IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	**No: CP-48-CR-1184-2017**
v.	:	
DEKOTA JEROME BAPTISTE,	:	
Defendant.	:	

ORDER OF COURT

AND NOW, this 14th day of October, 2019, upon consideration of Defendant's, Dekota Jerome Baptiste's ("Defendant"), Omnibus Post-Sentence Motions, Brief in Support, and Supplemental Brief in Support thereof, and the Commonwealth's Brief in Opposition thereto, it is hereby **ORDERED** that Defendant's Motions are **DENIED**.

STATEMENT OF REASONS

I. Factual and Procedural History

According to Defendant's testimony, Defendant encountered Terrence Ferguson ("Ferguson") four times over a two-day period. First, on February 22, 2017 at Thressa Duarte's ("Duarte") house where a "situation" occurred. Subsequently, on February 23, 2017, the contact continued as follows: outside of Duarte's grandmother's senior citizen housing; in an alleyway in Easton; and, at the AutoZone in Easton. The details regarding these encounters are elaborated upon *infra*.

Defendant stated at the time of trial that he had known Duarte for about ten years, and they met in high school. Notes of Trial ("N.T.") Vol. V (5/10/19) at 20:3-12. Defendant testified that he has visited the Duarte home, located on Ferry Street in Easton, Pennsylvania, "a couple times." Id. at 32:22-24, 69:11-15. While at Duarte's house on Wednesday, February 22, 2019, Defendant testified that Ferguson arrived and pounded on the door in an "angrily and aggressive manner." Id. at 34:10-14, 30:19-22. This is the first encounter between Defendant and Ferguson. Defendant recalled that Duarte opened the door, and Defendant observed Ferguson wearing a hoodie jacket with the hood up, and Ferguson's right arm was in the jacket pocket, which Defendant claimed made him feel "threatened and scared for [his] life." Id. at 38:9-13. According to Defendant, the bulge in Ferguson's pocket signified that Ferguson was carrying a weapon. Id. at 81:7-15. Defendant stated Ferguson then "stormed out the door." Id. at 38:22. This is the "situation" referred to by Defendant *infra*.

Defendant testified that the following day, February 23, 2017, he arrived at Duarte's house at approximately 6:00 p.m. and he remained there for "a couple minutes." Id. at 26:4-10. Next, Duarte's mother drove Defendant and Duarte from the Duarte household in Easton, Pennsylvania, to Duarte's grandmother's senior citizen home, only a few blocks away. Id. at 26:11-17, 70:2-7. Defendant stated that they were at Duarte's grandmother's home for a short period of time. Id. at 26:20. Defendant recalled that he

remained inside of the car, and Duarte and her mother exited the vehicle and entered the building. Id. at 26:21-27:3. It was here that Defendant and Ferguson had their second encounter. While in the car, Defendant observed Ferguson's vehicle drive up and park next to where the Defendant was located. Id. at 27:4-6. When Duarte exited her grandmother's house, Duarte entered the Ferguson vehicle. Id. at 27:7-9. Defendant stated that Duarte's mother dropped him off at his vehicle, then he visited a friend, and then drove through Easton. Id. at 29:2-7.

Defendant stated that as he was driving, he identified the car in front of him as the Ferguson vehicle, and Defendant followed that vehicle down an alleyway and then parked beside it. Id. at 29:8-15. This is the third encounter between Defendant and Ferguson. Defendant asked Ferguson if they could talk about the situation that took place on the day prior, Wednesday, February 22, 2017. Id. at 29:16-17, 38:16-19.

Defendant then followed Ferguson's vehicle to AutoZone, located at 2503 Nazareth Road, Easton, Pennsylvania 18045. Id. at 39:2-17, 43:11-12. This was the fourth and final encounter between Defendant and Ferguson. April Drake ("Drake"), an employee working at the McDonalds across from the AutoZone, testified that she observed the incident while working at the drive thru window. N.T. Vol. I (5/6/19) at 109:20-112:25. Drake's testimony revealed that as the two cars entered the AutoZone, the car identified as the Defendant's drove over a median. Defendant recalled

exiting his vehicle, walking over to the Ferguson vehicle, and telling Ferguson that he did not want problems between the two of them. N.T. Vol. V (5/10/19) at 43:11-15. Defendant testified that he believed the issues between him and Ferguson were resolved. Id. at 43:19-23. Defendant stated that as he was walking back to his car, he heard tires screeching and saw Ferguson moving his car towards the Defendant. Id. at 45:10-20. Defendant testified that Ferguson used his car to hit Defendant, more specifically Defendant claimed:

> Once the first hit landed, it took my knees out. I went to the ground. Now, at that point, because of the impact to the car hitting my car, now the backside of my bumper --- my car do a 180-degree spin, turn, so at that point, the back bumper is coming full speed at me nearly almost taking my whole upper body out, so I had to roll out of the way. At that point, now, the cars are pitched together. All I think at this point is survival, at this point, and defending myself.

Id. at 46:10-19. Defendant further claimed that Ferguson used his car to hit him four more times. Id. at 48:8-12. After claiming to be knocked down to the ground again, Defendant stated he "reached for my firearm with my left hand and started shooting." Id. at 48:12-14. After the shooting, Defendant left the AutoZone because he claimed he was panicked, scared and nervous. Id. at 49:20-24.

