CLD-208

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-2102**

ROBERT P. BROZENICK, Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

(W.D. Pa. Civ. No. 2-22-cv-01583)

Present: SHWARTZ, MATEY, and FREEMAN, *Circuit Judges*

Submitted is:

Appellant's letter, treated as a motion for a certificate of appealability in the above-captioned case.

Respectfully,

Clerk

ORDER

The application for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c). Jurists of reason would not debate the District Court's conclusion that it lacked jurisdiction because Appellant did not establish that he was in custody on the challenged convictions when he filed his petition under 28 U.S.C. § 2254. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (per curiam); *Piasecki v. Ct. of Common Pleas, Bucks Cnty., PA*, 917 F.3d 161, 165–66, 170 (3d Cir. 2019).

By the Court,

/s/ Arianna J. Freeman
Circuit Judge

Dated: October 4, 2023
Sb/cc: Robert Brozenick
Samantha R. Bentley, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

October 4, 2023

Samantha R. Bentley, Esq.
Allegheny County Office of District Attorney
436 Grant Street
Pittsburgh, PA 15219

Robert P. Brozenick
P.O. Box 393
Carnegie, PA 15106

RE: Robert Brozenick v. Commonwealth of Pennsylvania, et al
Case Number: 23-2102
District Court Case Number: 2-22-cv-01583

ENTRY OF JUDGMENT

Today, **October 04, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.

Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Patricia S. Dodszuweit, Clerk

By: Stephanie
Case Manager
Direct Dial 267-299-4926

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2102

ROBERT P. BROZENICK,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

(W.D. Pa. No. 2:22-cv-01583)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: October 30, 2023
Sb/cc: Robert P. Brozenick
Samantha R. Bentley, Esq.

APPENDIX A UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
NO. 23-2102 DECISION OCTOBER 30, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH

ROBERT PAUL BROZENICK, Petitioner, vs. COMMONWEALTH OF PENNSYLVANIA and DISTRICT ATTORNEY OF ALLEGHENY COUNTY, Respondents.	Civil Action No. 2:22-cv-01583 United States Magistrate Judge Cynthia Reed Eddy

MEMORANDUM OPINION[1]

Petitioner, Robert Paul Brozenick, ("Brozenick" or "Petitioner"), has filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging the June 28, 2018, judgment of sentence imposed on him by the Court of Common Pleas of Allegheny County, Pennsylvania, at its criminal case at CP-02-CR-0002351-2017. (ECF No. 6). For the reasons that follow, the Petition will be dismissed for lack of subject matter jurisdiction.

Jurisdiction

State prisoners seeking to obtain habeas relief under 28 U.S.C. § 2254 must demonstrate that they were "in custody" at the time the federal habeas petition was filed. The general rule is that a petitioner may not challenge a sentence that has expired. The custody requirement is easily satisfied when the petitioner is subject to confinement or on probation at the time the petition is filed. *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004) ("it is . . . clear that being on probation

[1] In accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties have voluntarily consented to jurisdiction by a United States Magistrate Judge, including entry of final judgment. (ECF Nos. 19 and 20).

APPENDIX C UNITED STATES COURT WESTERN DISTRICT PENNSYLVANIA
PG. 1-3 OPINION/DECISION 2:22-cv-01583-CRE

meets the "in custody" requirement for purposes of the habeas statute."). This "in custody" requirement is jurisdictional and presents a threshold matter to be decided by the federal court.

Background and Procedural History

Following a jury trial, Brozenick was found guilty of four misdemeanor counts of Terroristic Threats and four misdemeanor counts of Simple Assault.[2] He was sentenced on June 28, 2018, to an aggregate sentence of 24 months probation. The instant federal habeas petition was filed on November 9, 2022.

The instant case was stayed and administratively closed on December 16, 2022, pending the resolution of Brozenick's PCRA Petition. (ECF No. 7). On March 7, 2023, Brozenick's PCRA petition was denied. Following the denial of his PCRA petition, Brozenick filed a Motion to Reopen Case in this Court. (ECF No. 11). In their response to the Motion to Reopen, Respondents argued that this Court lacked subject matter jurisdiction because Petitioner was not "in custody" for purposes of 28 U.S.C. § 2254 when he initiated this case. (ECF No. 13). The Court directed Brozenick to reply to Respondents' argument, specifically addressing the "in custody" issue. (ECF No. 14).

Brozenick filed a timely Reply and Amended Reply, (ECF Nos. 15 and 16). In neither filing did he address the "in custody" issue; rather he complained about the alleged errors that occurred in the course of the state court proceedings leading to his convictions. However, no matter what errors occurred during the proceedings leading to his conviction and or during the appellate procedures or post conviction procedures in state court, if Brozenick was not in custody pursuant

[2] The Court takes judicial notice of the docket in the criminal case against Petitioner in Commonwealth v. Brozenick, CP-02-CR-0002351-2017 (Allegheny County CCP), which is the judgment he is seeking to attack via the instant Petition in this Court.

APPENDIX C UNITED STATES COURT WESTERN DISTRICT PENNSYLVANIA
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to the conviction being challenged herein at the time he filed this Petition, the Court lacks subject matter jurisdiction. *Maleng v. Cook*, 490 U.S. 488, 492 (1989).

Brozenick has not disputed that his probation had ceased at the time of he filed this federal habeas case. Thus, the Petition will be dismissed due to lack of subject matter jurisdiction.

Certificate of Appealability

Because jurists of reason would not find the foregoing analysis to be debatable, a Certificate of Appealability will be denied.

Conclusion

For the reasons set forth herein, this case will be dismissed because this Court lacks subject matter jurisdiction. A Certificate of Appealability will be denied as well. An appropriate Order follows.

May 15, 2023

BY THE COURT:

s/Cynthia Reed Eddy
Cynthia Reed Eddy
United States Magistrate Judge

cc: ROBERT PAUL BROZENICK
P.O. Box 393
Carnegie, PA 15106
(via U.S. First Class Mail)

Samantha Renee Bentley
Allegheny County District Attorney
(via ECF electronic notification)

APPENDIX C UNITED STATES COURT WESTERN DISTRICT PENNSYLVANIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT PAUL BROZENICK
Plaintiff(s),

vs.

COMMONWEALTH OF PENNSYLVANIA and DISTRICT ATTORNEY OF ALLEGHENY COUNTY,
Defendant(s).

Case No. 2:22-cv-01583

PRO SE

NOTICE OF APPEAL of WRIT OF HABEAS CORPUS

(Title of Pleading)

The Plantiff Robert Paul Brozenick comes forth with this Notice of Appeal of the petition of WRIT OF HABEAS CORPUS after this Western District Of Pennsylvania court ordered that the Plantiff Robert Paul Brozenick has not and the Record has not proved his that his "In Custody" status by the Commonwealth of Pennsylvania that Mr. Brozenick had claimed was valid and that his sentence was no longer valid and had expired and that Mr. Brozenick was NO LONGER under the status of "In Custody" of the Commonwealth This Notice Of Appeal will directly address that and that Mr. Brozenick is still considered "In Custody" by the Commonwealth of Pennsylvania with factual material documentation including the Commonwealth of Pennsylvania's own Docket records with timelines and other documents that were issued by Pennsylvania and that an ERROR had occurred in judgement by this Western District of Pennsylvania Federal Court.

Dated: June 5, 2023 Signed: Robert Paul Brozenick

APPENDIX D NOTICE OF APPEAL OF WRIT OF HABEAS CORPUS
Pg. 1

Ex 16

[J-33-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 1 WAP 2021
	:	
Appellee	:	Appeal from the Order of the Superior Court entered June 8, 2020 at No. 1086 WDA 2018, affirming the Order of the Court of Common Pleas of Allegheny County entered June 28, 2018 at No. CP-02-CR-0002351-2017.
v.	:	
ROBERT PAUL BROZENICK.	:	
	:	
Appellant	:	ARGUED: May 18, 2021

ORDER

PER CURIAM

AND NOW, this 22nd day of September, 2021, the appeal is dismissed as having been improvidently granted.

Judgment Entered 09/22/2021

DEPUTY PROTHONOTARY

APPENDIX E. PENNSYLVANIA SUPREME COURT DECISION

J-S11003-20

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ROBERT PAUL BROZENICK	:	
Appellant	:	No. 1086 WDA 2018

Appeal from the Judgment of Sentence Entered June 28, 2018
In the Court of Common Pleas of Allegheny County Criminal Division at No(s): CP-02-CR-0002351-2017

BEFORE: NICHOLS, J., MURRAY, J., and MUSMANNO, J.

MEMORANDUM BY NICHOLS, J.: **FILED JUNE 8, 2020**

Appellant Robert Paul Brozenick appeals from the judgment of sentence imposed following his jury trial conviction for four counts of terroristic threats and four counts of simple assault.[1] Appellant argues that the trial court erred by denying his motion for judgment of acquittal and reopening the record, rejecting his request for a missing witness jury instruction, and denying his motion for a mistrial based on an alleged *Brady*[2] violation. We affirm.

