Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
12/07/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-007757-001 DT 12/05/2011

HONORABLE SAMUEL A. THUMMA

CLERK OF THE COURT
I. Huerta
Deputy

STATE OF ARIZONA

JANINE M LETELLIER

v.

DAVID HULSTEDT (001)

AMY MICHELLE KALMAN

COUNTY ATTORNEY - GRAND JURY
GRAND JURY CLERK
GRAND JURY EXHIBITS-CCC
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

This matter is before the court on Defendant David Hulstedt's February 19, 2010 Motion for Redetermination of Probable Cause pursuant to Ariz. R. Crim. P. 12.9 (the "Motion").[1] The court has considered the State's March 24, 2010 Response; Defendant's April 19, 2010 Reply; Defendant's September 9, 2011 Supplement; the State's September 27, 2011 Supplement and related exhibits as well as argument of the parties on October 21, 2011. For the reasons set forth below, the court grants the Motion and remands this matter for a new determination of probable cause by the grand jury.

Procedural Background

Defendant is charged with Child Abuse and Kidnapping, each Class 2 Felonies, alleged to have been committed on November 7, 2008 and involving Defendant's then 22-month old daughter ("D.H."). [10/15/2009 Indictment; Motion at 2-3] On November 7, 2008, Defendant was

[1] The court twice granted requests to extend the deadline to file any Ariz. R. Crim. P. 12.9 motions, making the Motion timely.

experiencing a mental health crisis. [Motion at 2] After interaction between Defendant, law enforcement and others lasting more than 90 minutes, Defendant was shot by City of Scottsdale police officers and paralyzed and D.H. fell from his grasp and suffered a skull fracture. [*Id*. at 3] In mid-2009, Defendant filed a civil suit against the City of Scottsdale in the United States District Court for the District of Arizona. *Hulstedt ex rel. Hulstedt v. City of Scottsdale*, CV09-01258-PHX-GMS. In October 2009, the grand jury issued the two-count Indictment and Defendant was arraigned in late November 2009.

The court then granted Defendant's motion to be evaluated pursuant to Ariz. R. Crim. P. 11. In 2010, Defendant was found incompetent but restorable and ordered to participate in restoration services. In mid-2011, Defendant was found competent, albeit medication dependent. These competency and restoration issues substantially delayed briefing, argument and resolution of the Motion.

In July 2011, the case was designated complex and the court then allowed the parties to file supplemental briefing on the Motion. On October 21, 2011, the court heard extended oral argument and took the Motion under advisement.

Analysis

As applicable here, "[r]emand of an indictment is appropriate only where the person under investigation is denied 'a substantial procedural right.'" *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 502, 844 P.2d 1147, 1152 (1992) (quoting Ariz. R. Crim. P. 12.9(a)). Whether to grant a motion to remand is a discretionary determination based on the record before the court. *See State v. Hocker*, 113 Ariz. 450, 454, 784, 788 (1976). The Motion makes four primary arguments for remand: (1) the grand jury was not properly instructed on the law; (2) the grand jury received false information and flawed inferences regarding D.H.; (3) the grand jury heard misleading testimony and (4) the State did not properly discharge its obligations under A.R.S. § 21-412. [Motion at 10-24] The court addresses these arguments in turn.

I. Instructions On The Law.

Contrary to Defendant's arguments, the grand jury was properly instructed on the law. The grand jury received statutory definitions and the elements of potentially applicable offenses. [*See* 10/15/2009 Tr. at 3-4 (noting potentially applicable statutes had been read to the grand jury; written copies of statutes had been provided to the grand jury and no grand juror asked that the statutes be "reread or clarified")] Nothing more was required. *See State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 415 (1981) ("No statute or rule requires the prosecution to frame instructions for each case under investigation."). Moreover, Defendant has cited and this court has found no Arizona case holding that, for example, the State was required to instruct the grand jury that

"[t]he term 'likely' in [A.R.S. § 13-3623] . . . has been interpreted to mean *probable*, rather than *possible*." [Motion at 11] Accordingly, Defendant has not shown that the State failed to properly instruct the grand jury on the law.

