

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :  
 :  
 vs. : No. CR-971-2020  
 :  
 CECIL THOMPSON, :  
 :  
 Defendant : Omnibus Pretrial Motion

**OPINION AND ORDER**

Defendant is charged by Information filed on August 21, 2020 with burglary and related charges. Defendant is alleged to have illegally entered and robbed the residence of 951 High Street on May 18, 2020 at approximately 1:30 p.m.

Defendant allegedly knocked on the front door and asked to see “Lisa.” As the minor who answered the door was closing it, Defendant allegedly forced his way into the residence, pointed a handgun at the three juveniles present and ordered them to get to the ground and to be quiet or he would shoot them.

He then forced the three juveniles, ages 9, 10 and 16, up to the second floor bedroom of Sherry Clark, their grandmother. He pointed the gun at Ms. Clark while instructing the juveniles to sit down. Ms. Clark began swinging a flashlight or similar device repeatedly at Defendant. An altercation ensued with Defendant striking Clark in the head, knocking her to the floor. However, Clark kept striking Defendant which prompted him to run from the bedroom and flee the residence.

On surveillance videos taken from the home, Defendant is alleged to have been in a gray/black hooded sweatshirt, blue jeans and white sneakers with a mask below his face. He is allegedly observed watching Clark carrying groceries into the house, after which

he raises his mask and approaches the residence.

On or about June 5, 2020, Clark's family members indicated that they observed Defendant walking past the residence and immediately recognized him. Photographs of this individual were subsequently shown to the victims who identified the individual as Defendant.

On May 14, 2021, Defendant filed an omnibus pretrial motion. The motion includes a motion to suppress identification, a motion in limine, a motion to admit expert identification testimony, a motion for discovery and a motion to admit records. A hearing and argument on the omnibus pretrial motion were held before the court on July 19, 2021.

Numerous exhibits were admitted into evidence on behalf of the parties' respective positions. The Commonwealth admitted two exhibits: Commonwealth Exhibit 1, a disc recording of the preliminary hearing held before MDJ Christian Frey on August 4, 2020, and Commonwealth's Exhibit 2, a transcript of that preliminary hearing. Defendant admitted eight different photographs marked as Defendant's Exhibits 1 through 5, and the Curriculum Vitae (CV) of Dr. Suzanne Mannes, an Associate Professor of Psychology at Weidner University, which was entered as Defendant's Exhibit 6.

Before the court is Defendant's Omnibus Pretrial Motion filed on May 14, 2021. The omnibus pretrial motion consists of several underlying motions. As noted, a hearing was held on July 19, 2021. Following the hearing, argument was held. The matter is now ripe for a decision.

Count I of the omnibus pretrial motion is a motion to suppress identification.

Defendant requests that the court suppress “all out-of-court identifications by the victims”, “their identification of Mr. Thompson at the preliminary hearing” and that the court prohibit all “future in-court identifications.”

Defendant argues that, under the totality of the circumstances, Defendant’s identification at the preliminary hearing was unreliable and unduly suggestive. Defendant submits that the identifications occurred after the victims observed Defendant walk by their home numerous times following the crime even though they sent to the police a still photograph from their surveillance video of a different black male “clearly not the...defendant.”

Further, Defendant argues that on July 29, 2020, a day after Defendant was in custody and two months after the incident on May 18, 2020, one of the victims was shown a line-up which included Defendant. During this line-up, the witness identified Defendant based on his “eyes” although testifying that Defendant was 20 to 30 feet away which, according to Defendant, would make it “hard to capture someone’s eyes.” Furthermore, Defendant argues that the photo array shown to the victim did not include any individuals with “weird bumps” on their foreheads. Moreover, Defendant argues that he does not have any weird bumps or “an odd forehead.”

In addressing this issue, the court has reviewed the transcript of the preliminary hearing before MDJ Frey on August 4, 2020, as well as the CD containing the audio-visual recording of that preliminary hearing and the other exhibits introduced into evidence. Moreover, the court reviewed its notes from the July 19, 2021 hearing.

Sherry Clark testified first on behalf of the Commonwealth. She testified via Zoom remote technology from the office of the District Attorney. On the date of the incident, she was at 951 High Street, where she lives with her husband and grandson.

