IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1017-2022**
	:	
Kadeem Anthony Lindo,	**:**	**Omnibus Pretrial Motion**
Defendant	**:**	

OPINION AND ORDER

Introduction

Kadeem Lindo (Defendant), is seeking through his omnibus pre-trial motion, a petition for a writ of habeas corpus on the Count 2 Misdemeanor Charge of Stalking-Intent to cause emotional distress. The Defendant argues that the Commonwealth has not met their *prima facie* burden for this charge because the altercation between the parties was a one-time occurrence which is not sufficient for establishing a course of conduct. The Commonwealth argues that they have met their burden of proof because the remarks allegedly made by Lindo during the May 20th altercation establish that there were at least two separate occurrences where the defendant was targeting the victim for the purpose of causing her emotional distress.

Additionally, the Defendant has made a pre-trial motion to suppress evidence presented by the Commonwealth regarding the pretrial and preliminary hearing identifications of him by the victim. The Defendant argues that the identifications were unreliable and suggestive, therefore denying him due process at law. The Commonwealth argues that the identifications were reliable and the governing law allows for this type of identification process even though it has a suggestive nature.

Procedural History

The preliminary hearing for the Defendant was held on August 4, 2022, before MDJ Aaron Biichle where all charges were held for court. On October 21, 2022, the Defendant filed an omnibus pretrial motion. The hearing was held on December 19, 2022, and the two issues pursued by the Defendant included a petition for habeas corpus on the stalking charge and a motion to suppress the pretrial and preliminary hearing identifications of the Defendant.

Background and Testimony

The victim, Carolyn Doughton (Doughton), testified at the preliminary hearing on December 19, 2022 that during the following events she was a resident of Williamsport, Pennsylvania, residing at 533 Market Street, apartment two. The altercation occurred on May 20, 2022 at approximately 4:45 p.m. During her testimony she explained that she got a knock on her door that day in May, as she expected it to be a one of her sponsors or sober sisters. To her surprise it was not, but rather it was a black male which she did not know, or had ever seen before.

She described him as skinny, with dreads, standing at least 5'7" tall, but definitely taller than her. Exhibit 1 presented by the Commonwealth shows that the defendant is black and skinny, and the defendant was identified on the December 19th hearing to have dreads that were approximately shoulder length. Doughton testified that when she opened the door, the man tried to force his way into the apartment, telling her that the two were going to have sex. The man forcibly grabbed the victim's wrist, attempting to place it onto his privates but Doughton ripped her arm away before the contact could occur. She told the man that he must leave because her boyfriend was home, though she did not have a boyfriend. She was saying anything that may get

him away from her. Subsequently, the man informed Doughton that he knew when she would come and go from her apartment. At that point the victim had become very frightened and slammed the door in the assailant's face.

Distraught about what to do, Doughton testified that she called her ex-parole officer to be informed on the correct steps to take before contacting the police, as she was afraid of the possible implications contact with law enforcement would have on her parole. Afterwards, she contacted the Williamsport Bureau of Police and was placed in contact with Officer Tyson Minier (Minier) on May 31, 2022. During her initial conversations with the Officer, Minier testified that Doughton had already come up with a possible suspect by the name of Kadeem Lindo (Defendant), as she had been discussing the incident with one of her neighbors and she was informed through that neighbor about Lindo and his presence in the building just north of the victim's residence.

After receiving this information Officer Minier testified that he reported back to Doughton with a lone photo of Lindo that he retrieved from Lindo's drivers license identification a few days later. When presented with the photo, Doughton confirmed that was the man that had come within 3 feet of her door on May 20, 2022. She confidently confirmed this with no hesitation or waiver when responding to Officer Minier. This identification occurred even absent the fact that in the photo presented to her, Lindo had a much different hair style than that which he had on May 20th. Doughton testified that she observed the defendant for an estimated minute in which she stood at her door, face-to-face with the defendant. During this period the lighting was good, it was during daylight hours, the assailant was extremely close, there were no obstructions between the two people, and the victim had good eyesight.

Analysis

1. **This Court concludes the Commonwealth has met is burden in proving its *prima facie* case for the stalking charge under 18 Pa. C.S.A. Section 2709.1 (a)(2) because they established all elements.**

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).

Keeping this burden in mind, the stalking charge in question is 18 Pa.C.S.A. §2709.1 (a)(2). The purpose of this statute is to allow for law enforcement officials to act upon predatory behavior that is often a precursor for more violent offenses such as homicide. Commonwealth v. Urrutia, 653 A.2d 706, 708 (Pa. Super. 1995). In establishing a *prima facie* case for stalking the Commonwealth must show that the defendant: (1) engaged in a course of conduct under circumstances (2) which demonstrate or communicate (3) an intent to cause substantial emotional distress to such other person. §2709.1 (a)(2). The element being called into dispute by the Defendant regards the "course of conduct" in element one because they argue that there have not been multiple occurrences which establish the course of conduct needed for a stalking charge.