II. Testimony About D.H.

Defendant next argues that the grand jury received false information and "flawed inferences" regarding D.H., including testimony that there was blood coming from her ear before Defendant was shot and that D.H.'s injuries may have occurred inside of the home. [Motion at 14-17] As noted by the Arizona Supreme Court, Arizona cases "clearly prohibit a trial court from considering an attack on an indictment based on the nature, weight or sufficiency of the evidence presented to the grand jury." *Crimmins v. Superior Court*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-86 (1983). In addition, the State need not "present evidence that is not exculpatory, including evidence relating solely to 'witness credibility and factual inconsistences,' which are ordinarily appropriate for trial." *Bashir v. Pineda*, 226 Ariz. 351, 355, 248 P.3d 199, 203 (Ct. App. 2011) (quoting *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997)).

As applied, the grand jury heard evidence that there was never any blood found in D.H.'s left ear and no bloody mucous from D.H. was found; that different police officers saw things differently; that doctors could not determine any type of sequence of events about when D.H.'s skull fracture occurred and that the fracture could have occurred from the fall to the ground after Defendant was shot. [*See* 10/15/2009 Tr. at 30, 39, 42-43] Both before and after the grand jury presentment, the State conceded that it was not claiming D.H. was injured while inside the house. [Motion Exhibit 4; 3/25/2010 Resp. at 16 ("The defense claims that there is no information that [D.H.] was injured in her home. The State agrees.")] This point was less than clear during the grand jury presentation, with the testimony suggesting that it could not be determined whether D.H.'s skull fracture occurred inside the home. [10/15/2009 Tr. at 42-43] Given the court's remand on other grounds, any future grand jury presentation should make plain that there is no evidence that D.H. was injured in the home. The court, however, rejects Defendant's remaining arguments on the point. [Motion at 14-17]

III. Other Evidence Provided To The Grand Jury.

Defendant claims the grand jury received misleading testimony regarding DNA; a 911 call; a safety issue; Sara Hulstedt; the crime Defendant said he committed earlier in the day; a video of the shooting and the extent of Defendant's injuries. [Motion at 17-22] None of these arguments merits remand on this record.

A. DNA Evidence.

The grand jury heard evidence that there was a mixture of DNA on blood found on Defendant's shirt and that neither Defendant nor D.H. could be excluded as the source of that DNA. [*See* 10/15/2009 Tr. at 41-45] It is true, as Defendant argues, that further testing of the stain might have better defined the source of that DNA. [Motion at 18] There is, however, no indication that such testing had been completed at the time of the grand jury presentment. The DNA evidence provided to the grand jury was not improper.

B. The 911 Call.

Defendant argues the State "played the [911] call but then misstated what was recorded." [Motion at 18] In fact, the State played the 911 call to the grand jury, which indicated Defendant's Mother thought D.H. may have needed her diaper changed. [*See* 10/15/2009 Tr. at 11-12; Motion Ex. 5 at 6] The grand jury also heard testimony that Defendant's parents were asked to leave the house "[b]ecause there was a safety issue. It's normal protocol for the people to exit the home during a situation like this." [10/15/2009 Tr. at 13; *see also id.* at 14, 23] The grand jury further heard testimony that Defendant's parents tried to take D.H. with them when they left the home, but that Defendant would not allow them to do so. [*Id.* at 13-14] As noted by the State, the grand jury also heard evidence of Defendant's demands and D.H.'s crying. [*Id*. at 11-12; 19] The 911 call and related evidence provided to the grand jury were not improper.

