IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-455-2023**
v.	:	
	:	
CHE'MARI MAY TRUAX,	:	**OMNIBUS PRETRIAL MOTION**
Defendant	:	

OPINION AND ORDER

Che'mari Truax (Defendant) was charged on March 8, 2023 with Third Degree Murder[1] and Endangering the Welfare of a Child[2]. The charges arise from the death of a 23-week gestational infant born at the Defendant's residence in the City of Williamsport. Defendant brought the infant still alive to the hospital, but the child did not survive.

Defendant filed an omnibus pretrial motion on May 4, 2023. The first hearing scheduled was on the recusal of this Court[3]. Defense Counsel also raised a Motion for Formal Discovery in the Omnibus Motion.[4] Hearing and limited argument on the remaining issues was held on was held on February 9, 2024[5]. The parties requested to brief the issues after a transcript was prepared. The final response was submitted to the court on April 26, 2024[6].

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[1] 18 Pa. C.S.A, § 2502(c)
[2] 18 Pa. C.S.A. § 4304(a)1.
[3] Defendant based their disqualification request of this Court on the fact that the Court was involved with issuing investigating search warrants to gather information recusal was required. That hearing was held on July 31, 2023. The Court denied that request for recusal dated August 3, 2023.
[4] The Court reviewed all of the discovery requests and disposed of the issues by a separate order dated February 9, 2024.
[5] Some of the issues raised in the OPTM the Court determined to be better suited to be raised in a Motion in Limine prior to trial. These issues were: prior bad acts and character evidence, prenatal drug use and prior abortion attempts, and precluding the Commonwealth characterizing the infant as "victim." The Commonwealth did concede that it will exclude any supporter pins, clothing, buttons, photos and any other supportive paraphernalia during the trial.
[6] A briefing schedule was set at the February 9, 2024 hearing which requested that Defense Counsel have their brief in to the court by March 11 for the Defense, March 25th for the Commonwealth and April 1st for any Defense reply brief. On March 25th, a stipulated order was entered by this Court granting the Commonwealth additional time to file its brief until April 19th and reply brief from the Defense on April 26th. The Commonwealth filed its brief on April 22nd and Defense filed its reply brief on April 26, 2024.

Defense Counsel alleges that the Commonwealth has failed to establish its *prima facie* burden on the charge of Endangering the Welfare of Children[7] or, in the alternative, that it should be graded a misdemeanor of the first degree. The Defense also alleges that pursuant to 18 Pa. C.S.A. §2608(a)(3) the Defendant should not have been charged with any offenses relating to the death of her infant.

The Commonwealth introduced the transcript of the preliminary hearing on March 22, 2023 held before MDJ Christian Frey as Commonwealth's exhibit #1. The Commonwealth did not present any additional testimony at the time of the hearing.

Preliminary Hearing Testimony

At the preliminary hearing on March 22, 2023, the Commonwealth called four (4) witnesses. Kathryn Kiessling (Kiessling), Chief Deputy Coroner of Lycoming County was called to testify that on March 7, 2023 she received a page from UPMC Williamsport to call Emily Tate about the death of an infant. N.T. Preliminary Hearing 3/22/2023 at 4. Kiessling testified that she called Tate and she was told that the infant came into the hospital through the emergency department (ED). *Id*. at 5. Tate reported to Kiessling that Defendant was at home and felt nauseous and went to the bathroom. *Id.* While there she thought she was going to have diarrhea but instead she delivered a 23-week infant who landed on the floor. *Id.* Tate told Kiessling that the infant's cord was cut very close to its body and breathed for about one hour after it was delivered. *Id.* As soon as the infant came to the hospital, it went into cardiac arrest and after about 20 minutes was unable to be resuscitated. *Id.* Tate told Kiessling that they could not use the umbilical cord because it had not been clamped and was cut down to the base.