The Court concludes that the Commonwealth has established a course of conduct because the alleged words of the Defendant show there were at least two separate acts committed by him in which he had the intent to cause the plaintiff severe emotional distress. The statute explains that a "course of conduct" is understood to be a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. §2709.1 (f). Each action within the "course of conduct" must evidence some type of intent to evoke substantial emotional distress within the victim and establishing this chain of activity is necessary before a charge of stalking can occur on its basis. Commonwealth v. Schierscher, 668 A.2d 164, 172 (Pa. Super. 1995). The actions shown to satisfy this conduct can include lewd, lascivious, threatening or obscene words, language, drawings, caricatures or actions, which occur face-to-face or anonymously toward the victim. §2709.1 (f). Because this is a "course of conduct," it requires that there must be at least two occurrences of this type of prohibited activity before this element of stalking can be met. Commonwealth v. Leach, 729 A.2d 608, 611 (Pa. Super. 1999). Once the

initial course of conduct is established, each additional occurrence of a prohibited activity can extend the chain and can amount to an additional charge of stalking. Leach, 729 A.2d at 612.

In this case, the first act in this course of conduct can be established through the testimony of the victim stating that the assailant said to her on May 20th that he had been surveilling her prior to the altercation. He expressed to the victim that he knew when she comes and goes from her apartment because he had been watching her. From this testimony, one can draw the reasonable inference that prior to the May 20th altercation the Defendant, on at least one occasion, surveilled the victim with the requisite mens rea of causing her substantial emotional distress because he later acted upon this surveillance, evidenced by the May 20th altercation in which he caused the distress.

The second act which completes the course of conduct as required by law is the May 20th altercation itself where the defendant allegedly confronted the victim on her porch and forcibly tried to enter into her apartment.

The Court recognizes that this is a novel way to establish a course of conduct. Most often the course of conduct resembles a pattern of clearly targeted acts toward the victim such as in Leach where the defendant vandalized the vehicle of another who had a PFA against him on nine separate occasions. Likewise, in Urrutia, a defendant's course of conduct stemmed from a situation dealing with an estranged relationship and him repeatedly showing up at the home of the victim while making serious threats to her and her children. These types of cases serve as paradigm situations in which a course of conduct has been established because they have multiple occurrences of prohibited activity in which one can easily derive the intent of the perpetrator from the acts. However, the paradigm situation is not always presented, as sometimes

the facts of a case will fall into the fringe category of the crime which still adhere to the black-letter-law.

In the present case there is an unconventional set of circumstances for the stalking charge. This is because most often there would not be the evidence needed to infer that a person observing the routines of their next-door neighbor intended to cause that neighbor substantial emotional distress in doing so. However, unique to this case are the alleged statements made by the Defendant to the victim regarding his surveillance of her prior to the May 20th altercation. Viewing the evidence in a light most favorable to the Commonwealth, these statements show that his purpose for the prior surveillance was to eventually act upon his known patterns of her in order to cause the victim substantial emotional distress.

The Defendant argues that because the May 20th occurrence was the only time in which he actually contacted or interacted with the victim that this means there was no course of conduct established. This is misreading of the statute. While most case law does resemble situations where there have been multiple interactions between the victim and perpetrator to establish a course of conduct, this is not what the law requires. The definition in the statute states that a course of conduct is any "pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct." 18 Pa. C.S. §2709.1 (f). Based on this plain reading, the unilateral activity of the Defendant alone may satisfy this requirement so long as his actions clearly evidence his intent. That is exactly what happened here. To hold otherwise would be in direct opposition of the main policy behind enacting this statute. See Commonwealth v. Urrutia, 653 A.2d 706, 708 (Pa. Super. 1995). If a perpetrator repeatedly displays predatory behavior with the intent to cause substantial emotional distress to a victim, it

would be inconsistent not to charge that perpetrator with the offense simply because the victim did not know of his intentions or observations.

The Court concludes that the Commonwealth has established a course of conduct because the alleged words of the Defendant show there were at least two separate acts committed by him in which he had the intent to cause the plaintiff substantial emotional distress.

Therefore, the Commonwealth has met is burden in proving its *prima facie* case for the stalking charge under 18 Pa. C.S.A. Section 2709.1 (a)(2) because they established all elements.

2. The Court concludes that the evidence regarding the pretrial and preliminary hearing identification shall not be suppressed because while the identification was suggestive, it is still reliable.

