

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

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| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | CR-783-2021 |
| | : | CR-743-2021 |
| vs. | : | |
| | : | CRIMINAL DIVISION |
| DARREN BROWN, | : | |
| Defendant | : | |

OPINION

This matter is before the Court on two Omnibus Pre-Trial Motions filed in the above referenced matters. Argument was held on October 22, 2021. At the time of argument, the Commonwealth indicated that it will provide the requested information relating to the Confidential Informant to Defendant at least seven (7) days prior to trial. Defendant agreed that this resolves the issues raised in the Omnibus Motion in case 743-2021. The remaining issues relate to the Motion filed in case 783-2021 only.

I. Factual and Procedural Background

On January 9, 2021, Defendant was charged with Burglary,¹ Criminal Trespass,² eight (8) counts of Aggravated Assault,³ Possessing Instruments of Crime,⁴ four (4) counts of Recklessly Endangering Another Person,⁵ Firearms Not to Be Carried Without a License,⁶ and Criminal Mischief.⁷ Specifically, the Information identifies a four (4) year old

¹ Count 1.

² Count 2.

³ Counts 3 through 10.

⁴ Count 11.

⁵ Counts 12 through 15.

⁶ Count 16.

⁷ Count 17.

and one (1) year old as the victims in Counts 4, 5, 8, and 9. The Affidavit of Probable Cause alleges the following:

On January 9, 2020, Defendant kicked in the door to the home of Nichole Gilliard, the Defendant's ex-girlfriend, where Ms. Gilliard, an unidentified male acquaintance, a four (4) year old child, and one (1) year old child were present. Ms. Gilliard saw Defendant brandish a gun, and thereafter pushed him down the stairs. After refusing to leave, Defendant again pulled out the gun and attempted to strike Ms. Gilliard across the face with the butt of the gun. A physical struggle ensued and eventually Defendant discharged the firearm and fled the scene.

A preliminary hearing was held June 8, 2021 at which time Ms. Gilliard testified that a person kicked in her door while she, a male friend, and two children were in the home, and that that person had a gun. *See June 8, 2021 Transcript at pages 1-2 and 4.* Upon seeing the gun, Ms. Gilliard pushed the person down the stairs and at some point the gun went off. *See June 8, 2021 Transcript at page 3.* When asked if she had any idea who the individual was who fired the gun, Ms. Gilliard answered “[n]o, because the person had a mask on.” *See June 8, 2021 Transcript at page 4.*

The Commonwealth then presented a video recording of Ms. Gilliard's statement she gave the same day as the incident at which time she identified the Defendant as the perpetrator. Specifically, she identifies him as her “crazy-ex boyfriend” and, in response to a question about what he was wearing, states that he was wearing a blue puffy coat but says nothing about a mask. Ms. Gilliard identifies the perpetrator as the Defendant in no uncertain terms.

At the preliminary hearing, Ms. Gilliard testified that at the time she gave her statement to the police, she thought she knew who the person was and she assumed it was Defendant because they were having arguments. *See June 8, 2021 Transcript at pages 5 and 6.*

Defendant now files a Writ of Habeas Corpus in the form of an Omnibus Pre-Trial Motion and argues that all Counts should be dismissed because District Justice Frey improperly admitted Ms. Gilliard's recorded interview and then made a credibility determination regarding Ms. Gilliard's conflicting testimony.

II. Discussion

In support of his assertion that all Counts should be dismissed, Defendant sets forth the following three arguments:

a. Prior Inconsistent Statement

At the preliminary hearing, Ms. Gilliard testified inconsistently, compared to her statement given to police immediately following the incident, regarding the identity of the perpetrator who allegedly broke into her house. Following this testimony, the Commonwealth introduced evidence of Ms. Gilliard's prior inconsistent statement both as substantive evidence and in an attempt to impeach its own witness. Defendant argues that this was improper pursuant to Rule of Evidence 803.1(3). The Court disagrees.

“A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility.” Pa.R.E. 613(a). Additionally, prior statements may be admitted as substantive evidence and are not excluded by the hearsay rule when the witness is subject to cross-examination and:

1. A prior statement made by a declarant-witness is inconsistent with the declarant-witness's testimony and "is a verbatim contemporaneous electronic recording of an oral statement." Pa.R.E. 803.1(1)(C).

2. A prior statement made by a declarant-witness identifying a person, made after perceiving the person, provided that the declarant-witness testifies to the making of the prior statement. Pa.R.E. 803.1(2).

3. A memorandum or record made or adopted by a declarant-witness that:

a. is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;

b. was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and

c. the declarant-witness testifies [sic] accurately reflects his or her knowledge at the time when made.

Pa.R.E. 803.1(3).

Here, Ms. Gilliard was subject to cross-examination on her prior inconsistent statement and, in fact, was cross-examined at the time of the preliminary hearing. It is undisputed that her statement given to the police following the incident and her testimony at the time of the hearing were inconsistent with one another. There is no argument from Defendant that her inconsistent statement was not a verbatim contemporaneous electronic recording, as Ms. Gilliard was recorded while being interviewed by the police. Therefore, Rule 803.1 subsection (1)(C) is met.

Additionally, the subject of Ms. Gilliard's inconsistent statements was the identity of the perpetrator. On the same day as the incident, she gave a recorded statement to the police identifying the perpetrator as Defendant, Darren Brown. At the time of the hearing, after Ms. Gilliard testified that she could not identify the perpetrator because he had a mask on, she specifically testified that she remembers giving an interview to the police and acknowledged telling them that the perpetrator was Defendant. *See June 8, 2021 Transcript at pages 4-6.* Therefore, Rule 803.1 subsection (2) is also met.