C. The Safety Issue.

Defendant next claims the grand jury improperly heard repeated references to "police acting to assure the safety of [Defendant's] parents and brother who were repeatedly seeking to go back to the home." [Motion at 20] The grand jury heard testimony about Defendant's family members asking to go back into the house and why they were not allowed to do so. [10/15/2009 Tr. at 19-20; 23] The grand jury also was told it was normal police procedure not to allow anyone in a home where their safety might be in jeopardy and/or where weapons were located. [*Id*.] The grand jury further was told that it was "protocol in a situation like this" that individuals are not allowed to go into a house. [*Id.* at 23] Although Defendant argues his parents "did not voice a fear for their safety," [Motion at 20] the fact that Defendant's family members may not have been concerned about their own safety is not inconsistent with such protocol. There was nothing improper or misleading about this testimony.

D. Sarah Hulstedt.

The grand jury heard testimony that Sara Hulstedt, Defendant's sister-in-law, told police after the incident that she heard Defendant "say that [D.H.] was going to go down soon." [10/15/2009 Tr. at 20] This statement, Defendant claims, should not have been provided to the grand jury because it was made after the incident. [Motion at 20-21] It is true that Sara Hulstedt made

those statements to law enforcement when she was interviewed after the events, a point the State concedes. [*Id.;* 3/25/2010 Response at 18] Testimony provided to the grand jury, however, was that Defendant himself told law enforcement that, if he did not see his brother, D.H. "would be going down." [10/15/2009 Tr. at 23-24] The grand jury also was told Defendant did not "clarify what 'going down' meant." [*Id*. at 24] Particularly given this testimony, the testimony provided about Sara Hulstedt's subsequent statements was not improper.

E. The "Terrible Crime" Committed by Defendant.

The grand jury heard that Defendant told police "he had committed a crime, a horrible, heinous crime [earlier in the day], and at other parts in the conversation refer[red] to it as a 'terrible, terrible crime,'" by holding D.H. "out of a window, out of a moving car." [10/15/2009 Tr. at 25, 26] In seeking remand, Defendant argues these statements were the product of "a hallucination" and the grand jury "testimony failed to capture the context of what was happening at the Hulstedt home." [Motion at 21] Defendant has not shown that the testimony provided to the grand jury on this point was incorrect. Nor does the court find that it was otherwise improper or misleading.

F. The Shooting Video.

A neighbor created a videotape of a portion of the events—including the shooting—lasting approximately two minutes, which was played to the grand jury. [10/15/2009 Tr. at 36-37] The grand jury was told it would be played without the audio, "because there's commentary by the neighbor that [the State doesn't] think is appropriate to play." [*Id*. at 36] No grand juror asked that the audio be provided and, when asked, no grand juror asked that the video be replayed. [*Id*. at 36-37]

Defendant argues the video improperly was played without sound, claiming the video "requires some expert commentary" to understand various aspects of what is seen. [Motion at 21] As requested by defense counsel, the court has viewed the video several times, both with and without sound. From the court's review, the commentary provided—apparently statements by the neighbor—does not provide any clearly exculpatory evidence. Nor does the court find that any expert commentary was required for the grand jury to understand the video or that it was otherwise improper or misleading to play the video without sound.

G. The Extent of Defendant's Injuries.

Defendant argues the grand jury should have heard more precise evidence about his injuries and the impact those injuries have had on his life. [Motion at 22] Testimony received by the grand jury made plain that, as a result of the shots fired by police officers, Defendant "received internal

injuries that caused him to be a paraplegic." [10/15/2009 Tr. at 34] This testimony is true; the grand jury had no questions about his injuries and Defendant has provided no authority supporting his position that the State was required to provide further detail about his injuries.

