

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-297-2022
	:	
vs.	:	
	:	CRIMINAL DIVISION
NIGEL AKEEM LEE,	:	
Defendant	:	

OPINION

This matter is before the Court on Defendant’s Omnibus Pretrial Motion filed April 14, 2022. For the reasons set forth below, the Motion is granted in part and denied in part.

I. Factual and Procedural Background

Nigel Lee (“Defendant”) was charged with one count of criminal attempt (murder in the first degree), two counts of aggravated assault, one count of persons not to possess, and one count of possessing instruments of a crime following an incident that occurred on February 4, 2022. A preliminary hearing was held on February 24, 2022. Defendant, through counsel, waived his arraignment and requested a pretrial date. The Information was filed on March 11, 2022. The deadline to file pretrial motions was extended to 60 days from the date discovery was provided via a stipulated Order dated March 23, 2022. Discovery was made available to the defense on April 6, 2022, thus making the deadline to file pretrial motions June 5, 2022. On April 14, 2022, the Defendant timely filed his Omnibus Pretrial Motion, raising the following issues:

1. Motion to Compel Discovery;
2. Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa.R.E. 404(b);
3. Motion to Preclude Prior Bad Acts;
4. Motion to Sever;
5. Motion for Juror Investigation Information;
6. Motion for Individual Voir Dire; and
7. Motion to Reserve Right.

An argument was held August 9, 2022, at which time Matthew Welickovitch, Esquire, appeared on behalf of the Commonwealth and Defendant appeared and was represented by Jeana Longo, Esquire.

II. Discussion

The Court will discuss each of the above Motions separately.

1. Motion to Compel Discovery

a. Discovery Related to Co-Defendant(s) and Witnesses

The Defendant requests all material required to be disclosed in accordance with Brady v. Maryland, 373 U.S. 83 (1963) and Pennsylvania Rule of Criminal Procedure 573(B)(1)(a) which has not been disclosed to date. Defendant specifically requests all written correspondence, email, any and all electronic communication, written summaries of all verbal communications between the District Attorney's Office and/or law enforcement and any witness or counsel for the same. Additionally, the Defendant's Motion requests that the Commonwealth disclose prior record information for all witnesses that the

Commonwealth intends to offer at trial and any agreements made, proposed, alluded to or discussed with the witnesses in this case, including witnesses that were charged or who could have been charged with offenses that stemmed from their activities at the residence where the incident occurred.

At the time of the argument on the Motion, Attorney Longo indicated that there were several witnesses at the home at the time of the incident, some of whom were interviewed. Attorney Longo provided the following names: Lindsey Straub, Mark Baskin, Lonnie Lee, and Jenny Lehman. Assistant District Attorney Welickovitch indicated that he had not spoken to any potential witnesses personally, nor had District Attorney Gardner. However, in order to allow the Defendant to adequately prepare his defense, the Motion to Compel Discovery Related to Co-Defendant(s) and Witnesses is **GRANTED**. Within fourteen (14) days of the date of this Order, the Commonwealth shall provide to Defendant's counsel any discovery that is required under Brady. With regard to the 4 individuals named at the time of the argument, as well as any other potential witnesses, the Commonwealth shall provide a "yes" or "no" response to Defendant's counsel indicating whether they were offered any consideration for their cooperation, and if so, what they were offered. This information shall also be provided within fourteen (14) days of the date of this Order.

b. Undisclosed Discovery

Defendant's Motion indicates that the Commonwealth has disclosed some discovery, including some recorded interviews, but has not disclosed certain additional information in violation of the Pennsylvania Rules of Criminal Procedure. The Defendant's Motion is **GRANTED** to the following extent:

1. *Lab/ballistic reports related to the bullets discovered at the scene.* Within fourteen (14) days of the date of this Order, the District Attorney's Office shall provide, in writing, whether any bullets have been sent out to a lab and, if so, when the testing is anticipated to be complete. Any lab or ballistic reports shall be provided to Defendant's counsel within ten (10) days of receipt by the Commonwealth.