By way of background, this case arose from an incident that occurred in the Borough of Carnegie, Allegheny County on December 22, 2016 at approximately 2:40 p.m. N.T. Trial at 43-44, 55-56, 127. At that time, Trey Gieg and four juveniles, J.W., E.T., S.T., and B.B. (collectively, the

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[1] 18 Pa.C.S. §§ 2706(a)(1), 2701(a)(3).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

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complainants), were sitting in a parked car on 6th Avenue across from Appellant's residence.

Appellant approached the complainants' car, tapped on the window with a handgun, and proceeded to "sweep" the vehicle, pointing his gun at all of the occupants. Appellant later testified that he saw the complainants passing around a smoking device and believed that they were using drugs on his street. He stated that he pulled out his firearm and called the police because he felt threatened.

On April 10, 2017, the Commonwealth filed a criminal information charging Appellant with five counts of terroristic threats and five counts of simple assault, each count relating to one of the five complainants.

On October 10, 2017, Appellant filed a motion to compel discovery, seeking, among other things, "the address and contact information (phone number preferred) for each witness the Commonwealth intends to call at trial, specifically [J.W., E.T., B.B., S.T.,] and Trey Gieg." Mot. to Compel Discovery, 10/10/17, at 2 (unpaginated). At the motions hearing on December 19, 2017, Appellant's counsel explained:

> I spoke with the [previous] assistant district attorney that was assigned to this case . . . We came to an agreement because [the Commonwealth would not] agree to give the phone numbers or addresses for the Commonwealth witnesses, [so the Commonwealth] sent a letter authored by myself requesting that these witnesses get in touch with me one way or the other whether they want to have an interview or not. Only one person responded. I'm asking for the witnesses' addresses. These wouldn't be given to [Appellant]. I understand that was a concern of [the Commonwealth].

N.T. Motions Hr'g, 12/19/17, at 10-11.

Ultimately, the trial court declined Appellant's request for the Commonwealth to provide phone numbers or addresses for the complainants. ***Id.*** at 12. Instead, the trial court ordered the Commonwealth to contact each of the witnesses, "[g]et a date and time to interview all of them" and then "make them available for the defense."[3, 4] ***Id.***

On April 3, 2018, the matter proceeded to a jury trial. The Commonwealth presented testimony from Officer Gittings, Sergeant Seaman, and two of the complainants, J.W. and E.T. N.T. Trial at 27-73.

J.W. testified that Appellant came out of his house, then walked to the complainants' car and pointed the gun at all of the occupants. ***Id.*** at 32. She testified that none of the complainants made any verbal threats or made any threatening gestures. ***Id.*** at 35. J.W. further testified that no one inside the car was armed and that she felt scared and "in shock." ***Id.*** She also indicated that one of the complainants was using a vaping device in the car. ***Id.*** E.T. corroborated J.W.'s testimony, adding that she felt "very scared" and that Appellant appeared to be angry. ***Id.*** at 42-54, 48, 46.

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[3] It does not appear that the trial court memorialized its ruling in a written order.

[4] It is not clear from the record whether these interviews occurred. However, Appellant has not claimed that trial counsel did not have the opportunity to interview the complainants prior to trial.

Carnegie Police Officer David Gittings testified that he spoke with the complainants and did not observe any indication of drug use, nor did he see any drug paraphernalia or weapons. ***Id.*** at 57-58, 62. Officer Gittings stated that although he "looked into the car," he did not conduct a "search underneath the seats or compartment" of the vehicle. ***Id.*** at 62.

Sergeant Shawn Seaman testified that he spoke with Appellant. Sergeant Seaman explained that Appellant "kept quoting the castle doctrine" and "stating that he felt threatened" by the complainants. ***Id.*** at 69. Sergeant Seaman recalled that although Appellant indicated that he felt threatened by the juveniles, he also stated that they had not made any threatening gestures or made any advancements toward him, because he "wasn't giving them a chance to." ***Id.*** at 70.

After the Commonwealth rested, Appellant requested a sidebar, at which the following exchange occurred:

> [Appellant]: I would make a motion for judgment of acquittal based on the fact that the Commonwealth has alleged that my client threatened to call the police and brandished a firearm. The sufficiency--
>
> [Trial court]: What about the other [complainants]?
>
> [The Commonwealth]: Two of the other remaining three [complainants, S.T. and Trey Gieg,] were present [in court] today. As a strategy and based upon discussion with them in the hallway, they are comfortable with the testimony as presented.
>
> [Trial court]: How about their state of mind?

[The Commonwealth]: The Commonwealth's position would be their state of mind was that [Appellant] intended to threaten violence and made terroristic threats --

[Trial court]: There were no statements made.

[Appellant]: Given the lack of testimony by these individuals, we would move for a judgment of acquittal.

[Trial court]: You want to call them?

[The Commonwealth]: As to the other [complainants], I can call them. I will call them.

[Trial court]: It's up to you. I am going to grant a judgment of acquittal on them. I don't know which count is which.

[The Commonwealth]: I will call them.

[Trial court]: They are all Jane Doe or John Doe except for the adult.

[The Commonwealth]: I will call the other [complainants]. They are present.

[Trial court]: Did you rest?

[The Commonwealth]: Yes.

[Trial court]: Do you move to reopen the record?

[The Commonwealth]: Yes.

[Trial court]: Do you wish to make a motion?

[The Commonwealth]: Yes. I would make a motion.

[Appellant]: I object based on the fact that the Commonwealth is only reopening the

record because they didn't meet their burden. Their lack of good faith --

[Trial court]: I'm overruling that. I'll give [the Commonwealth] latitude to do that.

N.T. Trial at 73-75.

After both S.T. and Trey Gieg testified, the Commonwealth rested. At sidebar, Appellant moved for a judgment of acquittal with respect to the fifth complainant, B.B., who did not testify. *Id.* at 93-94. The trial court granted Appellant's motion with respect to the charges involving B.B. *Id.* at 95.

The trial court then asked the parties if there were any requested jury instructions. *Id.* at 96. Appellant asked the trial court give a missing witness jury instruction regarding B.B., "given that [he] did not appear" for trial. *Id.* at 98. Specifically, Appellant explained that, based on the Commonwealth's failure to call B.B., "the jury may infer that the witness would have been favorable to the defense." *Id.* at 99. Further, Appellant added that "the missing witness is in fact in custody in Abraxas currently. So, the reason he's not here is because he is incarcerated." *Id.* The trial court responded that "Abraxas is not a jail" and is instead "a treatment program for addiction." *Id.* Appellant also requested an instruction on justification, explaining that Appellant intended to testify that he acted in self-defense. *Id.* at 100. The trial court deferred ruling on the proposed jury instructions so that Appellant could testify. *Id.* at 101-102.

During his testimony, Appellant stated that he noticed the complainants sitting in a car parked across the street from his residence around 2:00 pm.

Id. at 104-05. Appellant went outside to inspect his own car, which was parked near the complainants' car. *Id.* at 108-10. At that time, he saw the complainants in their car, passing around "what looked like a smoking device." *Id.* at 110-11. After the complainants noticed Appellant standing outside of their car, they "got kind of panicky, like startled" and began moving around. *Id.* at 111. Appellant stated that he saw the driver reach between his legs and that he "felt threatened," because he thought the driver was "reaching for a weapon." *Id.* Appellant testified that he was "scared" and that he thought he had "walked in on a drug deal." *Id.* At that point, Appellant testified that he pulled his gun out, told the complainants to leave, and stated that he was calling the police. *Id.* At the conclusion of Appellant's testimony, the defense rested. *Id.* at 126.

The next day, Appellant renewed his request for a missing witness jury instruction. *Id.* at 129. Appellant added that because B.B. was in a drug rehabilitation facility, his testimony would be helpful to Appellant's self-defense claim. *Id.* at 130. The trial court denied Appellant's request, stating that there was no "nexus" between the fact that B.B. was undergoing drug rehabilitation treatment and Appellant's belief the complainants were using drugs when Appellant confronted them. *Id.* at 130-32. Further, the trial court explained that B.B. was not exclusively available to the Commonwealth, did not have special information material to the issue at hand, and his testimony would have been cumulative of the testimony from other witnesses. *Id.* at 133-34.

Appellant then moved for a mistrial, alleging that the Commonwealth violated ***Brady*** by failing to disclose that B.B. was in a drug rehabilitation facility. ***Id.*** at 132. In denying Appellant's motion, the trial court explained that the information about B.B.'s rehabilitation was not useful to the defense, as Appellant could "not get into anything about drug use" or why B.B. was in rehabilitation at the time of trial. ***Id.*** Further, the trial court noted that Appellant did not have "a scintilla of evidence that [B.B.] was using drugs two years ago," as the testimony at trial reflected that the complainants were smoking a vape pen. ***Id.*** at 133.

Ultimately, the jury found Appellant guilty of four counts of terroristic threats and four counts of simple assault. ***Id.*** at 174. On June 28, 2018, the trial court sentenced Appellant to an aggregate term of two years' probation. On July 6, 2018, Appellant filed a timely post-sentence motion challenging the weight of the evidence. Following a hearing on July 10, 2018, the trial court denied Appellant's motion.

