

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-475-2014
	:	
vs.	:	
	:	
	:	
JASON R. SPOERI,	:	
Defendant	:	

**OPINION AND ORDER**

This matter came before the court on March 9, 2015 for a hearing and argument on Defendant’s omnibus pretrial motion. Defense counsel submitted a letter brief in support of Defendant’s motion on March 23, 2015. The relevant facts follow.

Between 7:15 and 7:30 a.m. on February 5, 2014, the Uni-Mart in Hughesville was robbed by a white male wielding a knife and wearing red sweatpants and a black jacket with a gray X on it. When the robber entered the store, he was also wearing a mask or scarf over his face. He held a knife to the girlfriend of one of the employees, but the manager told him that she didn’t even work there. He then went over to the manager and said, “Give me the money or I’ll stab you.” When the manager refused, he went over to the cash register, but was having trouble seeing through his mask. He removed the mask to better see the cash register, and the manager saw his face for a minute or more. Another employee saw the robber leave in a white Subaru and got the license plate number. The manager called 911 and reported the incident to the police.

The police ran the license plate and discovered that the vehicle was registered to an individual who resided at 127 Lime Bluff Road in Hughesville, which was only a half-mile to a mile away from the Uni-Mart. Trooper Paul McGee arrived at that residence at

7:55 a.m. Other officers were already on the scene. A white Subaru with the reported license plate number was in the garage.

Two females and Defendant lived at the Lime Bluff residence. Trooper McGee asked them if they knew anything about the robbery. Defendant denied any involvement in the robbery. Trooper McGee told them that the vehicle used in the robbery was in the garage. The females were not aware that the vehicle had been used that morning. Trooper McGee asked them if there were any other males in the home or if there were any other males who were permitted to use the vehicle. There were not.

The manager and the employee who got the license plate number were brought to the residence. Trooper McGee asked the owner of the vehicle if the employee who saw the vehicle in which the robber left could walk up to the garage and look at her vehicle. She consented. The employee walked up to the garage and looked inside. He indicated that the white Subaru in the garage was the vehicle he saw leaving the Uni-Mart after the robbery.

Trooper McGee then asked Defendant if, in the spirit of cooperation, he would follow him to the end of the driveway. Defendant said “yes” and followed Trooper McGee out of the house and down the driveway. Trooper McGee then asked Defendant if he would turn and face a police vehicle and pointed to the vehicle. Defendant turned and faced the vehicle.

The manager and the employee were in the police vehicle. After a minute or less, the manager identified Defendant as the person who robbed the Uni-Mart. The trooper inside the vehicle with the witnesses signaled Trooper McGee, who told Defendant he could

go back up to the house. Trooper McGee then walked over to the vehicle and talked to the manager. He asked her if she was 100% sure. The manager said “yes, she’d bet her kids’ lives on it.”

Trooper McGee walked over to Defendant. Defendant insisted that he had no knowledge about the robbery. Trooper McGee read Defendant his Miranda rights, placed him in handcuffs and put him in a police car.

Trooper McGee went inside the house and told the females that Defendant was under arrest for robbery. Trooper McGee then asked them for consent to search the residence. Both females signed a consent to search form (see Commonwealth Exhibit 1). Trooper McGee asked them if they could tell him where the clothes and knife were. One of the females led Trooper McGee to the laundry room, and she started pulling items out of a laundry basket. A jacket and red sweatpants matching the description of the clothing worn by the robber were at the bottom of the laundry basket. Trooper McGee advised the female that he was going to get a warrant because he wanted to recover the shoes and the knife. She then led Trooper McGee to a box of shoes.

The police obtained a search warrant for the residence and recovered drug paraphernalia consistent with marijuana and heroin use.

Under Information 478-2014, Defendant was charged with two counts of robbery, terroristic threats, possessing instruments of crime, prohibited offensive weapon, simple assault, criminal attempt theft by unlawful taking, and possession of drug paraphernalia arising out of the alleged robbery of the Uni-Mart on February 5, 2014.

Under Information 475-2014, Defendant was charged with several additional

robberies and related offenses that occurred between January 13, 2014 and February 2, 2014.

Defendant filed an omnibus pretrial motion, which contained a motion to suppress identification; a motion to suppress physical evidence; a motion to suppress statements; a motion to disclose promises of leniency or preferential treatment and criminal history information; a motion for disclosure of other crimes, wrongs or acts pursuant to Pa.R.E. 404(b); a motion for formal discovery; a petition for writ of habeas corpus; a motion in limine to exclude lay person evidence at trial as to the identification of Defendant; and a motion to reserve right.