[7] The third-degree murder charge was dismissed by the MDJ after the preliminary hearing at some point after the preliminary hearing but before formal court arraignment. There is nothing in the record to show how the parties were notified of the MDJ's decision.

Id. at 5-6. Tate told her that there was no indication of trauma to Defendant. *Id.* Ultimately Kiessling scheduled an autopsy for the infant on March 9, 2023 in Allentown. *Id.* at 7. On cross, Kiessling testified that by failing to clamp the cord, the infant could suffer from blood loss. *Id.* at 8. As of the time of the preliminary hearing, the Coroner's office had not received the autopsy report. *Id.* at 9.

Next the Commonwealth called Natalie Miller (Miller), a certified nurse midwife employed at UPMC Williamsport. *Id.* at 10. She was working on March 7, 2023 when the Defendant brought the infant to the emergency department. *Id.* at 11. Miller was paged to the ED and went to Defendant. *Id.* at 12. Miller described Defendant's demeanor as "stoic." *Id.* Miller testified that Defendant told her that she had a positive pregnancy test in November of 2022 and that she delivered the infant at 3 pm. *Id.* at 14-15. After refreshing her recollection, Miller added that the Defendant came into the ED at about 4PM that same day. *Id.* at 15. Miller testified that Defendant told her that at about 3 pm she delivered the baby with the placenta, cut the umbilical cord with scissors and wrapped the baby on a scarf and placed it on her bed. *Id.* Defendant told Miller that she placed the baby in a box in order to transport it to the hospital. *Id.* Miller added that the baby was pronounced at 16:23 hours (4:23 pm) and she would have escorted Defendant to the labor and delivery (L&D) floor of the hospital. *Id.* On the L&D floor Miller would have had the opportunity to obtain a better history and exam of the Defendant. *Id.* at 16. Defendant told Miller that she began cramping at 9:00 am that morning, was cramping all day and confirmed that she delivered the child at 3:00 pm. *Id.* at 22. Miller said that the Defendant told her that after delivery she cleaned herself up and then went to the hospital. *Id.* While initially interested in receiving treatment, Miller described that at about 5:00-6:00 pm Defendant would have requested to leave the hospital. *Id.*

Next to testify for the Commonwealth was Michael Gerst (Gerst), M.D., the Chief Medical Officer of the UPMC ED. Gerst testified that he was one of the medical professionals who began working on the infant when it arrived at the ED in the resuscitation room at approximately 3:55 PM. *Id.* at 27. The infant when it arrived was very cold to the touch, with spontaneous movements and agonal[8] breathing. *Id.* Gerst described it as 23 weeks in developmental age based upon the information provided to him by the mother. *Id.* at 32. When the infant came to the hospital, the placenta was not attached to the infant. *Id.* at 28. Once the infant was assessed, an L&D nurse began CPR on the infant. *Id.* In addition, another doctor attempted to access the umbilical cord to administer fluids, but was unable. *Id.*at 29. The infant was pronounced at 16:23 or 4:23 PM, approximately 28 minutes after it arrived to the ED. Gerst described the infant as having no significant abnormalities when it presented to the ED. *Id.* at 32. While in the ED just prior to calling the code, the infant had a stable airway and was being administered continuous CPR. *Id.* at 34.

Last to testify was Agent Aaron Levan (Levan) from the Williamsport Bureau of Police. Levan was the investigator who responded to the report of a death of an infant at UPMC. He testified that he obtained search warrants for Defendant's blood at the residence, and her medical records. *Id.* at 38. After the search of the residence, the police discovered the remainder of the umbilical cord and bloody garments. *Id.* The search of the medical records established Defendant arrived at the ED at 3:55 pm after delivering the infant at 2:55 pm. *Id.* at 37. The infant was alive when it arrived at the hospital. *Id.* at 38. Police later seized Defendant's cell phone and Levan testified that Defendant never called 911but told people that she was going to

[8] Agonal breathing is characterized by gasping, labored breathing that sounds like snoring, snorting, or moaning. It can be brief or last for several hours and occurs when the brain is not getting enough oxygen, usually because the heart is not working properly.

go to the ED. *Id.* at 40. Levan also testified to the contents of 16 text messages between Defendant and her mother discussing what to do. *Id.* at 44.