Appellant subsequently filed a timely notice of appeal and a court-ordered Pa.R.A.P. 1925(b) statement. The trial court issued a Rule 1925(a) opinion asserting that Appellant's claims were meritless.[5]

Appellant raises the following issues on appeal:

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[5] The trial court initially filed a Rule 1925(a) opinion on August 1, 2019. However, the following day, the trial court issued an amended opinion indicating that the original version was an incomplete draft that was mistakenly filed. ***See*** Trial Ct. Op., 8/2/19, at 1 n.1.

1. Whether the trial court erred by denying [Appellant's] motion for judgment of acquittal when the Commonwealth initially rested and by further allowing the Commonwealth to reopen the record where the Commonwealth had failed to present sufficient evidence to sustain three counts of simple assault and three counts of terroristic threats?

2. Whether the trial court erred in denying [Appellant's] motion for a mistrial based on the Commonwealth's failure to disclose material, exculpatory evidence in violation of [***Brady***]?

3. Whether the trial court erred by failing to give curative instructions to the jury about the missing complaining witness and his current locations, thus biasing the jury against [Appellant's] self-defense claim?

Appellant's Brief at 6 (some capitalization omitted).

Reopening the Record

In his first issue, Appellant argues that "[t]he trial court abused its discretion by reopening the record where not only had the Commonwealth rested, but the defense had moved for a judgment of acquittal" on the charges involving B.B., S.T., and Trey Gieg. Appellant's Brief at 16. Appellant asserts that after the trial court rejected the Commonwealth's argument that J.W. and E.T.'s testimony was sufficient to establish the charges against all five complainants, it provided the Commonwealth with "numerous opportunities" to move to reopen the record. ***Id.*** at 26-27. Further, Appellant contends that by asking the Commonwealth if it intended to reopen the record, the trial court "effectively made the motion for the Commonwealth." ***Id.*** Finally, Appellant asserts that the instant case is distinguishable from our Supreme Court's decision in ***Commonwealth v. Tharp***, 575 A.2d 557 (Pa. 1990), where the

Commonwealth presented circumstantial evidence and reopened the record to clarify a single objective fact. ***Id.*** at 23-24.

The Commonwealth responds that the trial court properly exercised its discretion to reopen the record and asserts that the instant case is analogous to ***Tharp***. Commonwealth's Brief at 8-9. The Commonwealth argues that the trial court was not required to grant Appellant's motion for judgment of acquittal, and instead "had the discretion to afford the parties equal opportunity to respond to its concerns." ***Id.*** at 9-10. The Commonwealth contends that it presented circumstantial evidence to support the charges involving the non-testifying complainants and that, as in ***Tharp***, the trial court was not precluded from reopening the record simply because it agreed with Appellant that the Commonwealth presented insufficient evidence. ***Id.*** at 9.

Our Supreme Court has held that "a trial court has the discretion to reopen a case for either side, prior to the entry of final judgment, in order to prevent a failure or miscarriage of justice." ***Tharp***, 575 A.2d at 558-59. Absent an abuse of discretion, we will not disturb the trial court's ruling. ***Commonwealth v. Baldwin***, 58 A.3d 754, 763 (Pa. 2012). "[A]n abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." ***Commonwealth v. Safka***, 141 A.3d 1239, 1249 (Pa. 2016) (citation omitted). Further, "[w]e will not condemn a trial court's ruling as an abuse of discretion merely because we

might have reached a different conclusion." ***Commonwealth v. Bango***, 742 A.2d 1070, 1072 (Pa. 1999) (citation omitted).

In ***Tharp***, the defendant was charged with corruption of minors, which required proof that he was over eighteen at the time of the offense. ***Tharp***, 575 A.2d at 557. After the Commonwealth rested without presenting direct evidence of the defendant's age, the defendant demurred.[6] ***Id.*** at 558. Rather than ruling on the defendant's motion, the trial court permitted the Commonwealth to reopen its case to offer direct evidence of the defendant's age. ***Id.*** On appeal, the defendant argued that the trial court erred by failing to grant the demurrer and by permitting the Commonwealth to introduce additional evidence. ***Id.*** Ultimately, our Supreme Court rejected the defendant's argument, holding that it was a proper exercise of a trial court's discretion "to permit the Commonwealth to reopen its case for the purpose of meeting a demurrer [*i.e.*, motion for judgment of acquittal,] interposed by the defense prior to its ruling upon that motion." ***Id.*** at 559.

Here, in its Rule 1925(a) opinion, the trial court rejected Appellant's claim, reiterating that it had discretion to grant the Commonwealth's motion

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[6] We note that pursuant to Pa.R.Crim.P. 606, the term "demurrer" for challenges to the sufficiency of the evidence is now referred to as a motion for judgment of acquittal. ***See*** Pa.R.Crim.P. 606 (A)(1) and Comment; ***see also Commonwealth v. Feathers***, 660 A.2d 90, 92 (Pa. Super. 1995) (observing that Rule 606, then numbered Rule 1124, "eliminated the use of the terms 'demurrer' and 'motion in arrest of judgment' and substituted a 'motion for judgment of acquittal'").

to reopen the record. Trial Ct. Op., 8/2/19, at 7. Based on our review of the record, we agree.

After Appellant moved for a judgment of acquittal, the Commonwealth offered to call the two available complainants, S.T. and Trey Gieg, who were already present in court.[7] As in ***Tharp***, the trial court had discretion to permit "the introduction of direct evidence to avoid the possibility of a result inconsistent with the true facts." ***See Tharp***, 575 A.2d at 559.[8] Under these circumstances, we cannot conclude that the trial court's decision to reopen the record was manifestly unreasonable, a misapplication of the law, or the result of partiality, prejudice, bias or ill will. ***See Baldwin***, 58 A.3d at 763; ***see also Safka***, 141 A.3d at 1249. Therefore, we discern no abuse of discretion. ***See Tharp***, 575 A.2d at 558-59. Accordingly, Appellant is not entitled to relief on this claim.

Mistrial for *Brady* Violation

In his second issue, Appellant argues that the trial court erred by denying his motion for a mistrial after the Commonwealth "failed to disclose

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[7] We reject Appellant's claim that the trial court "made the motion for the Commonwealth" by asking if it wished to reopen the record.

[8] To the extent Appellant attempts to distinguish ***Tharp*** based on the fact that the Commonwealth did not present circumstantial evidence before moving to reopen the record, his claim is without merit. As noted previously, trial courts have discretion to reopen the record "in order to prevent a failure or miscarriage of justice." ***Tharp***, 575 A.2d at 559. Therefore, we reject Appellant's assertion that the trial court was precluded from reopening the record based on the lack of circumstantial evidence or the "subjective" nature of the element in question.

material, exculpatory evidence in violation of [***Brady***]." Appellant's Brief at 28. Specifically, Appellant refers to information that B.B. was in a drug rehabilitation facility at the time of trial. ***Id.***

In support of his ***Brady*** claim, Appellant first argues that the evidence was favorable to his defense. ***Id.*** Specifically, he asserts that he could have used the information to bolster his self-defense claim, which was based, in part, on Appellant's own assertion that the complaining witnesses were using drugs when he approached their vehicle. ***Id.*** He further contends that the fact of B.B.'s drug rehabilitation "could have been used to impeach the remaining four witnesses, who testified that "they were not [using] illegal substances in the vehicle." ***Id.*** at 30.

Second, Appellant asserts that "the Commonwealth, at the very least, inadvertently suppressed B.B.'s whereabouts and the testimony he could provide." ***Id.*** at 29. Appellant claims that the Commonwealth failed to abide by the trial court's discovery order and "utterly failed to disclose" that B.B. "had not appeared for trial until halfway through the jury trial." ***Id.***

Third, Appellant contends that "the eleventh hour reveal by the Commonwealth that B.B. was located in a drug rehabilitation facility significantly prejudiced [Appellant's] self-defense claim." ***Id.*** at 30. He argues that, had this information been disclosed prior to trial, Appellant "would have been able to impeach the credibility of the [complainants] and/or bolster

his self-defense claim by demonstrating to the jury that the [complainants] were, in fact, partaking in drug use." ***Id.*** at 31.

The Commonwealth responds that Appellant failed to establish a ***Brady*** violation, as he did not demonstrate that the information relating to B.B.'s whereabouts would have been favorable to his defense. *Commonwealth's* Brief at 13. Additionally, the Commonwealth argues that there was no evidence that the Commonwealth suppressed the information concerning B.B.'s rehabilitation or that it otherwise denied Appellant access to B.B. ***Id.*** Finally, the Commonwealth asserts that Appellant failed to prove that B.B.'s testimony was material and, therefore, he cannot satisfy the prejudice prong of ***Brady***. ***Id.*** at 12-13.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. ***Commonwealth v. Bryant***, 67 A.3d 716, 728 (Pa. 2013). A mistrial is appropriate "only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." ***Id.*** (citation and internal quotation marks omitted).

Brady provides that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady***, 373 U.S. at 87; ***see also*** Pa.R.Crim.P. 573(B)(1)(a) (providing that the prosecutor must disclose any evidence within

the prosecutor's possession or control that is favorable to the defendant and is material to defendant's guilt or to punishment).