Ronald Johnson ("Johnson"), who was a passenger in the back seat of Ferguson's car, presented facts contrary to Defendant's recital. Johnson stated that he is a mechanic, and Ferguson was driving to the AutoZone to get car parts, and then Johnson was going to work on Ferguson's car. Id. at

167:1-11. Johnson testified that, on the day in question, he and a woman named Michelle were picked up by "Lex," which is a nickname for Ferguson, on Walnut Street at approximately 5:00 p.m. or 6:00 p.m., and "Tess" was also in the car. Id. at 168:4-13, 173:14-19. The name "Tess" was a reference to Duarte. Johnson sat on the passenger's rear side and Michelle sat on the driver's rear side. Id. at 168:22-25. Johnson testified that Ferguson pulled the car over on Union Street, and the Defendant pulled up next to Ferguson. Id. at 168:8-24. Johnson stated that he heard the Defendant say to Ferguson, "you disrespected me with my girlfriend." Id. at 170:5-10. Johnson said that Ferguson drove away, and the Defendant was driving erratically and chasing them. Id. at 170:12-24.

Johnson's testimony reiterated Drake's testimony, stating that he observed the Defendant driving across the median. Id. at 171:1-8. Johnson stated that he suggested to Ferguson, "don't stop, just pull back out again and see if he would stop doing what he's doing." Id. at 171:9-12. Johnson testified that Ferguson circled around and parked in the AutoZone parking lot. Id. at 171:9-14.

Johnson stated he got out of the vehicle and observed the Defendant exit his car and shout at Ferguson. Id. at 171:15-18. Johnson testified that he went into the AutoZone, but was unable to make a purchase "because of what was going on outside." Id. at 177:16-24. Although not in chronological order, Johnson continued to testify about the incident.

Johnson testified that he "was outside the [AutoZone] door when the shots were going off." Id. at 178:4. Johnson stated that he observed "cars bumping into each other" with drivers in both vehicles, and one car blocking the other's exit. Id. at 178:1-17. Johnson stated the Ferguson vehicle attempted to exit, but the Defendant was blocking the path, and Ferguson hit the Defendant while the Defendant was inside of his car. Id. at 178:21-179:7. Johnson recalled the Defendant exited his vehicle, and Ferguson did not attempt use his vehicle to hit Defendant's body. Id. at 179:9-14.

At the AutoZone, employees and customers observed, or heard, the gunshots and called 911 for help. N.T. Vol. I at 160:14-166:13, 129:11-130:18. Officer Kenneth McPherson ("McPherson"), a patrol officer for the Palmer Township Police Department, stated that upon his arrival to AutoZone, he observed "a gray-colored Hyundai Sonata facing the AutoZone, like the glass front, with a black male slumped over the driver's side steering wheel." N.T. Vol. II at 136:16-19. James Alercia ("Alercia"), a Detective at the Palmer Township Police Department, arrived at the "very hectic crime scene" which he photographed and secured with crime scene tape. N.T. Vol. I at 65:15-25, 67:17-22. Zachary Lysek, a coroner for Northampton County, pronounced Ferguson dead at 8:00 p.m. N.T. Vol. II (5/7/19) at 61:4-11, 64:5-25.

Officer Daniel Pacchioli ("Pacchioli"), a patrolman of the Wilson Borough Police Department, testified that he was at nearby Meuser Park at

approximately 7:20 PM on February 23, 2017, and heard gunshots coming from the 25th Street area. N.T. Vol. I (5/6/19) at 189:19-190:8. He testified that he got into his vehicle, and noticed a car driving quickly past him with smoke coming out of the rear of the vehicle. Id. at 190:9-13. Next, Pacchioli activated his lights and siren, and he pursued the car in question. Id. at 190:14-192:15. Pacchioli pursued the vehicle for about two to five minutes, and then the vehicle stopped at the 1400 block of Lehigh Street. Id. at 193:24-194:5. Pacchioli requested Easton Police units for assistance. Id. at 193:20-23.

Defendant testified that he discarded the firearm out of the window of his car while driving because he was panicked, nervous, and scared. N.T. Vol. V (5/10/19) at 50:9-12. Officer Colby Kuronya ("Kuronya") of the Palmer Township Police Department was placed on a search team to locate the gun used in the shooting. N.T. Vol. II at 86:6-16. Kuronya recounted the search trail. Id. at 87:11-88:4. Kuronya discovered the discarded firearm on Spruce Street, an alleyway behind Ferry Street. Id.

Defendant states he was on the phone trying to contact his family members, which is why he claims he did not notice the police officer's lights and did not pull his vehicle to the side of the road immediately. N.T. Vol. V (5/10/19) at 49:25-50:5. After stopping his vehicle, the Defendant was arrested and taken into custody by Pacchioli without any issue. N.T. Vol. I (5/6/19) at 194:16-195:13, 196:14-21.

McPherson arrived at 1400 Lehigh Street to assist Pacchioli in the transport of the Defendant to the Palmer Township Police Department. N.T. Vol. II (5/7/19) at 137:22-139:8. Therein, McPherson and Lieutenant Tom Trinchere ("Trinchere") entered the processing room with Defendant. Id. at 139:10-22. At approximately 2200 hours, or 10:00 p.m., McPherson read the Defendant his Miranda warnings and notice of the right to counsel, which the Defendant acknowledged and waived with his signature. Id. at 141:14-24. Defendant was questioned by the police, and admits to having provided answers that were not true. N.T. Vol. V (5/10/19) at 50:24-51:19, 126:7-15, 128:5-12, 129:4-8. Defendant agreed to participate in a gunshot residue test, which yielded positive results of gunshot residue on the Defendant's left hand. Id. at 51:11-22. Sergeant Timothy Ruoff ("Ruoff") administered the gunshot residue test using equipment called XCAT. N.T. Vol. II (5/7/19) at 182:9-188:22.

Just before midnight of February 23, 2017, the Defendant was placed in his holding cell to sleep. Notes of Proceedings ("N.P.") (1/26/18) at pp. 17-20. While Defendant was held overnight, officers obtained two search warrants for the houses where the Defendant and Ferguson were living. N.T. Vol. II (5/7/19) at 193:2-194:2. Police also obtained a search warrant for a DNA swab from Defendant. Id. at 194:3-195:17. Defendant was served with the warrants, acknowledged that he understood the warrants,

and submitted to DNA testing. Order of Court (April 27, 2018) at pp. 3, 14-15.