IV. The Grand Jury Was Not Properly Informed About Defendant's Request To Testify.

Defendant argues the State improperly interfered with his rights under A.R.S. § 21-412 by failing to inform the grand jury of his request to testify and his request that his investigator/expert be allowed to testify. [Motion at 22-23 & Ex. 1 11/14/2009 letter at 2; *see also* 9/9/2011 Supplement (citing, inter alia, *Bashir v. Pineda*, 226 Ariz. 351, 248 P.3d 199 (Ct. App. 2011))] By statute,

> "The grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so. The person under investigation shall have the right to advice of counsel during the giving of any testimony by him before the grand jury, provided that such counsel may not communicate with anyone other than his client. If such counsel communicates with anyone other than his client he may be summarily expelled by the court from the grand jury chambers. The grand jurors shall weigh all the evidence received by them and when they have reasonable ground to believe that other evidence, which is available, will explain away the contemplated charge, they may require the evidence to be produced."

A.R.S. § 21-412. As applicable here, Ariz. R. Crim. P. 12.6 contains comparable language. This language makes no provision for a request to testify by anyone other than the "person under investigation," and Defendant has provided no authority to the contrary. Accordingly, the court rejects Defendant's argument that the grand jury should have been informed of his request for other individuals to testify.

Turning to Defendant's request to testify, as explained by the Arizona Court of Appeals,

> "if a defendant has requested to appear [before the grand jury] and provided some detail of the proposed testimony and evidence, a prosecutor has a duty to convey that information to the grand jury in a fair and impartial manner so that it may make an informed decision. Failure to do so removes the choice from the grand jury and justifies remanding the indictment."

Bashir, 226 Ariz. at 355, 248 P.3d at 203. This concept originated in *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997) and *Bashir* further described the required action when a person under investigation asks to testify before the grand jury:

> "The defendant is seeking an opportunity to present evidence [him]self. Consequently, the issue is not whether the proposed evidence is 'clearly exculpatory' or 'exculpatory.' The issue is what the prosecutor should tell the grand jury about the defendant's request so that it can make an informed decision about the defendant's request to appear. *Trebus* set the standard. If a 'defendant's request provides information with some degree of detail . . . as to the subject and outline of the proposed evidence,' the prosecutor must 'convey[] that information to the grand jury.'"

Bashir, 226 Ariz. at 355, 248 P.3d at 203 (quoting *Trebus*, 189 Ariz. at 626, 944 P.2d at 1240). Both parties agree this standard applies here. [*See generally* 9/9/2011 Supplement; 9/27/2011 Response]

On January 14, 2009, Defendant (through counsel) asked "pursuant to ARS § 21-412 to appear [before any grand jury convened] and offer evidence that may deter a finding of probable cause." [Motion Ex 1 1/14/2009 letter at 1] The request detailed Defendant's anticipated testimony adding that, if allowed to appear before the grand jury, Defendant will testify that, on November 7, 2008:

- "He was experience paranoia as a result of a mental health condition.
- He asked to speak to Governor Napolitano.
- Thereafter there were a series of conversations between the Scottsdale Police 911 operator, his parents and with other members of the Scottsdale Police Department.
- His parents exited their home which left him alone with his 23 month old daughter, [D.H.]
- [He] . . . observed a number of police vehicles outside of the home and feared that he would be shot.
- [He] . . . has been the primary caregiver for [D.H.], has never mistreaded her, and has never had any intention of doing so. Nonetheless, in his desire to have his brother come into the parent's home [he] verbalized a threat to police that was directed to [D.H.]
- After that, [he] expressed on a number of occasions his desired that everything come to a peaceful ending.

- He walked out of his parents' home with his hands above his head because police told him to do so when he exited.
- He would not leave his 23 month old daughter alone in the home.
- He walked out holding his daughter safely above his head.
- He walked towards the street and then back towards the home.
- He made no gesture to throw his daughter to the ground.
- He made no verbal threats to anyone outside the home.
- He was shot and fell to the ground."

[Motion Ex. 1 1/14/2009 letter at 2] Defendant supplemented that request several times. [Motion Ex. 1 2/23/2009 letter at 1 ("I am supplementing my letter of January 14, 2009 in which my client requested, pursuant to ARS § 21-412, to appear and offer evidence that may deter a finding of probable cause."); 3/11/2009 letter at 1 ("This also supplements my earlier letters in which my client requested, pursuant to ARS § 21-412, to appear and offer evidence that may deter a finding of probable cause.")]