To establish a ***Brady*** violation, an appellant must prove three elements: "(1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it impeaches; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensued." ***Commonwealth v. Weiss***, 81 A.3d 767, 783 (Pa. 2013) (citations omitted).

"Exculpatory evidence is that which extrinsically tends to establish defendant's innocence of the crimes charged." ***Commonwealth v. Lambert***, 765 A.2d 306, 325 n.15 (Pa. Super. 2000) (citation omitted). "***Brady*** does not require the disclosure of information that is not exculpatory but might merely form the groundwork for possible arguments or defenses." ***Commonwealth v. Roney***, 79 A.3d 595, 608 (Pa. 2013) (citation and internal quotation omitted). Further, "[t]he burden rests with the appellant to prove, by reference to the record, that evidence was withheld or suppressed by the prosecution." ***Id.*** at 607 (citation and internal quotation omitted).

In order to demonstrate prejudice, "the evidence suppressed must have been material to guilt or punishment." ***Commonwealth v. Gibson***, 951 A.2d 1110, 1126 (Pa. 2008) (citations omitted). Evidence is material under ***Brady*** when there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different. ***Id.*** at 1127 (citations omitted). "The mere possibility that an item of undisclosed information might

have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense." ***Commonwealth v. McGill***, 832 A.2d 1014, 1019 (Pa. 2003) (citation omitted).

Here, in its Rule 1925(a) opinion, the trial court reiterated that Appellant "fell woefully short of meeting [the ***Brady***] standard. Other than baldly asserting a violation[, Appellant] failed to adequately develop [his] argument." Trial Ct. Op., 8/2/19, at 7. Based on our review of the record, we agree.

As noted by the trial court, B.B.'s subsequent drug rehabilitation had no bearing on the facts of Appellant's case. ***See*** N.T. Trial at 132-33. Therefore, Appellant cannot establish that the evidence was favorable to his defense. ***See Weiss***, 81 A.3d at 783; ***see also Roney***, 79 A.3d at 608. Further, Appellant did not prove that the Commonwealth was aware of B.B.'s placement in rehabilitation and failed to disclose it. ***See Roney***, 79 A.3d at 607. Finally, evidence relating to B.B.'s drug rehabilitation was not material, as it would not have affected the outcome of trial. ***See Gibson***, 951 A.2d at 1127; ***see also McGill***, 832 A.2d at 1019. Therefore, because Appellant failed to establish the underlying ***Brady*** claim, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial on that basis. ***See Bryant***, 67 A.3d at 728. Accordingly, Appellant is not entitled to relief on this issue.

Missing Witness Jury Instruction

Lastly, Appellant argues that the trial court erred by denying his request for a missing witness jury instruction. Appellant's Brief at 32. In support, Appellant asserts that B.B. was available to the Commonwealth, as the Commonwealth "knew of B.B.'s whereabouts and were merely negligent in retrieving him." ***Id.*** at 35. Further, Appellant asserts that B.B. was unavailable to the defense, as "B.B. was lodged in a drug rehabilitation facility and the Commonwealth had not provided this information nor any contact information to the defense." ***Id.*** at 34. With respect to the substance of B.B.'s testimony, Appellant asserts that B.B. "would have not only testified about his struggles with drug use and corroborated that portion of [Appellant's] testimony, but [his] testimony would have aided in impeaching the other witnesses, and [he] would have potentially testified as to the incident itself from his perspective." ***Id.*** Finally, Appellant asserts that "none of the six instances [in ***Commonwealth v. Miller***, 172 A.3d 632, 645-46 (Pa. Super. 2017)] apply to [Appellant's] case."[9] ***Id.*** at 36. Therefore, Appellant argues that he was entitled to a missing witness instruction with respect to B.B. ***Id.***

The Commonwealth responds that B.B. "was not available to the Commonwealth" and was instead "equally unavailable to both parties." Commonwealth's Brief at 19. Further, the Commonwealth argues that "there is no reason to believe that testimony from B.B. would have been anything

[9] In his brief, Appellant addresses the six exceptions that preclude a defendant from obtaining a missing witness instruction. ***See*** Appellant's Brief at 33-35. However, because we agree with the trial court that Appellant failed to meet the threshold requirements for a missing witness instruction, we decline to address the applicability of the exceptions.

other than cumulative of the other eyewitness testimony." ***Id.*** The Commonwealth asserts that "[i]f anything, [B.B.'s] testimony was more likely to have provided further evidence of [Appellant's] guilt." ***Id.*** Therefore, the Commonwealth contends that the trial court properly denied Appellant's request for a missing witness instruction. ***Id.*** at 20.

When reviewing a challenge to jury instructions, this Court will "reverse a [trial] court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Galvin***, 985 A.2d 783, 799 (Pa. Super. 2009) (citation omitted). When a trial court refuses to deliver a specific jury instruction, "it is the function of this Court to determine whether the record supports the trial court's decision." ***Commonwealth v. Buterbaugh***, 91 A.3d 1247, 1257 (Pa. Super. 2014) (*en banc*) (citation omitted). "[T]he relevant inquiry for this Court . . . is whether such charge was warranted by the evidence in the case." ***Commonwealth v. Baker***, 963 A.2d 495, 506 (Pa. Super. 2008) (citations and internal quotation omitted).

With respect to the missing witness instruction, we have explained:

> A missing witness instruction may be given in limited circumstances. When a potential witness is available to only one of the parties to a trial, it appears this witness has special information material to the issue, and this person's testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that [the testimony] would have been unfavorable.

Miller, 172 A.3d at 645 (citation and quotation omitted).

In order for the "missing witness" adverse inference rule to be invoked against the Commonwealth, the witness must be available only to the

Commonwealth and no other exceptions must apply. ***Commonwealth v. Culmer***, 604 A.2d 1090, 1098 (Pa. Super. 1992). We have set forth the six exceptions as follows:

> 1. The witness is so hostile or prejudiced against the party expected to call him that there is a small possibility of obtaining unbiased truth;
>
> 2. The testimony of such a witness is comparatively unimportant, cumulative, or inferior to that already presented;
>
> 3. The uncalled witness is equally available to both parties;
>
> 4. There is a satisfactory explanation as to why the party failed to call such a witness;
>
> 5. The witness is not available or not within the control of the party against whom the negative inference is desired; and
>
> 6. The testimony of the uncalled witness is not within the scope of the natural interest of the party failing to produce him.

Miller, 172 A.3d at 645-46.

Here, in denying Appellant's request for a missing evidence instruction, the trial court explained:

> First of all, [B.B.] was not available to the Commonwealth only. Second, he does not have special information material to the issue at hand. Other than [Appellant's] thought that he does. And his testimony that [Appellant] pointed the gun at everyone in the car would be cumulative. Four or five people already testif[ied] that that happened. That's about as cumulative as it gets.

N.T. Trial at 133-34.

Based on our review of the record, we agree with the trial court that Appellant failed to establish the threshold requirements for a missing witness jury instruction. ***See Miller***, 172 A.3d at 645. Further, we discern no error of law or abuse of discretion by the trial court. ***See Galvin***, 985 A.2d at 799. Therefore, we affirm on the basis of the trial court's ruling. ***See*** N.T. Trial at 132-34.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/8/2020

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT BROZENICK,

Appellant

CRIMINAL DIVISION

CC201702351
1086 WDA 2018

AMENDED OPINION

BY:

HON. KEVIN G. SASINOSKI
Room 507 – Courthouse
436 Grant Street
Pittsburgh, PA 15219

COPIES TO:

Joseph Stine, Esq.
542 Forbes Avenue
Pittsburgh, PA 15219

Michael Streily, Esq.
District Attorney's Office
4th Floor – Courthouse
Pittsburgh, PA 15219

APPENDIX G COURT TRIAL OPINION Pg. 1-7

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

vs.

CC201702351
1086 WDA 2018

ROBERT BROZENICK,
Appellant

AMENDED OPINION[1]

Sasinoski, J.

Defendant was charged with four (4) counts each of Terroristic Threats[2] and Simple Assault[3] at CC201702351, In Allegheny County, Pennsylvania. On June 28, 2018, the defendant was sentenced to an aggregate term of twenty four (24) months' probation. Post sentence motions were filed and denied, and a timely Notice of Appeal was filed.

Defendant alleges the following errors in his 1925(b) statement:

I. Mr. Brozenick's convictions for four counts of Simple Assault and and four counts of Terroristic Threats must be vacated because the Commonwealth failed to produce sufficient evidence to disprove Mr. Brozenick's self-defense claim beyond a reasonable doubt.

II. Mr. Brozenick is entitled to a new trial because this Honorable Court erred by denying Mr. Brozenick's Proposed Jury Instructions and by not instructing the jurors that lawful possession of a firearm does not necessarily give rise to the required mens rea of every charge involved and, further, that it is the jury's duty to determine the weight of the evidence of the firearm and the lawful concealed carry permit.