Defendant was arraigned thereafter and charged with the following offenses: Criminal Homicide; Criminal Attempt to Commit Criminal Homicide; Aggravated Assault; Recklessly Endangering Another Person; Receiving Stolen Property; Possessing Instrument of Crime; Persons Not to Possess Firearm; Firearms Not to be Carried Without a License; and Fleeing or Attempting to Elude a Police Officer.

Following a preliminary hearing on April 12, 2017, the case was specifically assigned to this Jurist as a major case. Defendant was formally arraigned on June 30, 2017. Defendant, through his original attorneys, Brian M. Monahan and Tyree Blair, filed an Omnibus Pretrial Motion on July 28, 2017. Defendant subsequently hired new counsel, and Evan T.L. Hughes entered his appearance as counsel for Defendant on September 28, 2017.

A pretrial hearing regarding the Omnibus Pretrial Motion was held on January 26, 2018. The undersigned received Defendant's supporting memorandum on March 27, 2018. The Commonwealth filed a Brief in Opposition on April 2, 2018.

On April 27, 2018, this Court entered an Order granting in part Defendant's Petition for Writ of Habeas Corpus/Motion to Quash as it related to the unlawful firearm possession charge under 18 Pa.C.S.A. § 6105;

however, the balance of the motion was denied. See Order at ¶ 1 (Apr. 27, 2018). The Order denied Defendant's Motion to Suppress Statements Made by the Defendant and Consent to Personal Search and denied Defendant's Motion to Preclude the Death Penalty and Strike Notice of Aggravating Circumstances. Id. at ¶ 2-3.

On May 4, 2018, this Court entered an Order allowing Attorney Evan Hughes to withdraw as counsel, and reinstated Attorneys Brian M. Monahan and Tyree Blair. See Order at ¶ 1-2 (May 4, 2018).

Jury selection in this matter commenced on April 29, 2019. Individual voir dire lasted until May 3, 2019. See Voir Dire Vol. I at 19:9-Voir Dire Vol. V. at 224. A total of 136 juror questionnaires were reviewed. Id. at 221:16-222:3.

The trial lasted for five days from Monday, May 6, 2019 until Friday, May 10, 2019. After deliberating for a number of hours on Friday, May 10, 2019, the jury returned guilty verdicts on all counts. N.T. Vol. V (5/10/19) at 293:18-295:14. Since this matter was filed as a capital case, the penalty phase began on Monday, May 13, 2019. Deliberations resulted in a life sentence.

The formal imposition of a life sentence without parole was made by the undersigned on Friday, May 17, 2019. Notes of Sentencing ("N.S.") (5/17/2019) at 9:17-22. At that time, the Defendant was also sentenced for his other convictions, as follows: on the offense of attempted murder of

Thressa Duarte, 120 months to 250 months; for recklessly endangering another person, 12 to 24 months; on the offense of theft by stolen property, a firearm, 27 to 120 months; for possessing instruments of a crime, a weapon, 16 to 60 months; on the offense of carrying a firearm without a license, specifically a loaded revolver handgun, 42 to 84 months; for fleeing and eluding a police officer via a high speed chase, 16 to 84 months. N.S. (5/17/2019) at 8:19-21, 9:2-12. The two counts of aggravated assault were merged with the attempted murder charge. Id. at 8:22-24. The aforesaid sentences resulted in an aggregate of 233 to 612 months. Id. at 9:13-16.

On May 28, 2019, Defendant filed timely post-sentence motions, as follows: (1) Motion for Judgement of Acquittal and Directed Verdict of Not Guilty; (2) Motion for a New Trial, and (3) Motion to File Supplemental Motions. On August 19, 2019, Defendant filed a Brief in Support thereof. On September 9, 2019 the Commonwealth filed a Brief in Response to Defendant's Omnibus Post-Sentence Motions. On September 10, 2019, Defendant filed a Supplemental Brief in Support of his Omnibus Post-Sentence Motions. These motions are now ready for disposition.

II. Discussion

A. Issues Withdrawn and Waived by Defendant

In his Brief in Support of Omnibus Post-Sentence Motions, Defendant raises fifteen issues before this Court. Of those fifteen issues, three issues were withdrawn and one issue was waived by the Defense, which leaves

eleven issues for disposition. Herein, we identify those issues withdrawn and waived by the Defense. Defendant withdrew the following issues:

> 5. This Honorable Court erred in allowing the Commonwealth cross-examination of your Defendant which presented false evidence as to the jury related to the number of gunshot wounds of the victim where the victim was only shot once in the right shoulder.
>
> 6. This Honorable Court erred in allowing the rebuttal testimony of Ronald Johnson which testimony was improper due to the unfair surprise with no proper notice to the defense.
>
> 10. The Trial Court improperly permitted evidence of your Defendant's prior criminal record history in the nature of juvenile delinquency for conspiracy to commit robbery during Trial.

Def. Br. in Supp. at p. 11-13, 16-17. In addition, Defendant waived the following issue:

> 9. The Trial Court erred in failing to permit direct examination of Defendant pertaining to the subject matter of the victim, Terrance Ferguson's, character as a known major drug dealer and said "occupation" known to the Palmer Police Department. This testimony would provide reason and motive for the victim's attempt to run over Defendant with his car.

Def. Br. in Supp. at p. 16.

Therefore, these issues are not being addressed and do not require further discussion. Accordingly, this Court reviews and rules on the remaining eleven issues.

B. This Court properly denied a portion of Defendant's Petition for Writ of Habeas Corpus/Petition to Quash by Order of Court of April 28, 2018.