Levan stated that at 2:57 [on March 7, 2023] there was a message to a Trisha Michelle stating 'need you'. *Id.* At 3:05 p.m. he described that there was a picture taken of the child which was determined to be at her residence based on the surroundings. *Id.* And the metadata from that picture revealed to the police that picture was taken at five after three in the afternoon. *Id.* From that point Levan describes a series of messages between Ms. Truax and Trisha Michelle. Levan testified that based on the content of some the messages prior, he believed that Trisha Michelle may be Defendant's mother. *Id.* He testified that there was from the first message up until 15:21 hours, 16 messages between Ms. Truax and Ms. Michelle.

Levan then testifies as follows:

> that at 15:11 hours, Trisha Michelle says, call 911 or I am.
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> At 15:13 hours Ms. Truax responds, I will, hold up.
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> At 15:14 hours Ms. Michelle responds, no, call now. And she also responds at 15:14 hours, what's the address. Ms. Truax responds I gotta see. That was at 15:14 hours.
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> At 15:15 hours, I need to know or I'm just gonna call and say dumb shit. That was from Ms. Michelle.
>
> At 15:15 hours Ms. Truax responds, I'm literally gonna do it.
>
> At 15:15 hours, Ms. Michelle responds, no, right now.
>
> At 15:15 hours, Ms. Truax responds back, don't fuck this up for me.
>
> At 15:15 hours Ms. Truax responds back, you're gonna get me in trouble, just chill.

At 15:15 hours Trisha Michelle responds, I'm trying to save my grandbaby's life, Mari May. Mari May is the Facebook handle that Ms. Truax is using.

At 15:16 hours, Trisha Michelle responds no, they're gonna know, Mari.

At 15:16 hours Michelle also responds, I S-T-G. (Levan was not sure what that stands for).

At 15:17 hours Ms. Truax responds, chill.

At 15:18 hours Trisha Michelle responds, Mari, I'm scared to death for my child.

At 15:18 hours, in a separate text, she responds -- Ms. Truax -- I'm sorry, Trisha Michelle responds, and her baby.

At 15:18 hours, Ms. Truax responds she's getting cold.

At 15:19 hours, Trisha Michelle responds, OMG, cover her up and call them, please, P-L-Z. Mari, they will save her life, I swear to you.

At 15:21 hours Trisha Michelle responds, I'm walking to the store. Call Elaine if you need to talk to someone. I'll be back in ten minutes.

And then at 15:55 hours we know that Ms. Truax arrives at the hospital.

The records also revealed that Defendant made a phone call to the hospital main number that lasted four (4) minutes and 44 seconds which began at 15:25 hours (3:25 pm). *Id.* Levan testified on cross examination that there was one FaceTime call made by defendant at 15:10 (3:10) pm. *Id.* at 40.

The parties made an extended argument on *prima facie* at the conclusion of the hearing and were given time to submit case law on the issue of Defendant's culpability.

A witness was then presented by the Defense on behalf of Defendant in the issue of bail. Rachna Vanjani, M.D. testified as to the detrimental effects keeping the Defendant in custody any longer than the preliminary hearing as the Defendant was not receiving proper post-partum care especially in light of the sad outcome after the birth. After considering the testimony and by agreement of the parties, Defendant was ordered to be released onto supervised bail.

Omnibus Hearing Testimony

At the hearing on the omnibus motion, the Court first heard argument on the issue of whether the representative of the Women's Law Institute may submit an *amicus* brief on behalf of the American College of Obstetrics and Gynecology[9] to offer contextual information regarding the unintended consequences that could flow from the ruling of the court on criminalizing the behavior of a woman while pregnant or with adverse pregnancy outcomes. The Court granted the opportunity for the group to submit a brief through Defense Counsel outlining their position. The brief was submitted and reviewed by the Court to assist in its determination of the issues raised.