III. This Honorable Court erred by denying Mr. Brozenick's Motion in Limine to prevent reference to any complaining witness as a victim, because the use of the word victim did bias the jury against Mr. Brozenick's presumption of innocence.

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[1] This Amended Opinion is filed to replace an incomplete "draft" opinion, which was mistakenly filed in this matter on 8/1/19.
[2] 18 Section 2706(a)(1).
[3] 18 Section 2701(a)(3).

IV. This Honorable Court erred in denying Mr. Brozenick's motion for a mistrial based on the Commonwealth's failure to disclose material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As a result, Mr. Brozenick's guilty convictions and sentences must be vacated and a new trial must be granted.

V. Mr. Brozenick is entitled to a new trial because this Honorable Court erred by failing to give curative instructions to the jury about the missing complaining witness and his current location, thus biasing the jury against Mr. Brozenick's self-defense claims.

VI. This Honorable Court erred by denying Mr. Brozenick's Motion for Judgment of Acquittal and allowing the Commonwealth to reopen the record after the Commonwealth rested without presenting sufficient evidence to sustain two counts of Simple Assault and two counts of Terroristic Threats. Thus, the guilty verdicts as two counts of Simple Assault and two counts of Terroristic Threats should be vacated.

This case arose from an incident in the Borough of Carnegie, where a car with a young adult and four juveniles was parked outside the defendant's residence on 6th Avenue on the afternoon of December 22, 2016 at approximately 2:40 p.m. The defendant approached the vehicle, tapped on the window of the car with a handgun, and proceeded to "scan" the vehicle, pointing it at all of the occupants. The defendant testified that he believed that the occupants were using drugs and told them he was calling police. Defendant told police that he pulled his firearm because he felt threatened.

Fourteen year old Justina Wegley testified that defendant came out of his house, stood on the porch, then walked to the car she was in and pointed the gun at all of the occupants. She testified that no threats were made to the defendant, no threatening gestures were made to defendant, no one inside the car was armed, and that she felt scared and shocked. (N.T., pp. 32-35)[4] Emmy Toogood, sixteen years old at the time corroborated Ms. Wegley, stating the defendant appeared to be angry. (N.T. pp. 45-46)

Carnegie Police Officer David Gittings, responded to a call about possible drug activities involving a firearm in front of 604 Sixth Avenue. Officer Gittings testified that the defendant complained to the dispatcher that occupants of the car were using drugs and that he approached them with a firearm. Upon his arrival, Gittings testified there was no indication of drug use or drug paraphernalia that he observed. (N.T. pp. 56-57) Sergeant Shawn Seaman testified that upon his arrival at the scene, the defendant "kept quoting the castle doctrine." (N.T. p. 67)

The officer testified that:

> I explained to him that his decision was wrong. He kept stating that he felt threatened. I wanted him to understand that what he should have done was called 9-1-1. That's our job. That's exactly what we get paid to do. (N.T. p. 68)

The officer testified that the defendant had not been threatened with a weapon, and that no threatening gestures or advancements were made towards the defendant. (N.T. 69-70) Two other witnesses, Sadie Toogood and Trey Gieg, also occupants of the car, corroborated the earlier testimony by Emily Toogood and Justina Wegley. (N.T. pp. 78-79)

Defendant first alleges the Commonwealth failed to produce sufficient evidence to disprove the defendant's self-defense claim beyond a reasonable doubt. In this case, defendant left the safety of his home, crossed his front porch, went down the walkway to the parked car on the street where he confronted the victims inside the car by pointing his handgun at them. No one inside the car threatened the defendant. No one inside the car was armed. No one exited the vehicle to confront the defendant. In fact, no one in the car even spoke to defendant before he confronted them by brandishing a firearm at them. The law regarding disproving the claim of self-defense is set forth in

[4] N.T. refers to Notes of Jury Trial Transcript dated April 3-4, 2018.

Commonwealth v. Smith, 97 A.3d 782 (Pa. Super. 2014). The burden of proving beyond a reasonable doubt that the defendant's act was not justifiable self-defense is on the Commonwealth. 18 Pa.C.S.A. §5058(a)(b). In *Smith*, the Court noted that the Commonwealth meets its burden of proving beyond reasonable doubt that defendants' actions were not justifiable self-defense if it establishes at least one of the following: 1. Defendant did not reasonably believe that he was in danger of death or serious bodily injury; 2. Defendant provoked or continued the use of force, or 3. Defendant had a duty to retreat and the retreat was possible for complete safety. Presently, there was sufficient evidence for the jury to find that defendant was unreasonable in his belief that he was in danger of death or serious bodily injury to justify pointing a gun at the victims. Although no force was threatened, or used against the defendant, he provoked the entire incident by leaving the safety of his house to confront, and threatened a car full of teenagers, parked, minding their business, in the middle of the afternoon. This claims is meritless.

Defendant next alleges the Court erred by "denying Mr. Brozenick's Proposed Jury Instructions" and by not instructing the jurors "that lawful possession of a firearm does not necessarily give rise to the required mens rea of every charge involved and, further, that it is the jury's duty to determine the weight of the evidence of the firearm and the lawful concealed carry permit." Initially, defendant has failed to state with specificity, the proposed jury instructions allegedly denied by the Court, and it would appear that he has waived any claim of error. As to the instruction on the firearm, the Court reviewed this issue with counsel at a hearing on December 19, 2017, as follows:

THE COURT: Any case law that says it [the instruction] should be given?

MR. TEHOVNIK: No your honor. This would be merely a request at the discretion of the Court. I guess this would be a matter of first impression. (N.T. 2, p. 5)[5]

The Court was disinclined to give the instruction at issue. It appeared to be a confusing stream of consciousness unsupported by any statute or case law. This claim is without merit.

The defendant next alleges the Court erred by failing to "prevent reference to any complaining witness as a victim, because the word victim did bias the jury against Mr. Brozenick's presumption of innocence.". The defendant claims that the use of the word victim "did" bias the jury, without any substantiation of the claim whatsoever. Nothing in a review of the record in this case would suggest that the jury was in fact biased as a result of referring to the victims as "victims". Moreover, at a pre-trial hearing on the matter, the issue was discussed and defense counsel was unable to provide any legal authority for his position. (N.T. 2, pp. 7, 10) Further, the Court explained that the jury would be instructed on the presumption of innocence. (N.T. 2, p. 7) It is well established that "the law presumes that the jury will follow the instruction of the trial court". *Commonwealth v. Brown*, 766 A.2d 961, 971 (Pa. 2001) For these reasons, this claim is without merit.

Defendant next alleges the court erred by not granting a mistrial based on a failure of the Commonwealth to disclose material, exculpatory evidence in violation of *Brady*. To establish a *Brady* violation, a defendant must prove three elements: 1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it impeaches; 2) the evidence was suppressed by the prosecution either willfully or inadvertently; and 3) prejudice ensued. *Commonwealth v. Roney*, 79 A.3d

[5] N.T. 2 refers to notes of Pre-Trial Hearing Transcript dated December 19, 2017.

595 (Pa. 2013) Defendant fell woefully short of meeting this standard. Other than baldly asserting a violation defendant failed to adequately develop this argument. For these reasons, this claim has no merit.

Defendant also claims the trial court erred by not giving a missing witness instruction, because Mr. Ball failed to appear as a witness. This witness was equally available to the defense. Moreover, the testimony of Mr. Ball would appear to be cumulative in nature. *Commonwealth v. Miller*, 172 A.3d 632, 645-46 (Pa. Super. 2017) This claim is without merit.

Finally, Defendant alleges the trial court erred by allowing the Commonwealth to reopen its case. It is well established that the reopening of a case, after the parties have rested, for the taking of additional testimony, is within the trial court's discretion. *Commonwealth v. Baldwin*, 58 A.3d 754 (Pa. 2012) This claim is without merit.

Based upon the foregoing, the judgment of sentence should be affirmed.

Commonwealth of Pennsylvania
v.
Robert Paul Brozenick

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0002351-2017

NOTICE OF INTENTION TO DISMISS

AND NOW, this 14th day of February, 2023, IS HEREBY put on notice that after a thorough review of the record, the Court intends to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907.

The Petitioner has the right to respond to this notice of intention to dismiss the Petition for Post-Conviction Relief within twenty (20) days of the date of this Order. If such response is not filed within twenty (20) days, this Court will enter a final Order dismissing the PCRA Petition.

BY THE COURT:

Judge Kevin G. Sasinoski

cc: Allegheny County District Attorney's Office, Criminal Division

APPENDIX H Pg. 1-2 ORDER TO DISMISS POST CONVICTION RELIEF

Commonwealth of Pennsylvania
v.
Robert Paul Brozenick

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0002351-2017

ORDER OF COURT

AND NOW, to-wit, this 7th day of March, 2023, it is hereby ORDERED, ADJUDGED AND DECREED, that the Petition for Post-Conviction Relief Act is DENIED.