On April 12, 2017, a Preliminary Hearing was held before the Honorable Jacqueline E. Taschner, Magisterial District Judge. At said

hearing, there was a lack of testimony or appearance by Duarte. However, hearsay evidence is permissible to establish a *prima facie* case at a preliminary hearing. See Pa. R. Crim. P. 542(E). "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 belief that the accused committed the offense." Commonwealth v. Weigle, 606 Pa. 234, A.2d 306, 311. Where a criminal defendant seeks to challenge the sufficiency of the evidence presented at his preliminary hearing, he may do so by filing a writ of habeas corpus. Commonwealth v. Landis, 48 A.3d 432 (Pa. Super 2012). The scope and standard of review for a grant of habeas corpus petition is as follows:

> The decision to grant or deny a petition for writ of [habeas corpus] will be reversed on appeal only for a manifest abuse of discretion.... Our scope of review is limited to deciding whether a *prima facie* case was established … The Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in **allowing the case to go to the jury**. When deciding whether a prima facie case was established, we must view the evidence in the light most favorable to the Commonwealth, and we are to consider all reasonable inferences based on that evidence which could support a guilty verdict. The standard clearly does not require that the Commonwealth prove the accused's guilt beyond a reasonable doubt at this stage.

Landis, 48 A.3d 432, 444 (Pa. Super 2012)(bold in original). The Court in Landis continued by stating "the prima facie case merely requires evidence of the existence of each element of the crime charged" and "[t]he weight and credibility of the evidence is not a factor at this stage." Id.

In Defendant's Brief in Support of Omnibus Post-Sentence Motions, issue (2) focuses on the portion of the Petition for Writ of Habeas Corpus/Motion to Quash as related to Duarte. Def. Br. in Supp. at p. 6-7. Therefore, our discussion in this section is limited to the attempted homicide and aggravated assault charges associated with Duarte as the victim.

To succeed on the charge of criminal attempt to commit homicide, the Commonwealth must prove that "the accused with a specific intent to kill took a substantial step towards that goal." Commonwealth v. Robertson, 874 A.2d 1200, 1207 (Pa. Super. 2005); see also 18 Pa. C.S.A. § 901(a). We concluded that the Commonwealth sustained its initial burden regarding attempted homicide. This Court relied upon Commonwealth v. Cross, where a conviction for attempted murder was upheld after the prosecution established that a feud existed between the defendant and the victim, the defendant shot at a vehicle, and the victim would have suffered serious, if not fatal, wounds had the vehicle's door not protected him. 331 A.2d 813, 814-15 (Pa. Super. 1974).

In the instant matter, testimony at the Preliminary Hearing revealed that Defendant walked to the front of the vehicle and fired shots toward the front passenger side. See Notes of Preliminary Hearing ("P.H.") at 52:9-17, 53:3-4. Duarte ducked under the front passenger's seat when Defendant allegedly fired multiple gun shots toward her portion of the vehicle. This Court previously found the facts of the instant matter similar to Cross. The

testimony regarding Defendant's actions formed the necessary probable cause for this Court to find that the Commonwealth satisfied their *prima facie* case on the attempted homicide charge. Therefore, this Court again denies Defendant's request.

Defendant was also charged with the aggravated assault of Duarte. A person is guilty of aggravated assault if he or she:

> (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; [or]
>
> . . .
>
> (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). This Court found that the Commonwealth presented sufficient evidence to establish the elements of the crime charged. We relied upon the testimony from the Preliminary Hearing, which established that the Defendant fired gunshots toward the front passenger side where Duarte was located. See P.H. at 52:9-17, 53:3-4. Thus, the Commonwealth succeeded in establishing its *prima facie* case for both attempted homicide and aggravated assault, and this Court properly denied Defendant's Petition for Writ of Habeas Corpus/Petition to Quash by Order of Court of April 28, 2018. We hereby confirm said denial.

C. This Court properly denied Defendant's Motion to Suppress Statements Made by Defendant and Defendant's Consent to Personal Search by the Palmer Township Police Department.

In Defendant's Brief, issue (3) questions this Court's denial of Defendant's Motion to Suppress. Def. Br. in Supp. at p. 7-10. Defendant moved to suppress "[a]ll statements made by defendant and any physical testing consented to . . . as involuntary and in violation of the defendant's rights to due process, and self-incrimination." Def. Mem. at 4.

The United States and Pennsylvania Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Pa. Const. art. I, § 8. A buccal swab, a procedure to collect DNA from a person's cheek, constitutes a search and is deemed reasonable under the Fourth Amendment pursuant to a valid warrant. See Maryland v. King, 569 U.S. 435, 446 (2013). To be valid, a warrant must be supported by probable cause and issued by a neutral magistrate. See Commonwealth v. Arter, 151 A.3d 149, 153 (Pa. 2016).

At the pretrial hearing, Ruoff testified that he obtained a search warrant for Defendant's DNA swab and served that warrant on Defendant the morning after his arrest. See N.P. 35:2-23. Defendant was given a copy of the warrant and stated that he understood its terms. Id. at 36:2-4. This Court found the record was absent of any challenge by Defendant as to

the warrant's validity, and therefore, the Defendant's constitutional rights were not violated and the DNA results were admissible at trial.

Defendant continues by arguing that statements he made to the police should be suppressed because those statements were a result of police coercion and an invalid waiver of his Miranda rights. The United States Constitution guarantees a suspect the right to an attorney and the right to remain silent. Miranda v. Arizona, 384 U.S. 439, 469 (1966). These constitutional rights become necessary whenever the accused is subject to "custodial interrogation," which is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Commonwealth v. Brown, 583 A.2d 805, 810 (Pa. Super. 1990). A defendant may waive these rights if the Commonwealth proves that the waiver is made "voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444. The Pennsylvania Supreme Court has explained that:

> . . . the totality of the circumstances must be considered in evaluating the voluntariness of a confession. The determination of whether a defendant has validly waived his Miranda rights depends upon a two-prong analysis: (1) whether the waiver was voluntary, in the sense that defendant's choice was not the end result of governmental pressure, and (2) whether the waiver was knowing and intelligent, in the sense that it was made with full comprehension of both the nature of the right being abandoned and the consequence of that choice.

