

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**TERRELL CRADLE,
Defendant**

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:
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:

CP-41-CR-1576-2022

**OMNIBUS PRETRIAL
MOTION**

OPINION AND ORDER

On April 14, 2022 Terrell Cradle (Defendant) was charged by the Williamsport Bureau of Police (WBP) with Receiving Stolen Property¹, a felony of the second degree, after a search warrant was executed on his residence on Franklin Street. At his residence they found a 9 mm Ruger which had been reported stolen in September, 2021. A timely omnibus motion was filed to that case, 622-2022, and on May 11, 2023, this Court found that while the search warrant issued by MDJ Aaron Biichle at 3:00 PM on April 14, 2022 set forth probable cause to search for indicia of occupancy, firearms, ammunition and firearms accessories, there was no probable cause to seize Defendant's phone. There was nothing in the affidavit to believe that more than one person was involved in the shooting or that Defendant was on his phone at or near the time of the incident or anything else to show that Defendant's phone was used in connection with the shooting.

Agents from the WBP also requested additional search warrants as part of their continuing investigation for Defendant's clothing, his cellular phone seized from his residence, a DNA sample and gunshot residue (GSR) swab directly from Defendant. These search warrants were issued on April 14, 20, and 21, 2022. After receiving the results of the GSR

¹ 18 Pa. C.S.A. § 3925(a).

samples, on November 2, 2022 Defendant was charged with count one Attempted Homicide², felony of the first degree; counts two and three Aggravated Assault³, felonies of the second degree; count four Carrying a Firearm without a license⁴, felony of the third degree, counts five and six Discharge of a Firearm into a structure⁵, felony of the third degree; count seven, Possession of a Weapon⁶, misdemeanor of the first degree; counts eight, nine, ten and eleven, Recklessly Endangering Another Person⁷, misdemeanors of the second degree and count twelve, Simple Assault⁸, misdemeanor of the second degree. Defendant was held for court on all of the charges filed. On January 18, 2023, Defendant filed a timely omnibus motion challenging the search warrants obtained by the WBP. Defendant's motion challenges the probable cause of the subsequent search warrants and the Commonwealth's evidence presented at the preliminary hearing in the form of a Habeas Corpus petition for all of the charges. The Commonwealth offered the transcript of the preliminary hearing with exhibits from the preliminary hearing along with two additional exhibits.

Background

Prior to Defendant being charged with the second set of charges the WBP obtained an additional four (4) search warrants. The first warrant was for GSR on Defendant's hands. The affidavit of the warrant issued on April 14, 2022 states the following:

On April 14th, 2022, about 0126 hours, Williamsport Bureau Police were triple tone emergency dispatched to the rear of the Brandon Cafe for report of shots fired. Upon arriving on scene, officers located evidence of a shooting scene to the rear of the establishment in the parking lot. Additionally, gunshot victim ARIEL DIAZ was located inside the Brandon Cafe by responding officers. DIAZ was transported to

² 18 Pa. C.S.A. §901(a).

³ 18 Pa. C.S.A. §2702(a)(1), (4).

⁴ 18 Pa. C.S.A. §6106(a)(1).

⁵ 18 Pa. C.S.A. §2707.1(a).

⁶ 18 Pa. C.S.A. §907(B).

⁷ 18 Pa. C.S.A. §2705.

⁸ 18 Pa. C.S.A. §2701(a)(1).

UPMC Susquehanna Health Williamsport where he was treated for two gunshot wounds.

After speaking with ARIEL'S sister, Mindy DIAZ, it was learned that ARIEL DIAZ had been a patron of the Brandon Cafe when he observed a black male, dressed in all black with a face mask on the outside in the alley to the east of the building. ARIEL had then sent his sister a text message with a photo of the individual and expressed that he felt something was off in his gut. After reviewing the photo, Mindy identified the individual as "Rell". She provided a photograph of "Rell" without a mask which law enforcement identified as TERRELL CRADLE.

Later on this date, Agent Hitesman and I met with TERRELL CRADLE and his caseworker at Diakon. While there, TERRELL agreed to speak with us and initially denied being at the Brandon Café. However, when confronted with surveillance footage which shows him outside the establishment, his story changed. He told us that he had been walking west on Washington Blvd. from a friend's house when he observed a relative inside the Brandon Café through the window. He said numerous times, "I don't know nothing about an incident". TERRELL claimed that afterwards he had gone to his home at 834 Franklin St. where he went to sleep. During our conversation with TERRELL, he was wearing black shoes, black sweatpants, a black hooded sweatshirt, and a black mask which covered all but his eyes, and a mesh nose area. The clothing description identically matched that of the individual shown in the surveillance video.