BY THE COURT:

Judge Kevin G. Sasinoski

cc: Allegheny County District Attorney's Office, Criminal Division

APPENDIX H Pg. 1-2 ORDER TO DISMISS POST CONVICTION RELIEF

OFFICE OF THE PUBLIC DEFENDER

CLIENT:	**ROBERT BROZENICK**	**FILE:**	**G 764411-4**
		HEARING DATE:	**FEBRUARY 23, 2017**
ATTORNEY:	**ROBERT DISNEY**	**TYPIST:**	**MARLENE DELIVORIAS**

PD: ALL RIGHT YOUR HONOR WE ARE RECORDING.

JUDGE: OK, COMMONWEALTH VS BROZENICK. I NEED ANYBODY THAT'S GOING TO TESTIFY TO STAND AND RAISE YOUR RIGHT HAND.

DA: WE'RE BRINGING IN OUR WITNESS.

JUDGE: WELL WE CAN SWEAR THEM AS THEY COME.

DA: OK.

JUDGE: COUNSEL MAY WANT THEM SEQUESTERED. I DON'T KNOW.

PD: I WILL.

DA: YEA, YOU'RE GOING TO GET SWORN IN RIGHT NOW BY THE JUDGE.

JUDGE: I NEED ANYBODY THAT'S GOING TO TESTIFY RAISE YOUR RIGHT HAND.

OATH: DO YOU SWEAR OR AFFIRM THE TESTIMONY YOU'RE ABOUT TO GIVE WILL BE THE TRUTH AND THAT YOU WILL ANSWER TO GOD ON THE LAST GREAT DAY.

W: YES, YOUR HONOR.

JUDGE: TWO WITNESSES.

DA: JUST ONE, WELL.

JUDGE: JUST ONE SWORN.

DA: ONE, I BELIEVE WE'LL ONLY HAVE ONE WITNESS. I JUST WANTED TO SWEAR IN THE AFFIANT IN CASE.

JUDGE: ANYTHING YOU WANT TO PUT IN THE RECORD BEFORE WE START? I'M ASSUMING YOU'RE WAIVING READING OF THE INFORMATION (INAUDIBLE).

PD: YES, ROBERT DISNEY ON BEHALF OF MR. BROZENICK. WAIVE A READING OF THE AFFIDAVIT AND COMPLAINT. NOT GUILTY.

JUDGE: AND ON BEHALF OF THE COMMONWEALTH YOU WANT TO PUT AMENDMENTS IN THE RECORD.

DA: YES, YOUR HONOR. MAY IT PLEASE THE COURT SHELLEY ROHRER FOR THE COMMONWEALTH. AT THIS TIME THE COMMONWEALTH WOULD MOVE TO ADD 5 CHARGES OF SIMPLE ASSAULT BY PHYSICAL MENACE 18 2701A3 AND 4 CHARGES OF TERRORISTIC THREATS 18 2706A1 AND YOUR HONOR THE GRADING ON THE SIMPLE ASSAULT IS A MISDEMEANOR OF THE SECOND DEGREE FOR EACH OF THOSE AND THE 4 ADDITIONAL TERRORISTIC THREATS WILL BE MISDEMEANORS OF THE FIRST DEGREE.

JUDGE: ANYTHING ELSE ABOUT THE AMENDMENTS?

PD: IT'S 5 2701, 4 BUT YOU'RE JUST ADDING 4.

DA: YES.

JUDGE: IT'S 5 OF EACH IS THAT CORRECT?

DA: YES.

DA: THE COMMONWEALTH WOULD CALL AS IT'S FIRST WITNESS UH BRANDON BALL. BRANDON IF YOU WANT TO COME TAKE A SEAT UP HERE AND THIS IS BEING RECORDED ON A PHONE HERE SO KEEP YOUR VOICE UP. COULD YOU PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD.

W: UH BRANDON BALL, B-R-A-N-D-O-N, B-A-L-L.

DA: AND BRANDON UH WERE YOU OVER UM ON 6TH AVENUE ON DECEMBER 22ND OF 2016?

W: YES.

DA: AND WHO WERE YOU THERE WITH?

W: I WAS THERE WITH 3 FEMALES AND 1 MALE. 2 FEMALES AGE OF 15, 1 FEMALE BY THE AGE OF 16, THE OTHER MALE DRIVING WAS 18 INCLUDING MYSELF.

DA: AND HOW OLD ARE YOU?

W: UH, 16 ON THE 22ND.

DA: AND DID ANYTHING UNUSUAL HAPPEN ON THAT DAY WHEN YOU WERE AT THAT LOCATION?

W: UM, YES. IT WAS MY BIRTHDAY. WE WERE GOING TO GO OVER MY FRIEND EMMANUEL'S HOUSE AND UH WE WERE PULLED INTO A STREET. WE WERE WAITING FOR HIS MOM TO PULL OUT OF THE DRIVEWAY SO WE COULD PARK AND WE WERE PARKED IN FRONT OF MR. BROZENICK'S HOUSE UH WAITING AND I GUESS TREY WAS USING THE VAPORIZER OR SOMETHING I DON'T KNOW. HE CAME OUT, CAME TO THE BACK PASSENGER SIDE.

DA: WHO IS HE CAME OUT?

W: MR. BROZENICK. UM, HE CAME TO THE BACK PASSENGER'S SIDE UM WITH A PISTOL UH WITH A WOODEN STOCK FROM METAL UM BARREL I GUESS AND TAPPED IT ON THE WINDOW AND SAID UH WE HAVE A PROBLEM. WAIVED THE GUN AT US AND SAID HE'S CALLING THE POLICE. WE DID NOTHING WRONG SO WE CALLED MY FRIEND EMMANUEL. HE HAD HIS BROTHER ELLIOT COME OUT WHO IS OVER THE AGE OF 18 AND UM WE WAITED AT HIS HOUSE FOR THE OFFICER TO COME AND THEN OFFICER GITTINGS CAME AND WE EXPLAINED THE SITUATION TO HIM.

DA: OK, NOW YOU SAID MR. BROZENICK UM WAS THE ONE THAT CAME OUT TO THE CAR. DO YOU SEE HIM IN THE COURTROOM TODAY?

W: YES.

DA: COULD YOU PLEASE IDENTIFY HIM BY SOMETHING HE'S WEARING TODAY.

W: UH, A BLUE JEAN JACKET WITH FUR.

DA: MAY THE RECORD REFLECT THAT THIS WITNESS HAD IDENTIFIED THE DEFENDANT.

JUDGE: YES.

DA: WAS THE CAR THAT YOU WERE IN PARKED ON THE STREET?

W: YES.

DA: AND YOU SAID THAT UH THE DEFENDANT WAIVED THE GUN AT YOU. WHAT DO YOU MEAN WHEN YOU SAID THAT?

W: INDIVIDUALLY POINTED THE GUN AT EVERYBODY IN THE CAR.

DA: WAS THAT POINTED AT EACH OF THE FIVE PEOPLE IN THE CAR?

W: EACH, ALL OF US.

DA: DID HE SAY ANYTHING ELSE TO YOU?

W: UM, HE SAID HE WAS CALLING THE POLICE. WE HAVE A PROBLEM AND FROM THERE ON WE WAITED FOR THE POLICE TO ARRIVE CAUSE WE HAD NOTHING, DID NOTHING WRONG.

DA: DO YOU REMEMBER WHAT TIME OF THE DAY THIS WAS?

W: UM, IT WAS AFTER SCHOOL SO I'D SAY BETWEEN 3 AND 5 O'CLOCK, ROUGHLY.

DA: I'LL OFFER FOR CROSS EXAMINATION.

JUDGE: CROSS EXAM.

PD: YES, YOUR HONOR. MR. BALL. WHAT WERE THE 3 FEMALES WHO WERE WITH YOU, WHAT ARE THEIR NAMES?

DA: OBJECTION YOUR HONOR, THESE ARE JUVENILE VICTIMS AND I DON'T BELIEVE THAT THEIR NAMES SHOULD BE PUT ON THE RECORD FOR TODAY.

PD: YOUR HONOR THEY'RE GOING TO THE IDENTITY OF THESE INDIVIDUAL WITNESSES ESPECIALLY SINCE THIS IS ACTUALLY (INAUDIBLE) SINCE THEY'RE BEING CHARGED MY CLIENT'S BEING CHARGED WITH TERRORISTIC THREATS AND ALSO SIMPLE ASSAULT AGAINST THESE INDIVIDUALS THEIR NAME IS GOING TO COME ABOUT AND MY CLIENT HAS A RIGHT TO, TO INSPECT THE EVIDENCE IN WHICH IS PRESENTED.

DA: AND YOUR HONOR, APOLOGIZE YOUR HONOR. IN A CRIMINAL COMPLAINT EVEN AT THIS STAGE THE VICTIM'S NAMES IN THE CRIMINAL COMPLAINT WOULD BE LISTED AS JUVENILE VICTIM, JANE DOE OR JOHN DOE.

PD: FOR PURPOSES OF THE COMPLAINT THAT IS TRUE YOUR HONOR BUT NOW WE'RE AT THE PRELIMINARY HEARING. NOW WE'RE PASSED THE COMPLAINT. UH, WE'RE ACTUALLY PRESENTING THE EVIDENCE AND NOW MY CLIENT IS BEING CHARGED WITH ADDITIONAL CHARGES AGAINST THESE INDIVIDUALS. UH, HE HAS A RIGHT TO KNOW THEIR NAMES.