She described a very tumultuous incident in which a black individual entered her home and went to her bedroom while pointing a gun to her grandson's head. She and the individual were involved in a melee with her striking him on numerous occasions and him striking her. Much of the melee was in areas of the home where there were no lights on. The incident was very traumatizing to her.

In terms of identifying the perpetrator, she indicated that the person who entered her home was the same person she had seen previously outside of the residence hiding behind a tree. When she was asked to identify him on the computer screen, she was unable to do so. She did note that the perpetrator had a weird forehead. There were 11 different zoom boxes in which 10 had faces. She could not identify Defendant from looking at any of the boxes. The Commonwealth, in an abundance of caution, would not point Defendant out nor would it enlarge his box.

On cross-examination, she indicated that the perpetrator had on a blue and white face mask during the incident and the face mask was up to the top of his nose. She also clarified that while the perpetrator was in her home, she did not recognize him as the individual she previously saw standing outside of her home. It was only after her daughter referenced to her that the individual previously standing outside of the home was wearing a gray sweatshirt, and she remembered what the perpetrator had on, that she made the

connection that it was the same person.

She further explained that the perpetrator also was wearing a hoodie sweatshirt with the hood up on his head. She admitted that she could only see about three to four inches of the individual's face and that he had "a weird forehead" with "two like bumps on each side of his forehead on top." She also noted that the individual standing outside of her house was wearing prescription glasses while the individual inside the house was not.

During the preliminary hearing, it was established that the witness had video surveillance outside of her house. The video surveillance was provided to the police. During the preliminary hearing, the witness was provided with a picture that was captured by Agent Bolt of the Williamsport Police Department. The picture was taken from the videotape. The picture was marked as Defendant's Exhibit 1 at the suppression hearing in this matter.

At the preliminary hearing, the witness testified that she had not seen the picture before but was seeing it for the first time. She identified the picture as the individual who broke into her house.

Further, the witness conceded that because she was "too scared for her grandkids" that she was not able to focus on everything when it was going on.

Dana Sierra next testified on behalf of the Commonwealth. She, her husband and two children live in the other side of the half-double where the incident allegedly occurred. Her mother is Sherry Clark.

On the date in question, she was returning from running errands with her mother and, approximately 30 feet from the location of her house, she saw a man standing on

the corner. He had just crossed the street and had turned around. Upon him noticing the car, he turned his “full body facing the direction” of the car and made eye contact with her. She could not recognize him as he pulled his mask up onto his face. She had never seen this individual prior to that date.

During the preliminary hearing, she identified Defendant from the Zoom depiction on the computer. She also identified Defendant’s Exhibit 1 as a photograph of the same individual she saw as she was approaching her residence.

She further testified that prior to the preliminary hearing, she was brought in for a line-up. She identified Defendant from the line-up pictures. Prior to the incident, she had never seen the individual. Since the incident, however, she saw him walking by her house. While reviewing the surveillance videos, she recognized the individual as the same individual who she had seen on the day of the incident.

A picture of the video was obtained as well. She identified the picture as the individual who she had seen on the day in question. That photograph was marked and admitted as Defendant’s Exhibit 2 at the hearing in this matter.

In describing the individual, she too referenced that he was wearing glasses and had “an odd forehead.” She clarified that “there was more of distinct physical features than most people’s foreheads.” According to the witness, “he seemed to have sort of a bump or kind of ridged...forehead.”

Subsequent to the incident, she and other family members had noticed the individual walking by their home on numerous occasions. Every time they saw him walking

by, they sent a still photograph from the surveillance videos to law enforcement.

Furthermore, her husband had sent “some videos over.”

She clarified that the identification from the line-up was “of the man [she] eye contacted, who pulled up his mask that day and entered [her] mom’s home.”

Christian Rivera was next called to testify on behalf of the Commonwealth. On the day of the incident at approximately 1:30 in the afternoon, he was at his grandmother’s house. He confirmed that his grandmother and mother were out doing errands and that they returned to the home at some point.

He helped with the groceries and went downstairs for a few minutes when there was a knock on the back door. His sister opened the door. At the door was an African American adult male who he had never seen before.

After a brief conversation, he went to shut the door when the individual pulled out a gun. He described the clothing that the perpetrator was wearing and noted that he had a face covering over his mouth and nose. Because of the face covering, he could only see about halfway up his nose to his forehead and hairline.