At the conclusion of speaking with TERRELL, I asked him if he would provide consent so that we could obtain a gunshot residue sample from him. He denied the request and I asked him if he had fired any handguns in the last 24 hours or so and he said, no. I explained that if he did not provide consent, we would be detaining him in order to obtain a search warrant for gunshot residue sample. He responded saying, "do what you gotta do."

TERRELL was detained and transported to police headquarters pending the authorization of a search warrant. Due to the facts and circumstances set forth, there is probable cause to believe that contained on the hands, clothing and face of TERRELL CRADLE is evidence of gunshot residue. I respectfully request that a search warrant be issued.

The next warrant to be reviewed was issued on April 14, 2022 at 2:15 p.m. This warrant was requested for Defendant's clothing that he was wearing as he was interviewed by the police, which matched the clothing worn by the suspect at the Brandon Café. The affidavit of probable of cause was identical to the one above with the addition of the following language in the second to the last paragraph:

While transporting CRADLE it was apparent that he had not showered or changed his clothing. It should be noted that during transport, there was a strong body odor emitting from CRADLE and his overall hygiene did not appear to be upkept.

And in the last paragraph:

Due to the facts and circumstances set forth, there is probable cause to believe that the clothing currently worn by TERRELL CRADLE has evidence of gunshot residue on them and were likely the same clothes worn during the commission of the crime.

The next warrant challenged by Defendant was requested by the police on April 20, 2022 at 9 a.m. This warrant was requested for a DNA sample from Defendant. The original search warrant listed above for GSR and instead of the last two paragraphs listed above the following was included:

TERRELL was picked up at his home at 834 Franklin St. in the City of Williamsport by Jared Hetherington. Jared is TERRELL'S case worker and did confirm that TERRELL came out from the back of the home and got into the vehicle to be taken to his appointment. During the interview, TERRELL also said that he lived at 834 Franklin St. with his brother and other roommates.

I did author and obtain a search warrant for 824 Franklin St. During the course of the search, indicia belonging to both TERRELL CRADLE and his brother Emmanuel Cradle was located in the middle upstairs bedroom. Additionally, indicia belonging to Emmanuel Cradle was located on the mattress of the top bunk bed. Located underneath a blanket on the bottom bunk bed where TERRELL CRADLE sleeps was a loaded 9mm Ruger firearm bearing serial #31151701. A want and warrant check were completed providing the serial number and returned showing the Ruger firearm had been stolen on September 9, 2022.

TERRELL CRADLE was arraigned on receiving Stolen Property and denied bail. He is currently being held in the Lycoming County Prison. Due to the facts and circumstances set for the, there is probable cause to believe that the DNA of TERRELL CRADLE is currently present on the recovered stolen firearm. Therefore, Your Affiant request a search warrant be issued to obtain DNA from TERRELL CRADLE for comparison purposes.

The remaining search warrant was requested for the WBP to seize Defendant's cellular phone. This warrant was issued by MDJ Biichle on April 21, 2022. However at the time of the

hearing the Commonwealth agreed that there was not enough in the additional warrant to justify a search of the cellular phone.

At the preliminary hearing on December 8, 2022 the Commonwealth presented the following evidence.

Agent Brittany Alexander (Alexander) of the WBP was the only witness called to testify. She testified that on April 14, 2022 she was the on-call agent and received a call in the early morning hours about shots fired at the rear of the Brandon Café. N.T., 12/8/2022, at 4. She went to the scene at the 400 block of Washington Blvd. and discovered four (4) casings in the rear or parking lot area. *Id.* at 5. By the time she arrived the bar was already closed. She also testified that there were two vehicles that were struck by bullets along with blood at the scene which went from the parking lot, through the alley and into the bar. *Id.*; Commonwealth's Exhibit #2. While she found the casings, she did not find any firearms at the scene. N.T., 12/8/2022, at 5.