2. *Recorded interview of law enforcement and witness Jenny Lehman.* Within fourteen (14) days of the date of this Order, the District Attorney shall confirm whether such a recorded interview exists and provide a written response to Defendant's counsel.

3. *Videos or pictures from any witness' cell phone.* Assistant District Attorney Welickovitch indicated that there is currently a backlog at the lab that processes and extracts information and but agreed to provide any information, reports, files, etc. to Defendant's counsel upon receipt. Therefore, all information received from the lab shall be provided to Defendant's counsel within ten (10) days of receipt by the Commonwealth.

4. *Texts between Adam Butler and Thomas Smith which were provided to law enforcement on February 28, 2022, by Thomas Smith.* Within fourteen (14) days of the date of this Order, the Commonwealth shall confirm with law enforcement whether they are in possession of this material and provide a response, in writing, to Defendant's counsel. If law enforcement is in possession of the requested information, the Commonwealth has a duty to provide it to Defendant's counsel.

5. *Any other texts obtained by law enforcement as it relates to Lee's charges.* The Commonwealth shall confirm with law enforcement, within fourteen (14) days of the date of this Order, whether they are in possession of any other texts related to Defendant's

charges and provide a response, in writing, to Defendant's counsel. The Commonwealth shall promptly provide any texts in the possession of law enforcement to Defendant's counsel.

6. *Rap sheets for any witnesses that the Commonwealth intends to call at trial.*

The Commonwealth shall provide rap sheets for any witnesses they intend to call at trial to Defendant's counsel within thirty (30) days of the date of this Order.

7. *Medical records for Adam Butler pertaining to (a) ongoing medical treatment as it relates to the incident and current medication and (b) records that reflect that Adam Butler is required to use a wheelchair.* At the time of the argument on the Motion, Defendant's counsel indicated that medical records were necessary to determine whether his medical conditions match his physical appearance. While the Commonwealth indicated that there is nothing prohibiting the Defendant from hiring a private investigator, they have agreed to provide medical records from the time of the incident that substantiate serious bodily injury. These records shall be provided to Defendant's counsel within thirty (30) days of the date of this Order.

2. Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa.R.Evid.404(b)

The Defendant requests that the Commonwealth be ordered to disclose to him any evidence which may be admissible pursuant to Pennsylvania Rule of Evidence 404(b). At the time of the argument, Defendant's counsel indicated that the Commonwealth had not filed notice of intent to introduce any 404(b) evidence, and requested that any notice be filed 60 days prior to trial to permit counsel to prepare a defense and challenge the probative value of said evidence. Pa.R.E. §404(b) requires only "reasonable notice in advance of the

trial.” This Court finds that thirty (30) days “reasonable” for providing advance notice of the intent to introduce other crimes, wrongs, or acts, and would provide sufficient time for the Court to address any motions in limine filed by the Defendant in response thereto.

Accordingly, the Commonwealth shall disclose any evidence which has not been disclosed to the defendant which may be admissible at trial pursuant to Pa.R.E. §404(b), and to provide a notice of intent to introduce any such evidence at trial at least thirty (30) days prior to trial.¹

3. Motion to Preclude Prior Bad Acts

The Defendant’s Motion avers that the Defendant indicates that the Commonwealth will seek the admission of prior charges that include attempted homicide and a prior guilty plea of aggravated assault from an incident that occurred in 2000, as well as seek the admission of prior allegations of domestic violence with his previous paramours. The Defendant argues that these prior bad acts are overly prejudicial and have no probative value other than to wrongfully demonstrate propensity evidence which is expressly prohibited by the rules of evidence. The Defendant seeks an Order deeming any evidence of prior investigations, arrests, allegations of domestic violence, etc. inadmissible.