Commonwealth v. Mitchell, 902 A.2d 430, 451 (Pa. 2006) (citations omitted).

The record shows that McPherson read Defendant his rights, Defendant signed that he understood those rights, and signed a waiver of those rights. Order of Court (April 27, 2018) at p. 3, 14-15.

Defendant claimed he was subjected to physical discomfort and consistent re-questioning by police officers. However, the record showed Defendant was provided with food and water during his interrogation and detention. See N.P. 20:24-25; 24:9-10. At no point after the interrogation was Defendant further questioned. Id. at 25:4; 38:8-13. Defendant argued that the length of interrogation and time spent in custody warrant suppression. Defendant was questioned for less than two hours. See N.P. 17:10-14; 19:12-19. In our April 28, 2018 Order, we cited case law holding that such a duration is not coercive enough to render a statement involuntary. See, e.g., Commonwealth v. Perez, 845 A.2d 779 (Pa. 2004) (interrogation lasted approximately four hours); Commonwealth v. Nester, 709 A.2d 879 (Pa. 1998) (interrogation lasted one hour and fifteen minutes); Commonwealth v. Taylor, 431 A.2d 915 (Pa. 1981) (interrogation lasted over one hour). Thus, while the duration of the interrogation is a factor to consider when determining the voluntariness of a statement and the validity of a Miranda waiver, the subject interrogation was not so unreasonable in length to grant Defendant's requested relief. This Court looked at the totality of the circumstances of Defendant's detention and interrogation and found that the circumstances do not warrant suppression.

In his Brief in Support of Omnibus Post-Sentence Motions, Defendant reiterates his belief that the questions of the interrogation and the manner of the detention requires suppression. The standard of review of a denial of a suppression motion is set forth in Commonwealth v. Grundza, 819 A.2d 66 (Pa. Super. 2002):

> Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Grundza, 819 at 67 (citing Commonwealth v. Reppert, 814 A.2d 1196 (Pa. Super. 2002))(internal quotation marks omitted).

As stated *supra*, the Defendant was questioned for approximately two hours. In other cases cited by this Court, interrogations lasted from one to four hours and were not found to be coercive. The Defendant was offered food and water during his interrogation and detention. In light of these established facts, this Court found that the Commonwealth met its burden of showing that the challenged evidence was not obtained in violation of the Defendant's rights. See Pa. R. Crim. P. 581(H). We confirm the finding that this Court properly denied Defendant's Motion to Suppress Statements Made by Defendant and Defendant's Consent to Personal Search by the Palmer Township Police Department.

D. This Court properly denied Defendant's Motion to Preclude the Death Penalty and Strike the Notice of Aggravating Circumstances.

Issue (4) in Defendant's Brief asserts the Commonwealth lacked evidentiary support for the aggravating circumstances required for seeking the death penalty. Def. Br. in Supp. at p. 10-11. Under 42 Pa.C.S. § 9711 (c)(1)(iv), the statute instructs:

> The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

The Commonwealth cited two applicable aggravating circumstances under subsection (d): (1) the Defendant committed a killing while in the perpetration of a felony; and, (2) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense. 42 Pa.C.S. § 9711 (d)(6)-(7). The Commonwealth alleged the Defendant killed Ferguson while in the perpetration of three felonies: (1) the attempted criminal homicide of Duarte, (2) the aggravated assault of Duarte, and (3) receiving stolen property.

In Commonwealth v. Buck, 709 A.2d 892 (Pa. 1998), the Court addressed whether a trial judge can hold a pretrial hearing to review the "sufficiency of the evidence" for aggravating circumstances. There, the trial

court held a pretrial hearing and concluded that the Commonwealth did not show sufficient evidence of the aggravating factors and granted the defendant's motion to quash. Id. at 894-95. On appeal, the Superior Court reversed the trial court's holding. Id.

The Pennsylvania Supreme Court affirmed the Superior Court in Buck, holding that the Commonwealth has no pretrial burden to prove aggravating factors. Specifically, the Supreme Court stated: "[t]he jury shall act as the factfinder, weigh evidence of aggravating and mitigating circumstances and determine the appropriate sentence in a capital case," and that "*absent a threshold showing of a valid claim of purposeful abuse*, a trial court's pre-trial determination regarding proposed aggravating factors violated the constitutional principle of separation of powers." Id. at 896 (emphasis in original). The Supreme Court continued by stating under 42 Pa.C.S. § 9711(c)(1)(i), "the trial court is required to instruct the jury to consider only aggravating circumstances for which there is *some evidence*. Thus, if the Commonwealth files a notice of aggravating circumstances which includes at least one aggravating factor that is supported by any evidence, the case is properly framed as a capital case." Id. (emphasis in original).

Here, we find that the Commonwealth timely filed a Notice of Aggravating Circumstances, thereby properly framing the matter as a capital case. The Commonwealth charged Defendant with the felonies of attempted homicide, aggravated assault and receiving stolen property. These felonious

charges form the aggravating circumstances whereby "Defendant committed a killing while in the perpetration of a felony." 42 Pa.C.S. § 9711 (d)(6). Further, testimony revealed evidence that in the commission of the offense against Ferguson, the Defendant "knowingly created a grave risk of death to another person," when he stood outside of Duarte's passenger window and shot into the car towards her person. 42 Pa.C.S. § 9711 (d)(7). We find no evidence of "purposeful abuse" by the Commonwealth. Therefore, we confirm our previous denial in the April 27, 2018 Order, and find that this Court properly denied Defendant's Motion to Preclude the Death Penalty and Strike the Notice of Aggravating Circumstances.