When the Defendant files the motion to suppress an identification the Commonwealth has the burden of proof to a preponderance of the evidence of establishing that the challenged evidence was not obtained in violation of the defendant's rights. Pa. R. Crim. P. 581 (H). A preponderance of the evidence standard is tantamount to a "more likely than not" burden of proof. Commonwealth v. McJett, 811 A.2d 104, 110 (Pa. Cmwlth. Ct. 2002).

The primary focus surrounding identification evidence is deciding its reliability given the totality of the circumstances. McElrath v. Commonwealth, 592 A.2d 740, 742 (Pa. Super. 1991). If a pretrial photographic identification is so unduly suggestive and conducive to irreparable mistaken identification, the accused has been denied due process of law. Commonwealth v. Chmiel, 889 A.2d 501, 523 (Pa. 2005). Sometimes police units will employ "one on one" identifications for the purpose of enhancing reliability. Commonwealth v. Moye, 836 A.2d 973, 976 (Pa. Super. 2003). The rationale is that these identification processes are quicker and therefore the officer can reduce the time elapsed between the commission of the crime and when

the witness looks at the suspect. Moye, 836 A.2d at 976. However, this process is also suggestive, hence the court must weigh the suggestiveness of the identification against a multitude of other factors to determine whether the "one of one" identification is reliable. Id. All of the factors together include: (1) the suggestiveness of the identification process, (2) the opportunity of the witness to view the perpetrator at the time of the crime, (3) the witness' degree of attention, (4) the accuracy of the prior description of the perpetrator, (5) the level of certainty demonstrated at the confrontation, (6) and the time between the crime and the confrontation. McElrath, 592 A.2d at 743. It is important to note that suggestiveness is just one of the factors in this equation and will not automatically make the identification illegitimate. Id. at 742. Furthermore, "Absent some special element of unfairness, a prompt 'one on one' identification is not so suggestive as to give rise to an irreparable likelihood of misidentification." Commonwealth v. Brown, 611 A.2d 1318, 1321 (Pa. Super. 1992). This means that while the use of a "one on one" identification process is a suggestive tactic, the timely employment of that method alone will not be enough to suppress the identification unless there are other factors weighing in favor of the defendant. Commonwealth v. Sample, 468 A.2d 799, 801 (Pa. Super. 1983). Of these factors, the one which weighs most heavily in making the determination is the opportunity for of the witness to view the perpetrator. Commonwealth v. Bradford, 451 A.2d 1035, 1037 (Pa. Super. 1982).

The use of a "one on one" identification process is suggestive, however that alone will not be so suggestive as to rise to the level needed for a suppression, as there must be other factors which favor the defendant. Moye, 836 A.2d at 976. In Bradford, a woman was walking in downtown Harrisburg when a man ran by her and snatched her purse in broad daylight. Bradford, 451 A.2d at 1036. During the event, she got a "good look" at the perpetrator's facial

features and characteristics as she chased him. Id. These facial observations were made for three to four seconds. Id. A bystander also observed the course of events which took place as he was able to observe the facial profile of the assailant on two separate occasions for about total of 8-10 seconds from a distance of 30-40 yards away. Id. Neither of the two witnesses experienced any obstruction during their viewings. Id. Shortly afterwards a police officer provided both witnesses with singular photograph of their suspect. Id. The victim was provided the photo two days after the crime and the other witness was provided the photo nine days after the crime. Id. The victim could not make a positive I.D. upon the initial showing; however, the other witness made the positive I.D. immediately. Id. Both of them made positive identifications of the defendant at trial. Id. When these identifications were challenged by a motion to suppress for suggestiveness, the Court held that the identification was not to be suppressed. Id. at 1038. The court reasoned that while the "one of one" procedure is 'suggestive and deplorable', suggestiveness is only one of the factors which is considered when deciding reliability. Id. at 1037. The majority of other factors strongly favored the witness identifications being credible and shall not be overlooked simply because the officer on duty engaged in a less than ideal technique for the identification. Id.

This case can be analogized to Bradford because within both fact patterns there has been the use of a suggestive identification technique, but the negativity of that suggestive technique is strongly outweighed by the reliability derived from the other factors. In Bradford, both witnesses viewed the assailant's facial profile in broad daylight with no obstructions for a handful of seconds. One of the witnesses was only steps away from the assailant while the other was roughly 30-40 yards. When the investigating officer approached the two witnesses, he provided them with only a singular photo of the suspect in which both witnesses eventually made a

positive identification from. Similarly, in the present case, the victim observed the assailant's facial profile on her doorstep for roughly one minute in broad daylight with no obstructions during the altercation. During this entire time period the victim was no less than a couple of feet from the assailant. When the investigating officer provided the victim with a singular image of the suspect the victim immediately made a clear identification of the defendant without reserve. This Court mirrors the Bradford Court in holding that the identification shall not be suppressed because while the identification process was suggestive, the totality of the circumstances favor this identification being reliable. In coming to this conclusion, the Court weighed each of the following factors as stated below:

Factor 1 – Suggestiveness of Identification

The Court concludes this factor favors the Defendant. This factor is not disputed between the parties as both acknowledge that this was a suggestive identification process. However, the suggestiveness in this case is more subdued than it was in Bradford given that it was actually the victim which brought the suspects name into the picture, rather than in Bradford, where the police officer was the first to bring up the suspect. This eliminates some suggestiveness which the Defendant is accusing the Commonwealth of.