The matter was presented to the grand jury on October 15, 2009, well after these letters were received by the State. At the close of the evidentiary presentation, the State instructed that "[b]efore the Grand Jury can consider[] its options, I would like to inform you that the subject of the investigation has made a written request to appear before you and testify." [10/15/2009 Tr. at 45] After reading Ariz. R. Crim. P. 12.6 aloud, the State further advised:

> "[i]t is up to you to determine whether or not to have the subject of this investigation appear. You are under no duty to do so but may hear the testimony if you feel it would assist you in making a determination in this case. If you decide to hear the testimony, the case can be reset for a later date. So at this time before any other deliberations, please deliberate to determine whether or not you wish to hear testimony from the subject of the investigation."

[*Id*. at 45-46] After deliberating, the grand jury responded: "No. The answer is no, we do not want to have the subject" testify, by a vote of 11 to 1. [*Id*. at 46] At no time was the grand jury told of the substance of Defendant's proposed testimony, which had been outlined by defense counsel in some detail months earlier.

The State argues Defendant withdrew his request to testify before the grand jury, pointing to a March 26, 2009 letter from defense counsel stating it "supersedes prior letters regarding this matter" but does not repeat Defendant's prior request to testify. [9/27/2011 Response at 7] That same letter, however, references Defendant's "ARS § 21-412 Request," a request repeated by defense counsel in a May 2009 letter. [Motion Ex. 1 3/26/2009 letter at 1; 5/21/2009 letter at 1

("This letter supplements the prior ARS 21-412 requests.")] Moreover, the State told the grand jury that Defendant made a written request to testify (although it did not relay the detail of that anticipated testimony summarized in the January 14, 2009 letter). [10/15/2009 Tr. at 45-46] Telling the grand jury of Defendant's request to testify negates any argument that the State believed Defendant had withdrawn that request prior to the grand jury presentment. Accordingly, the court finds that Defendant did not withdraw his request to testify before the grand jury.

In the January 14, 2009 letter, Defendant asked to testify before the grand jury and provided a fair degree of detail as to the subject and outline of his proposed testimony. Given that request, which was never withdrawn, the State had an obligation to convey that information to the grand jury and to allow the grand jury to determine whether it wished to have Defendant testify. *Bashir*, 226 Ariz. at 356, 248 P.3d at 204. Because that did not happen, Defendant was denied a substantial procedural right. *See id.*; Ariz. R. Crim. P. 12.9(a). Moreover, on the record before it, the court cannot conclude that this denial constituted harmless error. Accordingly, the court grants the Motion on this ground and remands this matter for a new determination of probable cause consistent with this Minute Entry. In doing so, the court is not ordering that Defendant be allowed to testify before the grand jury. Instead, the court is ordering that the grand jury be told of Defendant's request to testify (which did occur in October 2009) and the subject and outline of the testimony Defendant would offer (which did not occur in October 2009) to allow the grand jury to fully consider Defendant's request. The grand jury may then make a fully-informed decision to allow Defendant to testify or to not allow Defendant to testify, consistent with the directives of *Trebus* and *Bashir*.

For all of these reasons,

IT IS ORDERED granting Defendant's February 19, 2010 Motion for Redetermination of Probable Cause as set forth above.

IT IS FURTHER ORDERED remanding this matter for a new determination of probable cause by the grand jury.

IT IS FURTHER ORDERED denying without prejudice as moot Defendant's September 9, 2011 Motion for Discovery No. 1: Production of Medical and Mental Health Records of Sergeant James Dorer and James Dorer's September 23, 2011 Request for Protective Order.

IT IS FURTHER ORDERED vacating the Complex Case Management Conference previously scheduled for December 16, 2011 at 10:00 a.m.

CR2009-007757-001 DT 12/05/2011

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.