Alexander then went to UPMC Williamsport looking for the victim, Ariel Diaz, but he had already been discharged from the hospital. *Id.* Upon review of the medical records, she discovered that he had been treated for two separate gunshot wounds: one to his upper right arm; and another which entered his upper left thigh and exited just under his left buttocks area. *Id.* at 9. Commonwealth's Exhibit #2.⁹ Neither of the slugs were recovered. *Id.* She was able to locate him and talk with him three separate times about what happened that day. *Id.* at 10. The first time they spoke, he did not remember anything. *Id.* Alexander then received a message from Diaz's sister with additional information about the incident. Diaz's sister told Alexander that prior to the shooting she had been communicating with her brother. *Id.* at 10. Diaz was

⁹ Identified as Commonwealth's #3 at the preliminary hearing.

able to take a picture of a black male in all black wearing a mask standing outside the east side window of the Brandon Café.¹⁰ *Id.* Along with the photograph, Diaz told his sister that if anything was to happen to him, this is the person who did it. N.T. 12/8/2020 at p.10. Although she did not know his name she had seen him around town and believed that he went by the name “Rell.” *Id.* She was able to provide Alexander a photo from social media of “Rell” without a mask, and Juvenile Probation (JPO) told Alexander that the photo depicted Defendant, Terrell Cradle. *Id.*; Commonwealth’s Exhibit #2.¹¹

Alexander then testified that later in the day on April 14th, she reached out to JPO to locate Defendant. Alexander and Agent Hitesman went to Diakon in Montoursville to speak with Defendant. *Id.* at p12. When asked what he was doing earlier in the day, Defendant denied being at the Brandon Café. *Id.* Alexander showed him the photo taken by Diaz, and Defendant then stated that he was there with his uncle at the time of the shooting but would not give her his uncle’s name. *Id.*; Unidentified Commonwealth’s Exhibit. She then asked if he had fired a firearm within the last 48 hours, to which Defendant replied no. *Id.* at 14. Since he was unwilling to let them perform a GSR test, Defendant was detained while the police obtained search warrants for GSR testing, Defendant’s clothing, and on the Defendant’s residence for a for a 9mm handgun. *Id.* Once the police found the gun, they also applied for a search warrant for the Defendant’s DNA to determine if he had held the gun found in his room. Testing of the weapon revealed that Defendant’s DNA was on it. Commonwealth’s Exhibit #2.¹² Alexander testified that Defendant did not have a license to carry the firearm. *Id.* When the gun was seized, it was loaded. The police sent the gun and cartridges to be analyzed. *Id.*

¹⁰ This photo was not specifically identified at the preliminary hearing but was introduced as one of the preliminary hearing exhibits at the time of the omnibus pretrial motion hearing.

¹¹ Identified as Commonwealth’s #4 at the preliminary hearing.

¹² This exhibit was identified as Commonwealth’s #7 at the preliminary hearing.

On cross-examination, Alexander testified that she believed that a 9mm firearm was involved based upon the casings found on the scene. *Id.* at 19. She also acknowledged that although she did have the opportunity to review security footage, she did not see the weapon being discharged. *Id.* She testified that the gun, casings, and bullets were sent away for analysis to determine whether the casings were discharged by the firearm, but that no results had been obtained. *Id.* at 20. Alexander also described the other items that were collected at the scene: personal effects, a cell phone, pair of glasses and DNA and blood samples. *Id.*

At the hearing on the motion, the Commonwealth also offered two additional exhibits. Commonwealth introduced the lab report from the Pennsylvania State Police crime lab which contained the results of the GSR swabs taken from Defendant. Commonwealth's Exhibit #3. According to the report dated October 7, 2022, the results indicated that Defendant may have recently discharged a firearm, was in close proximity to a firearm when it was discharged or came in contact with gunshot residue that was on another surface/object.

The other exhibit was a firearm and toolmark lab report dated April 28, 2023 from the Pennsylvania State Police. Commonwealth's Exhibit #4. This report contained the results of the testing on the 9mm gun found at Defendant's house including the shells and magazine, along with the cartridges found at the scene. First, the gun was tested and was functional and capable of discharging the type of ammunition for which it was manufactured. In addition, all of the cartridges which were collected by the WBP from the scene were determined to have been discharged by the firearm found at Defendant's house. The firearm and tool mark examiners conclusion was that his opinion was that the probability of the marks on the cartridges being produced by "different sources is so small that it is considered a practical impossibility."