Defendant first contends that the identification of him outside the residence on Lime Bluff Road should be suppressed because (1) the show-up confrontation was involuntary and inherently and unnecessarily suggestive; (2) the identification was the fruit of an illegal arrest, where he was arrested at his home without an arrest warrant or search warrant; and (3) his compelled participation in the identification procedure constitutes self-incrimination. The court cannot agree.

There is nothing in the record to support Defendant's contention that the show-up was involuntary. Trooper McGee credibly testified that he asked Defendant to follow him to the end of the driveway and Defendant agreed to do so. Defendant was neither under arrest nor in handcuffs at that time.

Relying on *Stovall v. Denon*,<sup>1</sup> Defendant initially contends that show-ups are inherently suggestive and have per se been condemned. The court finds that Defendant's reliance on *Stovall* is misplaced. *Stovall* does not stand for the proposition that the results of

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<sup>1</sup> 388 U.S. 293 (1967).

all show-ups must be suppressed or that suggestiveness alone requires suppression. The *Stovall* Court stated: “The practice of showing suspects singly to persons for identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it....” 388 U.S. at 302.

Furthermore, the Pennsylvania appellate courts have set forth the following standard for the admissibility of identification evidence:

In reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable. *Commonwealth v. Sample*, 321 Pa. Super. 457, 461, 468 A.2d 799, 801 (1983), citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) and *Commonwealth v. Sutton*, 496 Pa. 91, 436 A.2d 167 (1981). Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors. *Id.* 321 Pa. Super. at 461-62, 468 A.2d at 801. As the *Sample* court explained, the following factors are to be considered in determining the propriety of admitting identification evidence: the opportunity of the witness to view the perpetrator at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.* 321 Pa. Super. at 462, 468 A.2d at 801. The corrupting effect of the suggestive identification, if any, must be weighed against these factors. *Id.*

*McElrath v. Commonwealth*, 592 A.2d 740, 742-43 (Pa. Super. 1991); see also *Commonwealth v. Moyer*, 836 A.2d 973, 976 (Pa. Super. 2003); *Commonwealth v. Bruce*, 717 A.2d 1033, 1037 (Pa. Super. 1998). Absent some special element of unfairness, a prompt, one-on-one identification is not *per se* violative of the accused’s constitutional rights, even where the complainant views the accused in handcuffs in a police vehicle or in the presence of uniformed officers. *Commonwealth v. Armstrong*, 74 A.3d 228, 238-239 (Pa. Super.

2013); *Moye*, 836 A.2d at 977.

In the alternative, Defendant claims that the facts and circumstances establish that the identification was unduly suggestive and subject to suppression. These circumstances include the following: (1) the police escorted the eyewitness to Defendant's home; (2) the police told the witness that they had an alleged suspect in custody, but she was never told that the robber may not be there at the location or that he may not be the suspect at all; (3) the identification was conducted through a police car window on an overcast winter day with another alleged witness in the vehicle, with the Defendant was approximately thirty feet away; and (4) Defendant was escorted from his home surrounded by several armed police officers.

The court disagrees with defense counsel's description of the circumstances. Although several uniformed police officers were present at the residence, they were not surrounding Defendant. The witness did not know if the police officers were armed; she didn't check for that because she expected them to be armed. Trooper McGee, who was in plain clothes, asked Defendant to follow him down the driveway and Defendant agreed to do so. Defendant also was not handcuffed and he was not wearing red pants or a jacket with an X on it.

The witness testified that she was not told whether the perpetrator was or was not at the residence. She knew the purpose of going to the residence was to view an individual to see if the perpetrator was there. She also testified that although another employee was in the car with her, he was not asked to identify the individual at the residence because he did not think he saw the perpetrator clearly enough.

The factors set forth in *Sample*, supra, support the admissibility of the identification. The witness had a good opportunity to view the perpetrator at the time of the crime. After the manager told the perpetrator that the female he was holding or threatening with a knife did not even work there, the perpetrator walked right over next to the manager and said “Give me the money or I’ll stab you.” When the manager refused, the perpetrator went to the cash register to take the money himself. The manager followed him. The perpetrator removed his mask to better see the register, and the manager saw his face for a minute or more. The manager was attentive to the robber and his actions.