After a period of time and some back and forth conversation the perpetrator directed the witness and his sisters up the stairs. After they reached his grandmother’s bedroom, his grandmother “started like beating him, chasing him out of the house.” After she chased him out of the house, he called the police.

When asked if he could identify the individual who was in the home that evening, he identified Defendant from the Zoom feed.

When asked if he was sure, the witness stated “it looks just like him.” When shown Defendant’s Exhibit 1 (marked during the preliminary hearing as Commonwealth’s Exhibit 1), he testified that it was the same individual. On cross-examination, he indicated that the perpetrator’s forehead was shaped “a little weird.” He agreed that it was an odd, big forehead.

Agent Bolt, a criminal investigator for the Williamsport Bureau of Police testified next for the Commonwealth. He investigated this matter. During the initial interviews with the victims, none of them were able to identify the perpetrator. They did indicate, however, that if they saw him again, they would recognize him. Once they viewed Defendant walking by their home, they immediately recognized him as the perpetrator. The victims “proceeded to continuously” give photographs and videotapes to Agent Bolt “over the course of several weeks.” He agreed that the prominent feature described by the witnesses and on Exhibit 1 was the “prominent forehead.” Defendant’s Exhibits 3 and 4 purport to be photographs taken from the surveillance videos at the victims’ residence on July 25, 2020 and July 26, 2020. Exhibit 3 is a photograph of Defendant walking by the victims’ home on the adjacent sidewalk. Exhibit 4 is an unknown male. Exhibit 5 is a photograph of Defendant while incarcerated at the Lycoming County Prison and which was depicted on the screen during the Zoom preliminary hearing.

In observing the photographs, the court will disregard Exhibit 4 because there are no distinguishing features. Exhibit 1 depicts a black male wearing glasses and having a prominent or “weird” forehead as described by the witnesses. Exhibits 2 and 3 allegedly



depict Defendant. The close-up of Exhibit 3 appears to show a prominent or “weird” forehead. On the other hand the photograph of Defendant, Exhibit 5 does not depict an individual with a prominent or “weird” forehead.

As Defendant noted in his motion, the admissibility of identification evidence is determined under the totality of the circumstances and the purpose is to assure reliability. *Commonwealth v. Moye*, 836 A.2d 973, 976 (Pa. Super. 2003). Further, and as Defendant argued, identification evidence should be prohibited unless the prosecution establishes by clear and convincing evidence at a suppression hearing that the witnesses’ proposed trial identification will be reliably based on the witnesses’ observation at the time of the crime, and that the identification was not induced by events occurring between the witnesses’ observations at the time of the crime and the witnesses’ in-court identification. *Commonwealth v. Fowler*, 352 A.2d 17, 20 (Pa. 1976).

The court has concerns regarding the witnesses’ identification in this case. First, the opportunity to view the perpetrator at the time of the crime was compromised by the trauma of the incident, and the fact that the perpetrator had a hoodie and a mask covering half of his face. Second, the record is devoid of any evidence that the witnesses paid particular attention to the perpetrator during the melee which is certainly understandable given the nature of the incident. The only distinguishing feature that caught the attention of the witnesses was the perpetrator’s forehead. Third, the degree of accuracy in the identifications is belied by the photographs and was likely induced by events occurring after the crime and before the identification. More specifically, the identification of the perpetrator

who was seen prior to the incident and during the incident was limited to a black male, dressed a certain way with a “weird” forehead. The photograph of the individual outside of the home prior to the incident verifies that the individual had a distinctive forehead. Prior to the identifications of Defendant, however, Defendant had walked by the home on numerous occasions presumably on his way to and from work. Seeing Defendant, a black male, walking in front of their home likely induced the witnesses into identifying him as the perpetrator. Furthermore, Defendant does not appear to have a distinctive forehead. Finally, the time between the incident and the identification was weeks, if not months.

The court, however, is constrained to deny Defendant’s motion to suppress the identifications, because Defendant has not shown improper police conduct.

“The purpose of a suppression order regarding exclusion of identification evidence is to prevent improper police action. Thus, where a defendant does not show that improper police conduct resulted in a suggestive identification, suppression is not warranted.” *Commonwealth v. Russell*, 209 A.3d 419, 431 (Pa. Super. 2019), quoting *Commonwealth v. Sanders*, 42 A.3d 325, 330 (Pa. Super. 2021).