Factor Two – Opportunity to view the perpetrator at the time of the crime

The Court concludes that this factor strongly favors the Commonwealth. This factor hinges upon how good of a look the identifier had of the perpetrator based upon the time, duration, location, and circumstances of the viewing. Bradford, 451 A.2d at 1037. In Bradford, the court determined that a clear viewing of the assailant in broad daylight for a handful of seconds was sufficient for both witnesses to be able to make a positive identification. Id. at 1038.

This was even so despite the fact that one witness viewed the assailant while she was chasing him and the other made his viewing from 30-40 yards away. The Commonwealth has made an even stronger case here as the victim in this case viewed the assailant for a minute while it was broad daylight and the assailant was standing still, no more than a couple of feet from her.

Factor Three – The witness' degree of attention

The Court finds that this factor favors the Commonwealth. This is because the Court finds a reasonable the inference that all of the victim's attention would not have been anywhere else but on the man, standing feet away from her, while attempting to force his way into the apartment.

Factor 4 – The accuracy of the prior description of the perpetrator

The Court finds that this factor favors the Commonwealth. The victim in the present case gave an accurate description of the assailant being black, having a height of roughly 5'7" but definitely being taller than her, having dreads, and being skinny, all prior to seeing a photo of Mr. Lindo. Based on the evidence presented, Mr. Lindo is a black male who currently has dreads, and appears to be skinny based upon exhibit 1 admitted into evidence by the Commonwealth. All descriptions given by the victim about the Defendant are generally accurate and give rise to nothing that the Court would find to be alarmingly inaccurate.

Factor 5 – The level of certainty demonstrated at the confrontation

The Court finds that this factor favors the Commonwealth. In Bradford, the victim was very hesitant about a positive identification of the defendant based upon the photo that had been presented to her. While she acknowledged that the photo had many of the same characteristics as the perpetrator she saw, she remained reluctant and did not make a positive identification until

trial. With this reluctancy in her identification the Bradford Court still found it to carry weight in being reliable. Bradford 451 A.2d at 1038. In this case, the Commonwealth has an even stronger argument because the victim made an instantaneous identification of the defendant upon viewing the photo shown to her by Officer Minier without any reserve. It goes above and beyond Bradford. Doughton's identification becomes especially persuasive to this Court because she was able to make a positive identification based off the photo shown by Minier even though the hair style in the photo was much different from that in which the Defendant had at the time of the alleged confrontation. One can infer from her quick identification that she had such a good look at the assailant's facial features that she was still able to identify him without reliance upon hair style.

Factor 6 – The time between the crime and the confrontation

The Court finds that this factor favors the Commonwealth. In Bradford a singular photograph was shown to one of the witness's nine days after the crime had occurred. The court found the timing to be sufficiently reliable for a "one of one" process, though they noted this was not the ideal method. Bradford 451 A.2d at 1036. Similarly, here the victim made her identification of the defendant a few weeks after the crime had occurred. While this Court acknowledges that the officers in both situations used an identification tactic that was not best suited for that point in the investigation, the identification that came from the victim in this case has still been shown by the Bradford precedent to be considered viable. Furthermore, it was an odd scenario for Minier to navigate here because the witness actually provided the name though she had never seen the man before. This shows that Minier was more so acting to accommodate the victim's request rather than attempting to coax her into a suggestive identification late in the investigation.

The Defendant argues that the suggestive "one on one" identification tactic shall be enough to support a suppression of the identification. However, binding precedent found in Brown states that "[a]bsent some special element of unfairness, a prompt 'one on one' identification is not so suggestive as to give rise to an irreparable likelihood of misidentification." Commonwealth v. Brown, 611 A.2d 1318, 1321 (Pa. Super. 1992). With no special elements of unfairness being found by the Court in this situation, the Defendants argument is found to be unpersuasive.

Given that of the six factors, five of them weigh in favor of the Commonwealth, including factor two, which is the one carrying the greatest weight, the Court concludes that the identification evidence is reliable and shall not be suppressed despite its suggestive nature.

ORDER

AND NOW, this 22nd day of June 2023, the Court DENIES the Defendant's petition for a writ of habeas corpus and the Defendant's motion to suppress.

By The Court,

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Nancy L. Butts, President Judge