JUDGE: OK, WELL I'M GOING TO ALLOW THE NAMES TO NOT BE DISCLOSED AT THIS TIME AND OF COURSE YOU WILL BE RECEIVING THAT WHEN YOU PUT IN YOUR DISCOVERY PACKET IN THE EVENT THAT IT'S HELD FOR COURT.

PD: OK. ALL RIGHT. SO, YOU SAY THAT YOU WERE THERE PARKED IN FRONT OF MR. BROZENICK'S HOUSE AROUND 3 AND 5 CORRECT?

W: YES.

PD: THAT WASN'T THE FIRST TIME YOU WERE THERE THAT DAY RIGHT?

W: UH, IT WAS THE SECOND. WE CAME EARLIER AND HIS MOM SAID SHE WOULD RATHER US WAIT TILL SHE WAS DONE WITH WORK.

PD: WHAT TIME IT WAS ACTUALLY TWO TIMES BEFORE THAT 3 TO 5 O'CLOCK TIME, CORRECT?

W: UH, NO SIR.

PD: WERE YOU DOWN THAT STREET ANOTHER TIME I MEAN OTHER THAN JUST MEETING EMMANUEL?

W: UH, WE PARKED ON THE STREET. WE WENT TO HIS HOUSE. HIS MOTHER ASKED US TO WAIT TILL SHE WAS UM READY FOR WORK AND LEAVING.

PD: WHAT TIME WAS THIS FIRST ENGAGE WHAT TIME WAS THE FIRST TIME YOU WENT OVER TO EMMANUEL'S HOUSE?

W: I'D SAY AROUND 3:30.

PD: AROUND 3:30, OK AND AT THIS POINT IN TIME YOU PARKED IN FRONT OF MR. BROZENICK'S HOUSE.

W: NO, SIR.

PD: DID AT ANY POINT IN TIME YOU STOP RIGHT BESIDE MR. BROZENICK'S HOUSE?

W: NOT UNTIL HE CAME OUT AND ASSAULTED US.

PD: NOT UNTIL THE SECOND TIME YOU WERE ON THAT STREET.

W: YES.

PD: SO, AFTER YOU WENT THERE THE FIRST TIME UM AND YOU WENT TO EMMANUEL' HOUSE AND HIS MOTHER TOLD YOU NOT TO GO OR COME BACK WHERE DID YOU GO?

W: WE DROVE AND WE JUST RODE AROUND FOR, WE PARKED IN FRONT OF HER DRIVEWAY.

PD: MMM HMM.

W: SHE SAID SHE WOULD ONLY NEED ABOUT 15, 20 MINUTES CAUSE SHE WAS GETTING READY FOR WORK. SHE WAS GETTING OUT OF THE SHOWER AND EVERYTHING. SO, WE LEFT. WE CAME BACK ABOUT 15, 20 MINUTES LATER, PARKED IN FRONT OF HIS HOUSE. HIS MOTHER DROVE OFF AS THE INCIDENT WAS GOING ON SHE.

W: UNDER EIGHTEEN. I DON'T KNOW IF I'M ABLE TO GIVE HIS NAME.

PD: YOU ALREADY GAVE IT. IT'S TREY, RIGHT?

W: YES. HE'S (INAUDIBLE)

PD: SO, HE'S DRIVING AND YOU SAY THAT MR. WHEN MR. BROZENICK SO YOUR WINDOWS THE WINDOWS WERE DOWN ON THE VEHICLE OR WERE THEY UP?

W: THE WINDOWS WERE UP.

PD: THEY WERE UP, ALL RIGHT AND MR. BROZENICK FIRST ASKED UM YOU ALL TO LEAVE, CORRECT?

W: NO, HE DIDN'T.

PD: OK, AND YOU SAID HE APPROACHED MR. BROZENICK APPROACHED UH TREY.

W: NO, HE DID NOT. THE WAY THE CAR WAS FACING. THE CAR WAS FACING DOWN THE STREET WHERE THE PASSENGER'S SIDE WAS FACING TOWARDS HIM. HE CAME TO THE BACK PASSENGER WINDOW WHICH I WAS IN THE BEHIND THE DRIVER'S SEAT IN THE BACK SEAT.

PD: MMM HMM.

W: AND HE CAME AND FLASHED HIS GUN. HE WAIVED IT. HE TAPPED IT ON THE WINDOW AND SAID YOU EITHER GET OUT OF THE CAR, WE HAVE BECAUSE WE HAVE AN ISSUE OR I AM CALLING THE POLICE AND WE DIDN'T GET OUT OF THE CAR AND HE STOOD THERE WITH THE GUN, WAIVED IT AT ALL OF US.

PD: WE'LL GET TO THAT IN JUST A SECOND. SO, UM MR. BROZENICK WHENEVER HE CAME UP AND THIS INITIAL APPROACH THE PASSENGER'S SIDE WAS HE STANDING ON THE SIDEWALK?

W: NO, YES.

PD: HE WAS STANDING ON THE SIDEWALK. AND THIS IS STILL IN FRONT OF HIS HOUSE.

W: YES.

PD: OK, UM AND THEN YOU HE STATED HE INITIALLY DID HE SAY UH SAY ANYTHING PRIOR TO PULLING OUT THE GUN OR WAS IT AT THE SAME TIME?

W: HE CAME TO THE WINDOW, PULLED HIS PISTOL OUT OF THE HOLSTER, TAPPED IT ON THE WINDOW TO GET OUR ATTENTION CAUSE WE WEREN'T PAYING ATTENTION TO HIM AT FIRST WE WERE TALKING AND WE WERE WAITING.

PD: WERE YOU, YOU STATED TREY WAS SMOKING SOMETHING, RIGHT?

W: YES, UH VAPORIZER, UM LIKE AN E CIGARETTE.

PD: AND THIS WAS AT THE, AT THE TIME THAT MR. BROZENICK APPROACHED.

W: NO, THIS WAS PRIOR.

PD: PRIOR, OK. WAS TREY THE ONLY ONE SMOKING OR USING UM, UH A VAPOR

DA: OBJECTION, RELEVANCE.

PD: YOUR HONOR THIS GOES TO NEGATE THE UM THIS ALSO BRINGS UP A DEFENSE FOR MY CLIENT AS FAR AS WHAT EXACTLY WAS SEEN.

JUDGE: WHAT'S THE OBJECTION?

DA: IT'S NOT RELEVANT WHO WAS SMOKING AN E CIGARETTE IN THE CAR.

JUDGE: YOU ALREADY TESTIFIED HE WAS SMOKING.

DA: HE ASKED IF THERE WAS ANYBODY ELSE. I DON'T BELIEVE IT'S RELEVANT FOR THESE CHARGES.

JUDGE: WELL, I'M GOING TO ALLOW THE QUESTION AND ANSWER.

PD: SO, WAS ANYBODY ELSE SMOKING UM AN E CIGARETTE OR ANYTHING?

W: TREY AND THEN THE ONE FEMALE THEY INDIVIDUALLY HAD THEIR OWN E CIGARETTES.

PD: THEY HAD THEIR OWN E CIGARETTES. NOW WERE ANY OF YOU SMOKING MARIJUANA?

W: NO, SIR.

PD: DOING ANY TYPE OF DRUGS.

W: NONE.

PD: OK, WHENEVER MR. BROZENICK WAIVED THIS GUN UH HOW DID HE DO IT? DID HE JUST GO BACK AND FORTH LIKE THIS OR?

W: HE PHYSICALLY HAD IT IN HIS HAND.

PD: OK.

W: AND POINTED IT AT ALL OF US.

PD: OK, POINTED IT NOW ARE YOU SAYING THAT HE WENT TO EACH.

W: I COULD LOOK DOWN THE BARREL.

PD: OK, AND HE DID THAT TO EACH PERSON IN THAT

W: INDIVIDUALLY STOPPED, HE POINTED AND HE SAID IF THERE'S ANY ISSUES.

PD: SO, WHENEVER HE'S SAYING THIS HE'S WAIVING IT LIKE THIS.

W: YES.

PD: OK, AND THAT MOTION IS JUST A BACK AND FORTH MOTION WITH THE GUN, RIGHT?

W: AND HE WENT FROM THE BACK SEAT, POINTED AT THE FRONT SEAT AND THEN BACK AT THE BACK SEAT.

PD: OK, AND DURING THIS TIME HE SAID UM HE WAS GOING TO CALL POLICE.

W: MMM HMM.

PD: IF YOU DID NOT GET OUT OF THE VEHICLE OR WAS HE GOING TO CALL THE POLICE, REGARDLESS?

W: HE SAID EITHER WE GET OUT OF THE VEHICLE OR WE LEAVE. HE WAS CALLING THE POLICE, SO THEN

PD: HE SAID EITHER HE SAID BOTH OF THEM, RIGHT? HE SAID EITHER YOU GET OUT OF THE VEHICLE OR YOU LEAVE.

W: YEA, HE SAID WE HAVE A PROBLEM.