Discussion

Search warrants

Both the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution protect citizens from unreasonable, searches and seizures. *Commonwealth v. Burgos*, 64 A.3d 641, 648 (Pa. Super. 2013). The Fourth Amendment has a strong preference for searches conducted pursuant to warrants. *Commonwealth v. Leed*, 186 A.3d 405, 413 (Pa. 2018). Search warrants may only issue upon probable cause and the issuing authority may not consider any evidence outside of the affidavits. Pa. R. Crim. P. 203 (B). The affidavit of probable cause must provide the magistrate with a substantial basis for determining the existence of probable cause. *Leed*, supra (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

In order to consider Defendant's claim that there was insufficient probable cause, the parties agree that the Court must restrict its analysis to the information contained in the affidavit of probable cause attached to the warrant, or its "four corners." The Court "must limit [its] inquiry to the information within the four corners of the affidavit submitted in support of probable cause when determining whether the warrant was issued upon probable cause." *Commonwealth v. Arthur*, 62 A.3d 424, 432 (Pa. Super. 2013).

"Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Leed*, supra (quoting *Commonwealth v. Johnson*, 615 Pa. 354, 42 A.3d 1017, 1031 (2012) (internal quotation marks and citation omitted). The affidavit of probable cause "must provide the magistrate with a substantial basis for determining the existence of probable cause[.]" *Gates*,

462 U.S. at 239, 103 S.Ct. 2317. In a case where the information from a confidential informant (CI) is used as the basis of information to form the totality of circumstances “...the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given **all the circumstances** set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a “substantial basis for ... conclud[ing] that probable cause existed.” *Commonwealth v Gray*, 503 A.2d 921, 925 (quoting *Gates, supra* at 238–39, 103 S.Ct. 2317) (emphasis added). It is “not require[d] that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location.” *Commonwealth v. Forster*, 385 A.2d 416, 437-38 (Pa. Super. 1978). A magistrate must simply find that “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Commonwealth v. Manuel*, 194 A.3 1076, 1081 (Pa. Super. 2018).

Defendant asserts that the each of the search warrants lacks probable cause. At the time of the hearing the Commonwealth agreed to withdraw the warrant on the cell phone. N.T. 5/12/2022, at 7-8. Therefore, the only warrants which will be reviewed are those for the DNA, gunshot residue and clothing of the Defendant.

Just as this Court determined on the first search warrant obtained by the city police, the affidavits do set forth probable cause to seize the Defendant’s clothing, obtain his DNA and check for gunshot residue (GSR) on Defendant’s hands.

Diaz observed a person in all black who was standing outside the Brandon Café and acting strangely. The Brandon Café is a bar on Washington Boulevard in Williamsport, Pennsylvania. Diaz sent a picture of the person to his sister. From the exhibits submitted during the preliminary hearing, it appears that Diaz was communicating with his sister at approximately 1:30 a.m. Shortly before 2:00 a.m., Diaz was shot in the parking lot behind the bar by someone dressed in all black.¹³ Some of the bullets fired at Diaz lodged in vehicles in the parking lot. Agent Alexander collected 9mm casings from the crime scene.

Diaz's sister identified the person in the picture as "Rell" and sent a photo of "Rell" without a mask on to the police who, with the assistance of the Juvenile Probation Office (JPO), identified "Rell" as Defendant, Terrell Cradle. JPO advised Agent Alexander that Defendant's address was 834 Franklin Street and Defendant had an appointment at Diakon later in the morning, maybe 10:00 or 11:00 a.m.

The police went to Diakon to speak with Defendant after his appointment. Defendant was wearing all black clothing just like the individual on video surveillance from the bar. Defendant initially denied being at the Brandon Café. However, once he was shown the photograph, he then admitted to being there visiting his uncle but he would not give his uncle's name. From Defendant's appearance, he had neither changed his clothing nor showered before going to Diakon. The Court is familiar with this area of Williamsport and knows that Defendant's residence is only a few blocks from the Brandon Café.

The police searched Defendant's residence pursuant to a search warrant. The police found a 9mm handgun under a comforter on Defendant's bed.

¹³ The Court concluded that the shooting happened shortly before 2:00 a.m. from the following: (1) the medical record that was submitted at the preliminary hearing that showed that the lab time was 0200; (2) the testimony of Agent Alexander that the bar was closed by the time she arrived; and (3) the fact that restaurant/bars in Pennsylvania close at 2:00 a.m., see 47 P.S. §4-406(a)(2).

From the totality of the circumstances, there is a fair probability that Defendant was the shooter. After being confronted with the photograph, Defendant admitted being at the Brandon Café at the time in question. Defendant was dressed all in black just like the shooter. The caliber of the casings found at the crime scene was the same caliber as the firearm located on Defendant's bed. Therefore, the police had probable cause to believe that Defendant was the shooter, that the firearm found in his residence was used in the shooting, and that Defendant's DNA would be located on the firearm.

