The Court,

____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
William Miele, Esquire (PD)
Gary Weber, Esquire
Work file