Finally, a record – the recorded interview – was made by Ms. Gilliard when she gave a statement to the police after the incident in her home when the incident was still fresh in her mind. At that time, she identified Defendant as the perpetrator. At the time of the hearing, she testified that she could not identify the perpetrator because he had a mask on, but not necessarily because she could not recall. *See June 8, 2021 Transcript at page 4.*

The Superior Court has held that “[t]his exception only applies where the witness lacks a present recollection of the event.” *Croyle v. Smith*, 918 A.2d 142, 148 (Pa. Super. 2007), *citing Commonwealth v. Young*, 748 A.2d 166, 177 (Pa. 1999). Here, it is not the case that Ms. Gilliard could not remember the identity of the perpetrator. Rather, she simply changed her mind. For this reason, the Court finds that the elements in Rule 803.1 subsection (3) are not met.

Despite all of this, it is well known that “hearsay evidence is admissible at a preliminary hearing and the Commonwealth may offer it to meet its burden of establishing a prima facie case, *i.e.*, proof that a crime has been committed and the accused is probably the one who committed it.” *Com. v. Carmody*, 799 A.2d 143, 146 n.2 (Pa. Super. 2002), *citing*

Com. v. Tyler, 587 A.2d 326, 328–29 (Pa. Super. 1991). Therefore, since hearsay evidence was admissible at the preliminary hearing and since the prior inconsistent statement is admissible pursuant to subsections (1)(C) and (2), *supra*, Ms. Gilliard’s statement was properly admitted into evidence.

b. Credibility Determination

Next, Defendant argues that, even if the Commonwealth has successfully impeached its own witness, the District Justice is not permitted to make a credibility determination, which he did when he heard both Ms. Gilliard’s testimony at the hearing *and* her initial statement to the police. Because those two are inconsistent with one another, he was required to weigh the evidence and ultimately chose to bound over the charges. Obviously, if District Justice Frey had not heard Ms. Gilliard’s prior statement, he could not have bound over the charges because the Defendant was not identified as the perpetrator.

At a preliminary hearing, the Commonwealth’s burden is met when it “produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense The evidence supporting a *prima facie* case need not establish the defendant’s guilt beyond a reasonable doubt, but must only demonstrate that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to proceed to a jury.” *Com. v. Wroten*, 257 A.3d 734, 742 (Pa. Super. 2021), *citing Com. v. Montgomery*, 234 A.3d 523, 533 (Pa. 2020).

At this stage, a District Justice is not permitted to determine credibility or weigh the evidence; rather, the evidence must be viewed in a light most favorable to the Commonwealth. *Com. v. Perez*, 249 A.3d 1092, 1102 (Pa. 2021); *Wroten*, 257 A.3d at 743.

The *Wroten* Court reversed a trial court's ruling that the Commonwealth had not established a prima facie case when it found that a witness was contradictory, that the evidence presented was "he said she said," and when it failed the Commonwealth for failing to show that defendant had a trait or habit of using excessive force. *Wroten*, 257 A.3d at 743. These findings indicated that the trial court was clearly not viewing the evidence in the light most favorable to the Commonwealth. *Id.*

Here, Ms. Gilliard is obviously giving two different stories – one where the Defendant was the perpetrator and one where she was unable to identify the perpetrator. Because the District Justice bound over the charges, Defendant now argues that he chose to believe Ms. Gilliard's prior statement that the perpetrator was the Defendant. However, if he had dismissed charges, the Commonwealth would have been arguing that he chose to believe Ms. Gilliard's testimony that she could not identify the perpetrator. Essentially, he was "stuck between a rock and hard place."

However, in the latter hypothetical, the Commonwealth has an argument that the Defendant does not – that the District Justice must view the evidence in the light most favorable to the Commonwealth. As Defendant correctly points out, the District Justice cannot simply "pick and choose" which story to believe. Therefore, since substantive evidence was presented of Ms. Gilliard identifying the Defendant, the District Justice had no choice but to accept that as true. Whether Ms. Gilliard was lying or telling the truth at the time she gave her statement to the police will be relevant only for the fact finder at the time of trial. At this stage of the proceedings, however, it was proper for the District Justice to find that the Commonwealth met its burden of proof and bound over the charges.

c. Children as Victims

Finally, Defendant argues that any Counts identifying the four (4) and (1) year old as victims should be dismissed because Ms. Gilliard's testimony does not support any intent or actual harm to them. Based on the Commonwealth's concession on this point, Counts 4, 5, 8, and 9 are dismissed.

III. Conclusion

The Court finds that Ms. Gilliard's prior inconsistent statement was properly admitted into evidence at the preliminary hearing and that the Commonwealth has established its burden of proof. Therefore, Defendant's Omnibus Pre-Trial Motions are denied, and all charges will remain with the exception of Counts 4, 5, 8, and 9, which are dismissed.

ORDER

AND NOW, this **16th** day of **November, 2021**, upon consideration of Defendant's Omnibus Pre-Trial Motions and for the reasons set forth above, in case 743-2021, the Motion is **DENIED** as moot. In case 783-2021, the Motion is **GRANTED** in part and **DENIED** in part. Counts 4, 5, 8, and 9 are **DISMISSED**. The remainder of the Motion is **DENIED**.

By the Court,

Ryan M. Tira, Judge

RMT/ads

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