No additional testimony was presented at the hearing. The parties did agree to allow the Defendant to absent herself for any future pretrial hearings in light of the reports of her mental health status as a consequence of the events of March 7, 2023.

Habeas Motion

[9] There were actually 34 organizations coming together to file the *amicus* brief: There were six medical organizations, including the American College of Obstetricians and Gynecologists, nine non-profit organizations, including Maternity Care Coalition, Juvenile Law Center, Community Legal Services, also 10 individual medical practitioners, six of which are OB/GYNs, one of whom is a prenatal addiction specialist, along with other individual legal professionals or academics to offer their expertise in informing the Court of the consequences of holding Defendant liable for her conduct while pregnant in addition to §2608. There were a lot of policy arguments contained in the brief. This Court believes that it is not the proper forum for those arguments.

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016). "The Commonwealth may sustain its burden of proving every element of the crime…**by means of wholly circumstantial evidence**." *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001); *see also Commonwealth v. Jones*, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in pretrial habeas proceeding. *Commonwealth v. Wojdak*, 466 A.2d 991, 997 (Pa. 1983); *see also Commonwealth v. Kohlie*, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, "inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

Applicable to any discussion of the charges filed in this case the Court must consider nonliability and defenses in crimes against an unborn child under the Pennsylvania Crimes Code. Section 2608 provides in applicable part

(a) Nonliability. --Nothing in this chapter shall impose criminal liability:

(1) For acts committed during any abortion or attempted abortion, whether lawful or unlawful, in which the pregnant woman cooperated or consented.

(2) For the consensual or good faith performance of medical practice, including medical procedures, diagnostic testing or therapeutic treatment, the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.

(3) Upon the pregnant woman in regard to crimes against her unborn child.

18 Pa. C.S.A. § 2608 (a).

In *Commonwealth v. Dischman* 195 A.3d 567 (Pa. Super. 2018) the Superior Court held that the Defendant who at 30 weeks pregnant overdosed on opioids resulting in her cardiac arrest and which required the fetus' birth via caesarian section, could not be prosecuted for any crimes against the unborn child. The Superior Court further agreed that the unambiguous language of section 2608(a)(3) dictates that a pregnant woman cannot be held liable under Chapter 26 for crimes against her unborn child.[10]

Therefore, under Pennsylvania law, specifically 18 Pa. C.S.A. § 2608(a)(3), a pregnant woman cannot be held criminally liable for conduct during her pregnancy that affects her unborn child, even if such conduct ultimately results in harm to the child after birth. This provision reflects the legislature's intent to shield pregnant individuals from criminal prosecution for prenatal behavior, regardless of whether that behavior is alleged to have caused harm to the fetus or the newborn child after delivery.

[10] Enacted in October of 1997, the Crimes Against the Unborn Child Act, 18 Pa.C.S.A. § 2601 *et seq.,* extends criminal liability for the murder, voluntary manslaughter, or aggravated assault of an unborn child to actors other than the pregnant woman.

In the present case, the prosecution seeks to hold the Defendant responsible for the outcome of her pregnancy by charging her with Endangering the Welfare of Children in that she violated her duty to her child. However, § 2608(a)(3) unequivocally bars charges when the alleged wrongful conduct occurred during pregnancy. Whatever the Defendant's actions whether it be to engage in substance use, failure to seek prenatal care, or other behavior, Pennsylvania law prohibits attributing criminal liability to the defendant for her prenatal conduct. Just as in *Dischman*, *supra,* whatever conduct Defendant engaged in which resulted in her premature delivery of the infant, cannot be prosecuted.