E. The Prosecution made Defendant's car, a 2016 Nissan Versa, available to the Defense.

Defendant argues in issue (8) of his Brief that the Commonwealth failed to preserve exculpatory evidence. Def. Br. in Supp. at p. 14-16. Bad faith is required for a due process violation where merely potentially useful evidence is destroyed before the defense has the opportunity to examine it. Commonwealth v. Snyder, 963 A.2d 396 (Pa. 2009).

Defendant argues that the Defendant's car was released to an insurance company prior to the Defense's attempt at extracting information from the Event Data Recorder in the vehicle. The record establishes that the Defendant's vehicle was towed to the Palmer Police Department, and then stored there for one year. N.T. Vol. II (5/7/19) at p. 191; see also N.T. Vol.

I (5/6/19) at p. 99. During that time, the car was available for inspection. Despite having more than ample time to do so, the Defense did not request an inspection of the vehicle until after its release. The record is void of any bad faith on behalf of the Commonwealth. Therefore, the Prosecution made Defendant's car, a 2016 Nissan Versa, available to the Defense for a reasonable period of time.

F. Defendant's Motion to Change of Venue/Venire was never Raised Before the Court.

Defendant argues in issue (12) of his Brief that this Court failed to grant Defendant's Motion for Change of Venue/Venire despite pervasive and inflammatory pretrial publicity. Def. Br. in Supp. at p. 20-21. Defendant states that publications from local newspapers, namely, the Express-Times, LehighValleyLive.com, and the Morning Call, were pervasive and inflammatory, which prevented the Defendant from receiving a fair trial. However, the Defendant did not raise this issue before the Court pursuant to Pennsylvania Rule of Criminal Procedure 584, nor did he provide any evidence of the alleged publications.

In Commonwealth v. Hughes, this Court denied Defendant's Motion for Change of Venue/Venire and on appeal, the Superior Court affirmed. Hughes, No. 2853 EDA 2017, 2019 WL 1489671 at *1 (Pa Super Apr. 3, 2019). In Hughes, the defendant was convicted of First Degree Murder and Criminal Conspiracy. Id. Defendant filed a motion for a change of venue or

venire and relied upon "thirty-five local newspapers articles about the murder published over four years," arguing that the "pretrial publicity was sustained, pervasive, inflammatory, and culpatory and there is a presumption of prejudice in selecting a fair and impartial jury in Northampton County." Id. at *11. The Superior Court held that despite the thirty-five articles, the defendant failed to meet his burden "in demonstrating that the pretrial publicity regarding this case has been so prejudicial as to preclude the empaneling of a fair and impartial jury." Id. at *12.

Here, not only did the Defendant not raise the issue of venue/venire as a Motion before the Court, but the Defense had the opportunity to question, and did in fact question, the jurors during voir dire as to their exposure to pre-trial publicity and whether it influenced their opinion and affected their abilities to perform their function. See generally Voir Dire Vol. I-Vol. 5. Additionally, as stated earlier, the Defendant has not proffered any evidence of the alleged pre-trial publicity. Furthermore, there was no Motion for this Court to grant or deny.

G. This Court determined that the Jury Panel was not "poisoned" by pretrial publicity pertaining to the allegation of a news broadcast in the jury lounge.

In his brief, Defendant contends at issue (7) that local news Channel 69 was broadcasted on the television in the jury lounge. Def. Br. in Supp. at

p. 13-14. The Defense bases its argument on the contention of one dismissed juror. Pretrial publicity is presumed to be prejudicial if: (1) the publicity is sensational, inflammatory, and slanted towards conviction rather than factual and objective; (2) the publicity reveals the accused's prior criminal record, if any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports. Commonwealth v. Carter, 643 A.2d 61 (Pa. 1994).

During voir dire, Juror 43 testified to reading about this case in 2017. Voir Dire Vol. III (5/1/2019) at 95:22-96:13. In addition, Juror 43 claimed to have recently heard of the case while returning home on Monday, April 29, 2019. Id. at 97:18-23. Juror 43 was equivocal in his answers. Upon further questioning by this Court, Juror 43 said "It was – or I think it was on [Channel] 69… I thought I saw a flash. I know I heard it on the radio, too," which he heard broadcasted in his car after Monday's proceedings. Id. at 105:3-13. Juror 43 was ultimately dismissed. Id. at 104:23-24.

This Court's administrative inquiry provided notice to both sides that Channel 69 is "absolutely never" on the television in the jury lounge. Id. at 108:15-21. When considering that Juror 43 merely "thought" he "saw a flash," there was no evidence that Channel 69 news was on the jury lounge television.

Alternatively, there was no evidence that the information in the alleged broadcast met the standard for prejudicial publicity. No information was provided that the alleged content was slanted towards conviction, mentioned the Defendant's prior criminal history, or was based upon police or prosecuting reports. In addition to the meticulous and individualized voir dire questioning by this Court, both sides had extensive opportunities to inquire about pretrial publicity. Defense counsel acknowledged that of the approximately forty jurors that had already been questioned, there was no evidence indicating that the panel was prejudiced. Id. at 103:1-8. Therefore, this Court properly determined that the Jury Panel was not affected by pretrial publicity pertaining to an alleged news broadcast in the jury lounge.

H. The Commonwealth properly exercised preemptory challenges during jury selection, and did not violate the Defendant's right to an impartial jury free from racial, ethnic, or gender discrimination pursuant to Batson v. Kentucky.

In issue (11) of Defendant's Brief, and in his Supplemental Brief in Support thereof, Defendant argues that the Commonwealth violated the Defendant's right to an impartial jury under Batson by striking three African American jurors. Def. Br. in Supp. at p. 17-20; see generally Def. Supp. Br. in Supp. Under Batson v. Kentucky, the United States Supreme Court held

that the Equal Protection Clause prohibits a prosecutor from challenging a juror solely on the basis of the juror's race. Batson, 476 U.S. 79, 89 (1986). Where a defendant makes a Batson challenge during jury selection:

> First, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination.