There also was a fair probability that Defendant was still wearing the clothing that he was wearing at the time of the shooting. It was only hours after the shooting, the clothing was all black- just like the shooter's clothing, and it appeared that Defendant had not showered recently. When coupled with the fair probability that Defendant was the shooter set forth above, there was a fair probability that Defendant's hands and clothing would contain gunshot residue (GSR).

Gathering Defendant's DNA and comparing it to any DNA on the firearm would connect him to the weapon and GSR would reveal if he had discharged the weapon at Diaz. Collecting the clothing would also capture whether Defendant would have discharged the firearm as well.

Habeas Motion

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 also may submit additional proof. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (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).

Attempted Murder

The Commonwealth has charged Defendant with one count of Attempted Murder. To satisfy this charge the Commonwealth is required to prove that “with intent to commit [Murder], [Defendant did] any act which constitute[d] a substantial step toward the commission of [Murder].” 18 Pa. C.S. § 901(a). Specifically, the Commonwealth must show Defendant possessed the “specific intent to kill and took a substantial step towards that goal.” *Commonwealth v. Blakeney*, 946 A.2d 645, 652 (Pa. 2008). Both the *mens rea* and *actus reus* elements must be present to satisfy Attempted Murder. *Commonwealth v. Predmore*, 199 A.3d 925, 929 (Pa. Super. 2018) (*en banc*). The *mens rea* element may only be satisfied if a defendant possesses the specific intent to commit Murder of the First Degree. *See*

Commonwealth v. Griffin, 456 A.2d 171, 177 (Pa. Super. 1983) (Second Degree and Third-Degree Murder by definition do not satisfy the *mens rea* requirement because the crimes do not require the intent to kill). Such specific intent may reasonably be inferred from an accused's use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Hobson*, 604 A.2d 717, 720 (Pa. Super. 1992). "The *actus reus* element of the offense is the commission of one or more acts which collectively constitute a substantial step toward the commission of a killing." *Predmore*, 199 A.3d at 929.

Based on the above, this Court finds the Commonwealth satisfied its burden that Defendant acted with a specific intent to kill. Defendant fired a deadly weapon at Diaz four times striking him twice. One bullet struck Diaz in the upper thigh. Based on the diagram in the medical records, it was so high on his left thigh that it was very close to Diaz's groin area. Fortunately, the bullet missed the femoral artery in his thigh and exited below his left buttock. Defendant also hit the victim in the right arm next to a vital area of the body containing major organs. These are sufficient wounds to establish a specific intent to kill. Therefore, the Commonwealth has met its burden on this charge.

Aggravated Assault

Defendant is charged with two counts of aggravated assault, attempting to cause serious bodily injury with extreme indifference to the value of human life and causing bodily injury with a deadly weapon. "A person is guilty of aggravated assault if he:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; and,

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon...

18 Pa. C.S.A. § 2702(a)(1),(4).

The testimony at the preliminary hearing established that the victim told his sister that if anything happened to him, it was because the Defendant did it to him. The victim was shot with a 9mm weapon. The victim sustained two gunshot wounds – one to his right arm at his elbow area and another to his upper left thigh. Therefore, the Commonwealth has established prima facie on the causing bodily injury with a deadly weapon charge.

As for the additional count of aggravated assault, the Commonwealth must prove that he attempted to cause or caused bodily injury under circumstances which demonstrated an extreme indifference to the value of human life. Defendant pointed a loaded gun at Diaz and allegedly pulled the trigger four times, hitting Diaz twice. The Commonwealth has satisfied its burden on these two charges.

Firearms not to be Carried without a License

In Pennsylvania, “any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree”. 18 Pa. C.S.A. § 6106(a)(1).

At the time of this incident, Defendant was 18 years old. Alexander testified that he did not have a license to carry a firearm. Since he was not yet 21 years of age he was not eligible for one in Pennsylvania. *See* 18 Pa. C.S.A. Section 6109(b). Defendant was not at his home or fixed place of business; he was lurking around the Brandon Café wearing all black clothing. The firearm and tool mark report admitted as Commonwealth Exhibit 4 shows that the 9mm casings recovered at the scene were discharged from the 9mm Ruger pistol seized from Defendant’s bed. Despite claiming he had not fired a firearm within the last 24 hours, Defendant had gunshot residue on his hands. Diaz did not see Defendant openly carrying a

firearm, but Defendant made Diaz concerned for his safety to the extent that he sent text messages and a photograph to his sister. From this evidence, a jury could infer that Defendant was carrying the firearm concealed on his person, but the jury is not required to do so. Therefore, the Commonwealth has met its burden of proof on this charge.