The failure of Sherry Clark to identify Defendant and the concerns Defendant has raised with respect to the identifications made by Dana and Christian Sierra go to weight and credibility, not admissibility. *Commonwealth v. Washington*, 927 A.3d 586, 601 (Pa. 2007)(witness’s inability to identify Appellant at the line-up did not affect the admissibility of her in-court identification, but only its weight and credibility.); *Commonwealth v. Steele*, 559 A.3d 904, 910 (Pa. 1989)(claim that witnesses’ identification of appellant was tainted by

newspaper photographs depicting him in shackles while under arrest went to the weight of the evidence, not its admissibility, where the identification testimony was not the result of improper behavior ascribable to law enforcement officials). While the witnesses' testimony exhibits some unreliability, this is a question for the jury. However, the court will provide a *Kloiber* jury instruction.

As to Defendant's motion in limine, during Defendant's interview, Agent Bolt noted on numerous occasions, or at least inferred on numerous occasions, that Defendant was previously in the criminal justice system or had a prior criminal history. Any and all references to this will be precluded. The evidence is not relevant but if relevant, it is overly prejudicial.

Additionally, the court will preclude any and all statements by Defendant referencing prior "trouble", "a gun" or being "locked up." This evidence is not at all relevant but if so, it is overly prejudicial.

The court will reserve a ruling on whether the statement by Agent Bolt as set forth in Paragraph 105 of Defendant's pretrial motion will be admissible. The court does not know in what context it was raised and accordingly, the court cannot determine at this point whether it is relevant or whether if relevant, the prejudice outweighs its probative value.

The court grants Defendant's motion to preclude any reference to Defendant's email account having an identification as "Phillygoon 91." While the court understands that Defendant chose this identification, using it in court has no probative value whatsoever. Even if probative, its prejudicial impact would far outweigh any probative value.

With respect to Defendant's motion to admit expert identification testimony, Defendant provided a report from Dr. Suzanne Mannes, dated June 6, 2021. This was admitted into evidence and marked as Defendant's Exhibit 6.

The court agrees with Defendant's argument that the case against Defendant is primarily, if not solely, dependent upon eyewitness testimony. In accordance with established case law, the court in its discretion will permit Dr. Mannes to testify per her report. See *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *Commonwealth v. Selinski*, 158 A.3d 102, 113 (Pa. Super. 2017).

With respect to Defendant's motion for discovery, said motion is granted. Within thirty (30) days of today's date, the Commonwealth must provide to Defendant copies of all emails sent by the alleged victims to Agent Bolt.

Finally, with respect to Defendant's motion to admit records, Defendant is requesting that the court permit Xbox records. According to Defendant, Mr. Thompson provided the Commonwealth with a notice of alibi defense. Defendant also obtained Xbox records which include a certification of authenticity by Yana Rosenbloom, the custodians of records from Microsoft Corporation which is the keeper of Xbox records.

Defendant requests that that the court permit the Xbox records to be admissible at trial with the certification of authenticity declared by Ms. Rosenbloom or, in the alternative, to allow to Ms. Rosenbloom to testify via remote technology.

The court does not have a copy of the certification and cannot determine whether it meets the requirement of Pennsylvania Rule of Evidence 803(6)(D). Moreover,

the court does not have the records. Accordingly, the court will defer a decision in this matter until the records are produced and the court has an opportunity to review them.

**ORDER**

**AND NOW**, this \_\_\_\_ September 2021, following a hearing and argument, Defendant's Motion to Suppress the Pretrial Identifications of Defendant is **DENIED**. Defendant's Motion to Preclude any In-court identification of Defendant is **DENIED**. The court will provide to the jury a *Kloiber* jury instruction. Defendant's Motion in Limine is **GRANTED**. Defendant's Motion to Admit Expert Identification testimony is **GRANTED**. Defendant's Motion for Discovery is **GRANTED**. Defendant's Motion to Admit Record is **DEFERRED**.

By The Court,

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Marc F. Lovecchio, Judge

cc: Mike Sullivan, Esquire (ADA)  
Nicole Spring, Esquire (PD)  
Judge Marc F. Lovecchio  
Gary Weber, Esquire