Commonwealth v. Watkins, 630 Pa. 652, 108 A.3d 692, 708 (2014); see also Commonwealth v. Edwards, 177 A.3d 963, 971 (Pa. Super. 2018).

To establish a *prima facie* case, the defendant must show: (1) that he is a member of a cognizable racial group, (2) that the prosecutor exercised a preemptory challenge or challenges to remove from the venire members of the defendant's race; and (3) that the relevant circumstances combine to raise an inference that the prosecution removed the juror(s) for racial reasons. Here, the Defendant established a *prima facie* case because (1) the Defendant is an African American, (2) the Commonwealth exercised a preemptory challenge against Juror 34, who was a member of the Defendant's race, and (3) Defendant made a statistical and circumstantial argument. In the last prong of the *prima facie* case, Defendant states that out of 136 total jurors, there were three African Americans. Def. Br. in Supp. at 19. Defendant argues that the Commonwealth only utilized seven of the available twenty preemptory strikes, which Defendant suggests is

evidence that the Commonwealth calculated its use of preemptory challenges. In addition, Defendant argued that the Commonwealth accepted the rehabilitation of other jurors, who were non-African American.

After this Court's *prima facie* finding, the burden shifted to the Commonwealth to articulate a race-neutral explanation for striking Juror 34. The individual voir dire of Juror 34 raised multiple issues for the Commonwealth. The Commonwealth based the preemptory strike of Juror 34 on the basis that he "had some hesitation regarding all doubt versus reasonable doubt. He had some hesitation concerning motive. He wanted to know motive. And … his comment… I don't know if I'm going to have nightmares about this." Voir Dire Vol. II (4/30/19) at 290:21-291:2. The Commonwealth further explained saying, "My confidence [in Juror 34] is whether he would pay attention to the exhibits based upon his reluctance to look at stuff, even though he said he would be impartial, it's certainly a basis for us to have some hesitation about this juror." Id. at 291:3-7.

This Court concluded that Juror 34 was inconsistent and arguably unconvincing enough for the Commonwealth to show that a race-neutral, rather than a discriminatory, reason was relied upon when striking Juror 34. We find that the Commonwealth properly exercised preemptory challenges during jury selection, and did not violate the Defendant's right to an impartial jury free from racial, ethnic, or gender discrimination pursuant to Batson v. Kentucky.

I. The Commonwealth established, beyond a reasonable doubt, that Defendant did not act in self-defense and was not justified in the shooting death of Terrance Ferguson.

Defendant contends in issue (1) of his Brief that the Commonwealth failed to establish evidence, beyond a reasonable doubt, that the Defendant was not acting in self-defense when he shot Terrance Ferguson. Def. Br. in Supp. at p. 3-6.

In Commonwealth v. Mouzon, the Pennsylvania Supreme Court summarized:

> [A] claim of self-defense (or justification, to use the term employed in the Crimes Code) requires evidence establishing three elements: (a) [that the defendant] reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm; (b) that the defendant was free from fault in provoking the difficulty which culminated in the slaying; and (c) that the [defendant] did not violate any duty to retreat… Although the defendant has no burden to prove self-defense… before the defense is properly in issue, there must be some evidence, from whatever source, to justify such a finding. Once the question is properly raised, the burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense. The Commonwealth sustains that burden of negation if it proves any of the following: that the slayer was not free from fault in provoking or continuing the difficulty which resulted in the slaying; that the slayer did not reasonably believe that [he] was in imminent danger of death or great bodily harm, and that it was necessary to kill in order to save [him]self therefrom; or that the slayer violated a duty to retreat or avoid the danger.

Mouzon, 617 Pa. 527, 531-32 (2012)(internal citations and quotations omitted).

In the instant case, the Commonwealth bears the burden of proving that the Defendant did not act in self-defense when he shot Ferguson. The Commonwealth presented evidence on all three theories to negate self-defense: Defendant was not free from fault in the provocation, the Defendant did not reasonably believe that he was in imminent danger, and Defendant violated his duty to retreat.

We start by identifying that the Defendant had a duty to retreat because the incident took place in a public location, and does not fall within an exemption under 18 Pa.C.S.A. §505.[1] Defendant claimed that he could not retreat; however, the evidence shows that the Defendant was able to maneuver around the vehicle and shoot at the front passenger side of the car. N.T. Vol. V (5/10/19) at 179. This Court is satisfied that the AutoZone parking lot was spacious enough for the Defendant to safely retreat.

We now turn to the issues of provocation and imminent danger. Despite being concerned about a "situation" with Ferguson, Defendant observed the Ferguson vehicle, continuously followed it, and then spoke with Ferguson. As a passenger and an eyewitness, Johnson testified that the

[1] 18 Pa.C.S.A. § 505 (b)(2) "The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if: (i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be."

Defendant said to Ferguson, "you disrespected me with my girlfriend." Id. at 170:5-10. Johnson said that Ferguson drove away, and the Defendant was driving erratically and chasing them. Id. at 170:12-24. Johnson's testimony reiterated Drake's testimony stating that he observed the Defendant driving across the aforesaid median. Id. at 171:1-8. Defendant claims to have been in imminent danger when he shot Ferguson. However, Defendant shot at the victim six times. Id. at 143:7-9. Defendant's aggressive pursuit of Ferguson in the alleyway, on the road, in the AutoZone parking lot, and the number of gunshots fired, is extensive evidence that the Defendant not only provoked the incident, but that he also was not in imminent danger.