PD: WE HAVE A PROBLEM AND THAT HE IS CALLING POLICE. NOW DID HE HAVE A CELL PHONE?

W: NO.

PD: RIGHT THERE AT THAT POINT IN TIME.

W: HE WALKED INTO HIS HOME.

PD: MMM.

W: CAME OUT WITHOUT THE PISTOL, JUST HIS CELL PHONE AND HE WAS ON THE PHONE WITH THE POLICE. BY THIS TIME, WE WEREN'T LEAVING. WE WERE WAITING FOR THE POLICE. WE DID NOTHING WRONG. WE WERE JUST SITTING IN THE CAR, WAITING FOR OUR FRIEND EMMANUEL. SO, WE PARKED IN FRONT OF EMMANUEL'S HOUSE. WE GET HIS BROTHER ELLIOT WHO IS OVER THE AGE OF 18.

PD: MMM HMM.

W: AND HE TRIES TALKING TO HIM, TRYING TO SETTLE THE SITUATION, TRYING TO STOP IT HERE LIKE. IT WAS JUST SOME MISCOMMUNICATION.

PD: HE WAS TRYING TO STOP WHAT? STOP MR. BROZENICK CALLING THE COPS.

W: NOT TRYING TO, TRYING TO GET TO THE BOTTOM, LIKE WONDERING WHY THE GUN WAS PULLED, WHAT'S THE WHOLE SITUATION. TRYING TO GET TO THE BOTTOM OF IT.

PD: OK, AND SO YOU HAD UM YOU ALL HAD MOVED THE VEHICLE AFTER MR. BROZENICK WENT AND GOT, GRABBED HIS CELL PHONE OR ARE WE ALL STILL PARKED IN FRONT OF HIS RESIDENCE?

W: HE WALKED INTO HIS HOME. TREY PULLED THE VEHICLE LITERALLY ONE DOOR AWAY. IT GOES MR. BROZENICKS'S HOUSE, HIS GARAGE, AN ALLEYWAY, NOT AN ALLEYWAY HIS DRIVEWAY.

PD: MMM HMM.

W: AND THEN EMMANUEL'S HOUSE. WE PARKED IN FRONT OF EMMANUEL'S HOUSE AND WAITED ON HIS STEPS FOR WHILE HE WAS TALKING TO THE POLICE.

PD: SO, WHILE MR. BROZENICK WAS OUTSIDE OF HIS HOUSE YOU ALL YOU AND THE OTHER OCCUPANTS OF THE VEHICLE ACTUALLY GOT OUT AND WALKED UP TO MR. EMMANUEL'S PORCH, EMMANUEL'S PORCH.

W: DIDN'T EVEN GO INTO HIS HOUSE, SAT ONTO HIS STEPS.

PD: SAT ONTO HIS STEPS. SO, YOU WERE ABLE TO SEE YOU WERE WATCHING MR. BROZENICK AT THIS TIME.

W: YES.

PD: OK, UM WAS THERE ANY OTHER CONVERSATION BETWEEN MR. BROZENICK AND YOU OR THE OTHER OCCUPANTS OF THE VEHICLE?

W: NO, THERE WAS MR. BROZENICK HAD NO BARELY ANY COMMUNICATION WITH ELLIOT AT ALL. ELLIOT ASKED HIM WHAT IS GOING ON SIR. HE SAID I'M ON THE PHONE WITH THE POLICE. LEAVE ME ALONE. FROM THERE ELLIOT DID NOT SAY ANY OTHER WORDS AND WE WAITED FOR OFFICER GITTINGS TO ARRIVE WITH THEM.

PD: OK, ALL RIGHT. I HAVE NOTHING FURTHER.

JUDGE: RE DIRECT.

DA: NO THANK YOU YOUR HONOR. THE COMMONWEALTH HAS NO FURTHER QUESTIONS FOR THIS WITNESS.

JUDGE: OK, YOU CAN STEP DOWN. ANYTHING ELSE YOU WANT TO PRESENT?

DA: NO, YOUR HONOR. THE COMMONWEALTH WOULD REST.

JUDGE: ANYTHING YOU WANT TO SAY COUNSELOR?

PD: YES, YOUR HONOR. WELL WE'RE JUST WE'RE READY FOR ARGUMENT YOUR HONOR.

JUDGE: OK.

PD: WHENEVER YOU'RE READY.

JUDGE: I'M READY.

PD: OK, UM AS FAR AS THE 5 TERRORISTIC THREATS. THE ACTOR COMMUNICATED A THREAT EITHER DIRECTLY OR INDIRECTLY TO COMMIT A CRIME OF VIOLENCE WITH THE INTENT TO TERRORIZE THE INDIVIDUAL. IF CALLING THE COPS UM IS A UM A THREAT. I DON'T KNOW WHAT IS. WE DO HAVE MR. BROZENICK HOLDING THIS GUN BUT THERE'S NO THREAT MADE THAT HE'S GOING TO LIKE HE'S GOING TO DO ANYTHING LIKE THAT. ALL THAT WE HAVE ARE THOSE FEW WORDS. I'M CALLING THE POLICE. LEAVE. WE HAVE A PROBLEM. UM, THERE IS A GUN OUT BUT THERE'S NO THREATS BEING COMMUNICATED OTHER THAN I'M GOING TO CALL THE POLICE AT WHICH POINT IN TIME MR. BROZENICK DID CALL THE POLICE. UH, THE REST IS THE SIMPLE ASSAULT. ATTEMPTS TO BY PHYSICAL MENACE TO PUT ANOTHER IN FEAR OF IMMINENT SERIOUS BODILY INJURY. UM, I DON'T THINK THAT WE HAVE MADE IT A ELEMENT OF FEAR. WHERE WE HAVE THESE INDIVIDUALS DRIVE ONLY A BLOCK AWAY, GET OUT OF THEIR VEHICLES, CONTINUE TO HAVE OR VISUAL OF MR. BROZENICK. MR. BROZENICK HAS VISUAL OF THESE INDIVIDUALS. THEY EVEN HAVE ANOTHER PERSON IN THEIR PARTY GO AND SPEAK TO MR. BROZENICK. UM, THAT NEGATES ANY TYPE OF FEAR. IF THERE WAS A FEAR THAT THERE WAS GOING TO BE SERIOUS BODILY INJURY THEN YOU WOULDN'T SEND ANOTHER PERSON INTO THAT, INTO THAT PATH.

BUT HERE WE HAVE A SITUATION WHERE THEY SEND ANOTHER PERSON. THEY STAY OUTSIDE, ONLY A BLOCK AWAY. UM, MAINTAIN VISUAL OF THIS INDIVIDUAL SO THAT FEAR ELEMENT HAS NOT BEEN ESTABLISHED. UM, THEREFORE I WOULD ASK THAT UM ALL CHARGES BE DISMISSED.

JUDGE: COMMONWEALTH.

DA: YES, YOUR HONOR. REGARDING THE SIMPLE ASSAULT BY PHYSICAL MENACE UH THE CHARGE ITSELF IS THAT THE DEFENDANT ATTEMPTS BY PHYSICAL MENACE TO PUT ANOTHER IN FEAR OF IMMINENT SERIOUS BODILY INJURY. THERE'S NO REQUIREMENT THAT A VICTIM ACTUALLY BE IN FEAR OF IMMINENT SERIOUS BODILY INJURY. SO, REGARDLESS OF WHAT THE VICTIM DOES AFTER THE FACT THAT THE DEFENDANT IN THIS CASE POINTS A GUN AT 5 INDIVIDUALS SITTING IN A CAR AND IS WHILE HE'S TALKING TO THEM AND POINTING THE GUN BACK AND FORTH THAT IS HIS ATTEMPT TO CAUSE A FEAR OF SERIOUS BODILY INJURY. THAT IS A THREAT YOUR HONOR. THE DEFENDANT IN THIS CASE IS COMMUNICATING A THREAT INDIRECTLY OR DIRECTLY. IN THIS CASE I WOULD SAY IT'S AN INDIRECT THREAT THAT IF YOU KNOW THAT I'M GOING TO HURT YOU IF YOU DON'T DO WHAT I SAY. UM, HE'S POINTING A GUN. THERE'S NOTHING MORE THREATENING THAN A FIREARM BEING POINTED ESPECIALLY AT A GROUP OF JUVENILES WITH ONLY ONE ADULT SITTING IN THE DRIVER'S SEAT OF A CAR. YOUR HONOR. AT THIS POINT I BELIEVE THAT UH THE COMMONWEALTH HAS MET ITS' BURDEN AND THAT ALL CHARGES SHOULD BE HELD IN THIS CASE.

JUDGE: COUNSELOR ANYTHING ELSE ON YOUR SIDE?

PD: NOTHING FURTHER.

JUDGE: OK, I'M HOLDING THIS MATTER FOR COURT ON 5 COUNTS OF TERRORISTIC THREATS AND 5 COUNTS OF SIMPLE ASSAULT AND 1 AND 2. THANK YOU.

TAPE ENDS
END OF TAPE
NJ TRIAL 11-22-2017
MD
9-20-2017