

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-630-2020**
 v. :
 :
 GARY COLATOSTI, : **OMNIBUS MOTION**
 Defendant :

OPINION AND ORDER

On September 9, 2020, Gary Colatosti (Defendant) filed an Omnibus Pretrial Motion including a Writ of Habeas Corpus, seeking additional discovery¹, and requesting the right to file additional motions should the need arise. A hearing on the motion took place on October 30, 2020. At that hearing, both Defendant and the Commonwealth agreed to rely upon the testimony provided at the preliminary hearing to resolve the habeas corpus petition. In his Omnibus motion, Defendant argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing and all charges should be dismissed.

Preliminary Hearing Testimony

Defendant was charged with two counts of Aggravated Cruelty to Animals,² two counts of Theft by Unlawful Taking,³ two counts of Receiving Stolen Property,⁴ two counts of Criminal Mischief,⁵ three counts of Tampering with Physical Evidence,⁶ and two counts of Cruelty to Animals⁷. The preliminary hearing was held on June 5, 2020. Edwin Kitzmiller, III

¹ The request for additional discovery was addressed at the time of the hearing and has been satisfied.

² 18 Pa. C.S. § 5534(a)(1).

³ 18 Pa. C.S. § 3921(a).

⁴ 18 Pa. C.S. § 3925(a).

⁵ 18 Pa. C.S. § 3304(a)(2).

⁶ 18 Pa.C.S. § 4910(1).

⁷ 18 Pa. C.S. § 5533(a).

(Kitzmiller) and Trooper Anthony Mazzone (Mazzone) testified on behalf of the Commonwealth. In May 2019, Kitzmiller and his family bought two calves for \$1,500 each: Lexi, a red and white registered Holstein, and Lindy, a black and white registered Holstein. P.H. 6/5/2020, at 4, 11. Over the next several months, the cows broke out of their fence a few times, but always returned home together. Id. at 6. On January 8, 2020, Lindy and Lexi escaped their electric fence enclosure and wandered off the Kitzmiller property. Id. at 4. Later that afternoon, however, only Lexi returned. Id. at 7. She had sustained a potentially life-threatening wound in her neck that required veterinary care. Id. at 7-8. A vet report indicated that it was highly unlikely that her injury was caused by her escape or by another animal. Id. at 31. Kitzmiller stated that Lexi's demeanor had changed tremendously to the point where she would not allow anyone to get close to her. Id. at 9. Prior to this escape, Lexi had never displayed this type of behavior. Id. Kitzmiller's property and Defendant's property are separated by land owned by John Hall (Hall). Id. at 12. A neighbor informed Kitzmiller's wife that the Colatosti's had seen the cows on their property. Id. at 6. Kitzmiller called and got permission from Defendant's wife to search their property for Lindy the next morning. Id. at 20.

On January 9th, Mazzone was dispatched for a report of animal cruelty involving cows. Id. at 26. He spoke with Kitzmiller and another witness to confirm what happened. Id. at 26, 32. The witness told Mazzone he had seen Defendant with a propane tank and torch burning a brush pile that contained animal guts, but when Mazzone inspected the brush pile with Defendant's permission, no guts were found. Id. at 26. Mazzone did notice a small blood trail leading to the brush pile and questioned Defendant about it. Id. at 34. Defendant responded it was likely deer or elk blood from Defendant's work as a taxidermist. Id. Following this conversation, Mazzone left to attend to another call. Id. at 34-35. Kitzmiller followed cow

tracks in the snow from his house, across Hall's land, all the way to Defendant's property. Id. at 21. Then, Kitzmiller followed tracks from Defendant's residence onto Hall's property and there he found front hindquarters of a cow cut up and put into trash bags. Id. at 5, 9, 20-21. Based on the black and white cow hair and manure stuck to the body parts, Kitzmiller believed these to be some of Lindy's remains. Id. at 10. Only Hall and Defendant had permission to be on the property where the body parts were found. Id. at 10.

Mazzone was dispatched to return to Defendant's property later that same day based on reports of a disturbance between Defendant and Kitzmiller over the missing cow. Id. at 27. Upon his arrival, Mazzone noticed "a whole bunch" of blood markings and tracks throughout Defendant's yard that were not present on his first visit earlier that morning. Id. He also saw blood and black hair in the bed of Defendant's pick-up truck. Id. Samples of the blood were taken from the truck and the results confirmed the substance was blood but could not determine the source of the blood. Id. at 40. Kitzmiller then showed Mazzone the trail of tracks he followed, beginning with ATV tracks starting on Defendant's property that lead into a field. Id. at 27. Those tracks lead to two sets of footprints headed into the woods. Id. at 26-27. The footprints took them to a downed tree where Kitzmiller had discovered the quartered beef in plastic bags. Id. at 27-28. The meat was still warm despite the cold temperatures and snow. Id. at 41-42. Mazzone took samples of the blood at this location and lab results came back positive for bovine blood. Id. at 29. Mazzone noticed a nearby dump pile in the field that smelled like fuel or gasoline. Id. at 28. Defendant's wife had given Mazzone permission to take pictures of the tire tread on Defendant's ATV when Mazzone arrived on the scene. Id. Mazzone compared those pictures to the tracks in the snow that lead to the cow parts on Hall's property and the tires on Defendant's ATV matched the tire tracks. Id. However, Defendant denied going to that

area where the cow parts were found but did admit to going to that field to dump fuel or gasoline. Id. at 28-29. A few days later, a friend of the Kitzmillers discovered cow remains in Columbia County and notified the police. Id. at 22. Two troopers were sent to the scene where a hide, tail, and legs were found among deer legs. Id. at 10, 30. Kitzmiller later identified these parts as Lindy's by the markings on said hide. Id. at 10.