Discharge of a firearm into an occupied structure

Under Pennsylvania law “a person commits an offense if he knowingly, intentionally or recklessly discharges a firearm from any location into an occupied structure.” 18 Pa. C.S.A. § 2707.1(a). An occupied structure is defined as “[a]ny structure, vehicle or place adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present.” 18 Pa. C.S.A. § 2701.1(d).

Here, the only testimony presented by the Commonwealth was that two vehicles were struck by the bullets fired that morning. Since neither vehicle was alleged to be a “occupied structure” as defined by the statute, the Commonwealth’s evidence fails on this charge. The Commonwealth agreed at the argument on the motion that the elements of the charge were not met. Therefore, these charges will be dismissed.

Possession of Weapon

A defendant commits the offense of Possession of Weapon if “he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.” 18 Pa. C.S.A. 907(b). For the same reasons stated with respect to possession of a firearm without a license, the court finds that Defendant possessed a firearm concealed upon his person. The evidence is also sufficient to show that he employed the firearm criminally. The shooter was dressed all in black. Defendant was dressed all in black. According to the firearm and tool mark report (Commonwealth’s Exhibit #4), the firearm found under a comforter on

Defendant's bed discharged the casings found at the crime scene. Defendant had gunshot residue on his hands. *See* Commonwealth's Exhibit #3. Defendant initially denied being at the Brandon Café but admitted to being there after being shown a photograph. Defendant also denied having discharged a firearm in the last 24 hours but had gunshot residue on his hands. Defendant's denials could be construed as consciousness of guilt. Based on the totality of the circumstances, the Commonwealth presented prima facie evidence that Defendant committed the offense of Possession of a Weapon.

Recklessly Endangering Another Person

A defendant commits the crime of Recklessly Endangering Another Person "if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa. C.S.A. § 2705.

The Commonwealth presented evidence that Defendant shot at Diaz four (4) times outside of an occupied restaurant/bar in the city. Two of the bullets struck Diaz in the right arm and left upper thigh. The other two bullets hit vehicles in the vicinity. Clearly, Defendant's conduct had the potential to place Diaz in danger of death or serious bodily injury. Accordingly, the Commonwealth has met its burden on this charge.

Simple Assault

A person is guilty of assault if "he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another" 18 Pa. C.S. § 2701.

The evidence in the possession of the police is that Defendant was identified as the person who fired shots at Diaz which resulted in him being treated at the hospital for two gunshot wounds. Bodily injury is defined as an "impairment of physical condition or

substantial pain.” 18 Pa.C.S.A. § 2301. Therefore, the Commonwealth has met its burden of proof.

Conclusion

In reviewing the totality of the circumstances, the police had sufficient probable cause to believe that Defendant was involved in the shooting. He was identified by both the victim and his sister as being on the scene at the time of the shooting. While Defendant initially denied being at the Brandon Café, he ultimately admitted that he was there. His clothing matched the clothing of the person in the surveillance video. Each of the search warrants for items from the Defendant’s person contained sufficient probable cause to gather the Defendant’s DNA, swab for gunshot residue and seize the clothing he was wearing less than a day after the incident occurred. Since the Commonwealth withdrew the search warrant for the phone, the seizure of the phone remains suppressed.

Since the firearm discharged projectiles into either the victim or two vehicles that were not adapted for overnight accommodations or carrying on business therein, sufficient evidence was not presented on the discharge of a firearm into a structure charge. On the other charges, the Commonwealth has met its *prima facie* burden.

ORDER

AND NOW, this 4th day of January 2024, for the reasons set forth in the foregoing Opinion, the Defendant’s Omnibus Pretrial Motion is hereby GRANTED in part and DENIED in part. On the Habeas Corpus motion, the Court GRANTS the motion as to Counts 5 and 6, Discharge of a Firearm, which are DISMISSED. The Court also SUPPRESSES any evidence

obtained from the search and seizure of Defendant's telephone. In all other respects, the motion is DENIED.

By the Court,

Nancy L. Butts, President Judge