Notwithstanding the Defendant claiming self-defense at trial, his words and actions after the shooting suggest that the Defendant was indeed guilty. During questioning with McPherson, Defendant stated that he was at the AutoZone to buy air fresheners, rather than stating that he was following Ferguson. Id. at 126:7-10. Defendant denied owning a firearm, rather than stating he had a firearm and used the firearm in self-defense against Ferguson. Id. at 129:5-12. Defendant denied knowledge of a shooting at the AutoZone, rather than telling the officers that he shot Ferguson in self-defense. Id. at 129:4-8. Defendant stated that he got into a car accident in the parking lot and immediately left because of an outstanding warrant for his arrest, rather than informing the officers that he was being attacked and needed to use self-defense against Ferguson. Id. at 126:12-129:25.

Defendant's words and actions are inconsistent with the justification claim of self-defense. The Commonwealth negated any claim of self-defense because the evidence established that the Defendant violated his duty to retreat, provoked the incident, and was not in any imminent danger. Therefore, the Commonwealth's case established beyond a reasonable doubt that the Defendant did not act in self-defense when he shot and killed Ferguson.

J. The mandatory sentence of life imprisonment without the possibility of parole for first degree murder imposed by this Court was lawful and did not violate the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment.

In issues (13) and (14) of Defendant's Brief, it is contended that the sentence imposed by this Court was unlawful and violated the Eighth Amendment prohibition against cruel and unusual punishment. Def. Br. in Supp. at p. 21-23. The standard of review over such questions is *de novo* and the scope of review is plenary. Commonwealth v. Cardwell, 105 A.3d 748, 750 (Pa. Super. 2014).

Defendant bases this argument on the United States Supreme Court case of Miller v. Alabama, which held that, "[m]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment prohibition on cruel and unusual punishment." Alabama, 567

U.S. 460, 1132 S.Ct. 2455, 2460 (2012). However, in the instant matter, Defendant was 24 years old at the time that he committed the crime. N.T. Vol. V (5/10/19) at 38:12-15. Defendant asks this Court to extend the Supreme Court's findings to any defendant, regardless of age. The Superior Court rejected the same argument made in Commonwealth v. Furgess, 149 A.3d 90 (Pa. Super. 2016). This Court rejects Defendant's argument on the basis that it is inconsistent with precedent and the *starre decisis* doctrine.

It has been determined that a mandatory sentence of life imprisonment without parole does not constitute "cruel and unusual punishment" where the sentence is proportionate to the crime. Commonwealth v. Green, 593 A.2d 899, 902 (Pa. Super. 1991). The Commonwealth contends that the Defendant was sentenced to life imprisonment for first degree murder in accordance with the mandatory sentencing provision established by the Pennsylvania legislature in 18 Pa.C.S.A. § 1102. Clearly, this sentence is proportionate to the crime. Therefore, the sentence this Court imposed upon Defendant was lawful and did not violate the Eighth Amendment prohibition on cruel and unusual punishment.

K. This Court properly instructed the jury in its closing charge.

Defendant argues in issue (15) of his Brief that this Court erred by not instructing the jury that in Pennsylvania the mandatory sentence for a

conviction of first degree murder is life imprisonment without the possibility of parole. Def. Br. in Supp. at p. 23-24. Defendant argues that without this instruction, the jury was not adequately informed.

The standard of review for examining a denial of a request for a specific jury instruction was explained by the Superior Court in Commonwealth v. Brown, as:

> [I]n reviewing a challenge to the trial court's refusal to give a specific jury instruction, it is the function of this [C]ourt to determine whether the record supports the trial court's decision. In examining the propriety of the instructions a trial court presents to a jury, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the appellant was prejudiced by that refusal.

Brown, 911 A.2d 576, 582-83 (Pa. Super. 2006).

As Defense counsel concedes, it is "[t]he jury's function to determine guilt or innocence." Commonwealth v. Carbaugh, 423 Pa.Super. 178, 182 (Pa. Super. 2014). However, Defense counsel ignores the case law surrounding that determination. The Superior Court in Carbaugh stated, "[p]unishment is a matter solely for the trial court," and "[t]he jury is not to know or to consider sentences when deliberating." Id.

The Pennsylvania Suggested Standard Criminal Jury Instructions states, "Do not concern yourself with what the penalty might be if you should find the defendant guilty. The question of guilt and punishment are separate questions. If you do find the defendant guilty, it will become my responsibility as judge to fix the penalty." Pa.SSJI (Crim) § 2.08 (2016). Although not identical, the jury instructions provided by this Court generally mirrored the suggested instruction in § 2.08. At the conclusion of the guilt phase of the trial, this Court instructed the jurors, stating, "In arriving at a verdict, you should not concern yourself with any possible future consequences of your verdict, including what the penalty might be if you should find the Defendant guilty. The question of guilt and the question of penalty are decided separately." N.T. Vol. V (5/10/19) at 281:12-16. Defendant's argument contradicts Pennsylvania case law and suggested jury instructions, which maintain a separation of the determination of guilt and its consequences.

Furthermore, Defendant's claim that the jury was uninformed on this issue is disingenuous. Although not required in a jury instruction as set forth aforesaid, the reference to life imprisonment without parole was mentioned by Defense counsel. In his closing, Attorney Monahan stated:

> If you find that his belief may have been unreasonable but nevertheless justified in his own mind, then that would be voluntary manslaughter, and the Court will tell you about that, but that's not first-degree murder that requires the death penalty or life in prison without the possibility of parole.

Id. at 200:16-21 (emphasis added).

Here, the instructions provided to the jury prior to their deliberations were adequate to assist them in performing their function. The jury was not palpably misled, and there was no omission tantamount to fundamental error. Based upon the aforementioned facts, this Court concludes that the jury instructions did not prejudice the Defendant.

BY THE COURT:

/s/ Samuel P. Murray

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SAMUEL P. MURRAY, J.

Date: October 14, 2019