Discussion

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. Commonwealth v. McBride, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. Id. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). "The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence." Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001); *see also* Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983); *see also* Commonwealth v. Kohlie, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, "inferences reasonably drawn from the evidence of record which would support a

verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003).

Defendant contends that the Commonwealth failed to satisfy the *prima facie* burden at the preliminary hearing. Defendant challenges the sufficiency of the evidence on all the charges brought against him. He maintains that the Commonwealth relied on suspicion and conclusory inferences to support their position. First, Defendant argues that the two counts of Aggravated Cruelty to Animals should be dismissed. To commit this offense, a person must intentionally or knowingly torture, neglect, or cause serious bodily injury or death to an animal. 18 Pa.C.S. § 5534. As for Lindy, Defendant argues there was insufficient evidence to show he intentionally or knowingly caused the cow’s death. In regards to Lexi, Defendant argues there was also insufficient evidence demonstrating he caused the cow serious bodily injury. Additionally, he alleges that there is a lack of evidence establishing that Lexi’s neck injury constituted serious bodily injury. The Commonwealth states that Lindy’s death is sufficient in itself to satisfy the elements of this count. Additionally, with respect to Lexi’s injury, the evidence presented at the preliminary hearing included the photos of the injury as well as the vet report discussing the severity of the injury and the Commonwealth believes this is enough to satisfy the *prima facie* burden. Second, Defendant asserts that there was insufficient evidence to support Theft by Unlawful Taking. To commit this offense, one must unlawfully take or exercise unlawful control over the property of another with the intent to deprive. 18 Pa.C.S. § 3927. Defendant asserts the evidence did not show that Defendant had been in possession of or exerted control over the cows. Third, Defendant argues that the evidence was insufficient to establish Receiving Stolen Property. To commit this offense, someone must intentionally receive, retain,

or dispose of “movable property of another knowing that it has been stolen, or believing that it has probably been stolen...” 18 Pa.C.S. § 3925. Defendant’s argument is that no evidence was presented to prove that the cows were stolen and mere possession of stolen property alone is not enough. Defendant also argues that the fact that the cows wandered onto his property is not enough to show that he committed this offense. Fourth, Defendant argues that the evidence was insufficient to establish Criminal Mischief because no evidence revealed that Defendant intentionally or recklessly tampered with the bovines. Fifth, Defendant asserts that the evidence does not support the charge of Cruelty to Animals because no evidence was offered to show that Defendant intentionally, knowingly, or recklessly abused or mistreated either cow.

Sixth, Defendant argues that the evidence was insufficient to establish Tampering with Evidence when no evidence was shown to demonstrate that Defendant was responsible for dumping the bovine parts at either location. Defendant also alleges that there was no evidence that he removed the cow parts with the intent to impair its availability. To support his position, Defendant cites to Commonwealth v. Gettemy, 591 A.2d 320 (Pa. Super. 1991). In Gettemy, police investigated the disappearance of a woman and her motorhome. Id. at 322. The defendant was charged with Tampering with or Fabricating Physical Evidence, among other charges, and subsequently challenged the sufficiency of the evidence on that charge. Id. The Pennsylvania Superior Court found that the record merely established that defendant was present in the states where the missing motorhome was seen. Id. at 323. The Court held that this was not enough to satisfy the *prima facie* burden and dismissed the charge. Id. For this case, the Commonwealth argues that by dismembering the cow, dumping the parts in two different locations, and burning guts in a fire, the Defendant was actively trying to eliminate any evidence. The Commonwealth also proffers that there was fresh blood found in Defendant’s

yard and that Defendant was aware of the criminal investigation due to several conversations with law enforcement. The Court believes that, though the Commonwealth relies on circumstantial evidence as they did in Gettemy, there are more links to the Defendant in this case, as previously listed, that would support the Commonwealth's position for Counts 12 and 13.

The Commonwealth's position on the remaining charges is that the evidence presented at the preliminary hearing was enough to satisfy the *prima facie* burden. This Court also agrees with the Commonwealth on Counts 1 through 11. Though the Commonwealth's case relies heavily on circumstantial evidence, there are enough links to the Defendant to meet this initial burden. However, if the Commonwealth wishes for a jury to convict on these counts, more evidence will be required to satisfy their burden at trial. However, that is not the question presented to the Court at this time. Therefore, the Defendant's motion to dismiss all charges is denied.

Conclusion

The Court finds that the Commonwealth presented enough evidence at the preliminary hearing to establish a *prima facie* case for the charges against Defendant. Therefore, Defendant's Petition for Writ of Habeas Corpus is denied.

ORDER

AND NOW, this 19th day of February, 2021, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Petition for Writ of Habeas Corpus in his Omnibus Pretrial Motion is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (LF)
Edward J. Rymysza, Esq.