The identification occurred within an hour of the robbery. Despite the fact that Defendant was not wearing the red pants and jacket at the time of the identification, the witness was so sure Defendant was the perpetrator that she said she would “bet her kids’ lives on it.”

Under the totality of the circumstances, the court finds the identification was reliable.

Defendant also claims the identification should be suppressed because he was arrested in his home without an arrest or search warrant. This contention is not supported by the record in this case. There are several exceptions to the warrant requirement, including consent. The police went to the residence to investigate the robbery after they ran the license plate of the white Subaru and discovered that the registered owner lived there. The occupants of the residence, including Defendant, cooperated with the police. They let the officers inside the residence (Defendant’s Omnibus Motion, para. 10), the owner of the Subaru consented to a witness viewing the vehicle, Defendant voluntarily participated in the show-

up, and the females consented to a search of the residence. Furthermore, Trooper McGee credibly testified that Defendant was handcuffed and arrested in the driveway *after* the manager identified him as the robber.

Defendant also contends that his compelled participation in the identification procedure constitutes self-incrimination. This contention is not supported by the facts or the law. Indeed, Defendant has not cited one case to support his claim. Defendant voluntarily followed Trooper McGee down the driveway where he could be viewed by the manager of the Uni-Mart. Furthermore, the right against self-incrimination has long been held to exclude only evidence which is testimonial in nature, as opposed to demonstrative or physical evidence. As Justice Holmes wrote over 100 years ago, “the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.” *Holt v. United States*, 218 U.S. 245, 252-253 (1910); see also *Commonwealth v. Aljoe*, 216 A.2d 50, 52-53 (Pa. 1966); *Commonwealth v. Romesburg*, 509 A.2d 413, 415 (Pa. Super. 1986)(“Field sobriety tests do not elicit testimonial or communicative evidence and, thus, do not trigger fifth amendment protection.”); *Commonwealth v. Fernandez*, 482 A.2d 567, 569 (Pa. Super. 1984)(compelling the defendant to shave his beard to facilitate his identification did not violate his rights against self-incrimination).

Defendant next seeks suppression of the physical evidence, claiming that the search of the residence violated his rights against unreasonable and unlawful searches and seizures under both the United States Constitution and the Pennsylvania Constitution,



because Defendant was arrested in his home without an arrest warrant or search warrant and the warrantless search of the residence was not made voluntarily.<sup>2</sup> These claims are without merit. Defendant was arrested outside his home after he participated in the show-up. The show-up was not a ruse to circumvent any warrant requirement; it was a legitimate identification procedure to ensure that Defendant was the individual who robbed the Uni-Mart and drove away in the white Subaru. It also is useful evidence to rebut any claim that someone else took the white Subaru without authorization. Moreover, the police not only obtained consent to search from the owner of the residence, the police also obtained a search warrant for the residence. Therefore, even assuming arguendo that the consent was not voluntary, the evidence would have been inevitably discovered when the police executed the search warrant.

Defendant's motion to suppress statements is moot. The Commonwealth indicated at the hearing that Defendant did not make any incriminating statements and it did not intend to introduce any of his statements at trial.

Defendant also filed a motion to disclose promises of immunity, leniency or preferential treatment as well as the complete criminal history of the witnesses the Commonwealth intends to call at trial. The court believes that this request is moot either because there is no such information or because the Commonwealth has already provided such. If the court is incorrect, the parties shall confer in an effort to resolve any issue and notify the court in writing of any outstanding disputes that cannot be resolved.

Defendant filed a motion for disclosure of other crimes, wrongs or act

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<sup>2</sup> The Court notes that Defendant withdrew paragraphs 32-34 of his Omnibus Motion.

pursuant to Pa.R.E. 404(b). Consistent with the court's prior practice and the Order entered in this case on March 26, 2014, the Commonwealth shall provide notice to defense counsel no later than the date of the pretrial of any 404(b) evidence that it intends to introduce at trial, unless the reason for such was discovered afterwards.

Defendant also filed a motion for formal discovery for copies of all video surveillance, results of all scientific or forensic testing, and notice and disclosure of each expert witness consulted in the instant matter. At the hearing, defense counsel indicated that a copy of the video surveillance was provided but he was having difficulty opening and viewing it. The parties indicated that they believed they could work out these discovery issues. If they cannot, they shall notify the court of this fact and their position on any disputed issues in writing so that the court can either rule on the issues or, if necessary, schedule further argument.