ADA Welickovitch indicated that he has not reviewed the facts of the older case to see if it provides evidence of motive, intent, etc., in which case it may be admissible. At this time, the Defendant’s Motion is **DENIED** as premature. If the Commonwealth intends to introduce the prior bad acts of the Defendant, they must file a notice pursuant to Pa.R.E. §404(b)(3), at which time the Defendant may file a Motion in Limine to preclude the

¹ The time requirement would not apply to evidence discovered within 30 days of trial.

introduction of such evidence. If the Commonwealth fails to file a proper notice of its intent, it will be precluded from attempting to introduce evidence of the Defendant's prior bad acts at trial.

4. Motion to Sever

The Defendant has a prior felony conviction and argues that the persons not to possess charge must be severed pursuant to Pa.R.Crim.P. 583 due to the nature of the evidence which is necessary to prove the offense that would not be admissible in trial on the homicide and related offenses. The Commonwealth indicated that it is not opposed to severing this charge and therefore this motion is **GRANTED**.

5. Motion for Juror Investigative Information

The Defendant alleges that the Commonwealth traditionally conducts record checks and obtains additional information on prospective jurors, and seeks access to the Commonwealth's information in order to promote fairness in the jury selection process. The Commonwealth has indicated that it no longer uses such techniques, and instead asks more pointed questions about criminal background of prospective jurors during the voir dire process. The Defendant's motion is **GRANTED** only to the extent the Commonwealth engages in the practice of conducting record checks or obtaining additional information on prospective jurors in this case. The Commonwealth shall provide copies of any information about prospective jurors to Defendant's counsel within fourteen (14) days of the date on which it is obtained.

6. Motion for Individual Voir Dire

Defendant alleges "[d]ue to the nature of the charges, sensational and prejudicial

publicity has appeared in the local media describing the alleged crime, victims, and crime scene.” Defendant is an African American male who is charged with the attempted homicide of a white victim. In her Omnibus Pre-Trial Motion, Defendant’s counsel makes several vague and unsubstantiated statements including “based on the responses received from various jury panels, racism does not and has never existed in Lycoming County”; “studies have shown that people do not like to discuss race or their individual opinions on race in public”; and “studies have also shown that prospective jurors are less likely to be truthful regarding their racial opinions when questioned by the Court as opposed to counsel.”

While the Court recognizes the Defendant’s constitutional right to ask questions about race on voir dire, the Court believes that a hybrid approach to voir dire can be utilized wherein the Commonwealth or the Defense are permitted to call individual prospective jurors in separately to ask additional questions rather than performing an individual voir dire which would be an extremely lengthy process but would not necessarily ensure any greater fairness and impartiality. Accordingly, Defendant’s Motion for Individual Voir Dire is **DENIED**; however, if any prospective jurors have concerns answering counsel’s questions about sensitive issues such as race in front of all prospective jurors during the selection process, they may request a sidebar with no probable cause needed.

7. Motion to Reserve Right

Defendant moves to reserve the right to make any additional pre-trial motions pursuant to Pennsylvania Rule of Criminal Procedure 579. This motion is **GRANTED**, but only to the extent that any motion is based on information or discovery provided by the Commonwealth after August 9, 2022, the date of the argument on Defendant’s Omnibus

Pre-Trial Motion.

Accordingly, the Court will enter the following Order.

ORDER

AND NOW, this 2nd day of **September, 2022**, upon consideration of Defendant's Omnibus Pre-Trial Motions, the argument of counsel on August 9, 2022, and for the reasons set forth above, the Court hereby enters the following Order:

1. The following Motions are **DENIED**: Motion to Preclude Prior Bad Acts and Motion for Individual Voir Dire.
2. The following Motions are **GRANTED**: Motion to Compel Discovery as outlined in subsection 1(a) and (b) above; Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa.R.E. 404(b); Motion to Sever; Motion for Juror Investigation Information; and Motion to Reserve Right.

By the Court,

Ryan M. Tira, Judge

RMT/jel

CC: DA – Matthew Welickovitch, Esq.
PD - Jeana Longo, Esq.
Gary Weber, Esq.
Jennifer E. Linn, Esquire