Defendant filed a petition for writ of habeas corpus in which he asserts that he was never advised that by waiving his preliminary hearing he agreed to waive his right to file a petition for writ of habeas corpus, any alleged waiver was invalid, and the Commonwealth's evidence is insufficient as a matter of law to establish a *prima facie* case as to the charges. The court finds that Defendant is not entitled to relief on this issue.

A defendant who is represented by counsel and waives his preliminary hearing is precluded from raising the sufficiency of the Commonwealth's *prima facie* case unless: (1) the parties have agreed at the time of the waiver that the defendant may later challenge the sufficiency; or (2) the defendant waived the preliminary hearing by way of an agreement made in writing or on the record and the agreement is not accomplished.

Pa.R.Crim.P. 541. A petition for writ of habeas corpus is a challenge to the sufficiency of Commonwealth's *prima facie* case. *Commonwealth v. Claffey*, 80 A.3d 780, 788 (Pa. Super. 2013).

On March 14, 2014, Defendant waived his preliminary hearing before MDJ Jon Kemp by signing a Waiver of Preliminary Hearing form. The form states in relevant part: "I understand that when I am represented by counsel and I waive the right to a preliminary hearing, I am thereafter precluded from raising challenges to the sufficiency of the *prima facie* case. .... I knowingly, voluntarily, and intelligently make this waiver of my preliminary hearing." Defendant was represented by an assistant public defender at the time scheduled for the preliminary hearing. Defendant has not alleged that the parties agreed that he could file a petition for habeas corpus or that an agreement was reached at the preliminary hearing that was not accomplished. Defendant also has not alleged any facts to support his boilerplate conclusions that his waiver was invalid and that the Commonwealth's evidence is insufficient to establish a *prima facie* case as to the charges. Therefore, Defendant has waived his right to file a petition for writ of habeas corpus.

Defendant filed a motion in limine to exclude any and all lay person opinion evidence identifying Defendant as the person depicted in any of the robbery surveillance video. As long as the proposed testimony is based on the witness' perception, is not based on technical or specialized knowledge, and is helpful to a clear understanding of the witness' testimony or a fact in issue, lay opinion testimony is admissible. Pa.R.E. 701; *Commonwealth v. Spencer*, 639 A.2d 820, 824 (Pa. Super. 1994)(witness permitted to testify that the defendant's gait was similar to that of the robber depicted on the surveillance video).

As is *Spencer*, the identity of the robber is an issue in this case, as Defendant has denied any involvement in the robberies. Therefore, lay testimony regarding the identification of Defendant is admissible.

Defendant's final request is a motion to reserve the right to file additional pretrial motions since there may be additional discovery that has not been received. Consistent with the court's prior practice, the court will permit Defendant to file a supplemental omnibus pretrial motion provided it is based on discovery provided after the date of the hearing in this matter.

**ORDER**

**AND NOW**, this \_\_\_ day of June 2015, upon consideration of Defendant's omnibus pretrial motion, it is ORDERED and DIRECTED as follows:

1. The court denies Defendant's motion to suppress identification.
2. The court denied Defendant's motion to suppress physical evidence.
3. Defendant's motion to suppress statements is moot as the Commonwealth has represented that Defendant has not made any incriminating statements and it does not intend to use at trial any statements that Defendant made when the police came to his residence on February 5, 2014.
4. The court believes Defendant's motion for disclosure of promises of leniency and complete criminal history of the Commonwealth's witnesses and the motion for discovery have been resolved or are being resolved by the parties. If there are any unresolved issues regarding these motions, the

parties shall notify the court in writing.

5. The court grants Defendant's motion for disclosure of other crimes, wrongs or acts pursuant to Pa.R.E. 404(b). Consistent with the court's practice, the Commonwealth shall provide notice of any 404(b) evidence no later than the pretrial date unless the reason for such was discovered afterwards.
6. The court denies Defendant's petition for writ of habeas corpus. Defendant waived his right to file a petition for writ of habeas corpus when he signed the Waiver of Preliminary Hearing form. Defendant also waived this issue by making a boilerplate, conclusory allegation that his waiver is invalid and the Commonwealth's evidence is insufficient.
7. The court denies Defendant's motion in limine to exclude lay person opinion evidence identifying Defendant as the person depicted in any of the robbery surveillance videos.
8. The court grants Defendant's motion to reserve right. If Defendant is provided any additional discovery past the date of the hearing in this matter, Defendant is permitted leave to file any supplemental omnibus pretrial motion based on said additional discovery.

By The Court,

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Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)

Edward J. Rymza, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file