The remaining count against Defendant is the offense of Endangering the Welfare of Children. If she cannot be charged with actions that she took prior to the delivery of the child, then the Commonwealth must be alleging that the actions that she took after the child's birth resulted in her violating her duty under Pennsylvania law.

Endangering the Welfare of a Child

Under Pennsylvania law (18 Pa. C.S. § 4304), this charge applies when a parent or guardian knowingly endangers the welfare of a child (EWOC) by violating their duty of care, protection, or support. To convict on this charge, the prosecution must prove that the defendant acted knowingly, not just negligently, and that their actions directly endangered the child.

> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

18 Pa. C. S. A. § 302.

In order for the Commonwealth to meet its *prima facie* burden, it needs to show first that Defendant knowingly acted to violate her duty of care protection or support. Pennsylvania Courts have established a three-part test that must be satisfied to prove EWOC:

> 1) [T]he accused [was] aware of his/her duty to protect the child;
> 2) [T]he accused [was] aware that the child [was] in circumstances that could threaten the child's physical or psychological welfare; and
> 3) [T]he accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Commonwealth v. Pahel, 456 Pa.Super. 159, 689 A.2d 963, 964 (1997) (quoting *Commonwealth v. Cardwell,* 515 A.2d 311, 315 (Pa.Super.1986)), *Commonwealth v. Bryant*, 2012 Pa. Super 257, 57 A.3d 191, 197 (2012).

Here the evidence presented by the Commonwealth at the preliminary hearing was that Defendant was cramping all day and told hospital personnel that when she went to the bathroom expecting diarrhea, she gave birth to the infant and passed the placenta around 3 pm. After placing the child on her bed and wrapping it in a scarf, Defendant took time to clean herself up, and cut the infant's umbilical cord. Less than an hour after the unexpected birth, she brought the infant to the hospital. The infant was breathing when it came to the ED. Approximately 30 minutes after its arrival at the hospital and after attempts to resuscitate the infant, it died.

Defendant took the infant to the ED after the unexpected birth and called the hospital, so that the Court may infer that she recognized that she had a duty to her infant child.

With respect to the second element, whether the accused was aware that the child was in circumstances that could threaten the child's physical or psychological welfare, three circumstances were mentioned – the failure to clamp the umbilical cord, cutting the umbilical cord too short or too close to the infant's body, and failure to immediately call 911 or seek

medical assistance medical assistance for the infant. Although there was testimony that the doctors could not use the umbilical cord to provide medications to the infant, there is nothing in the record to show that Defendant knew that cutting the umbilical cord too short or too close to the infant's body would hinder efforts to provide medical treatment to the infant. Similarly, there is no evidence that Defendant knew she needed to clamp the umbilical cord but failed or refused to do so or that her failure to clamp the umbilical cord contributed to the adverse outcome or placed the infant in danger of death or serious bodily injury apart from the infant's premature birth. The court finds that the Commonwealth presented insufficient evidence to establish a prima facie case of EWOC on either of these theories. However, based on the communications between Trisha Michelle and Defendant, she recognized that the infant was in a condition that required medical attention to survive and despite Michelle's entreaties for Defendant to call 911 and Defendant's text that the infant was cold, Defendant never called 911 and did not take the infant to the hospital for approximately one hour after its birth.

The remaining question for the Court is whether her actions that day could reasonably have been expected to protect the child's welfare.

In previous cases, the Pennsylvania Courts have upheld convictions for violating 18 Pa.C.S.A. § 4304 based upon an act of omission. In *Commonwealth v. Barnhart,* 345 Pa. Super. 10, 497 A.2d 616 (1985), the defendants were convicted of violating § 4304 when their child died of cancer after defendants failed, for religious reasons, to seek medical treatment for the child. In *Commonwealth v. Morrison,* 265 Pa.Super. 363, 401 A.2d 1348 (1979), and *Commonwealth v. Humphreys,* 267 Pa.Super. 318, 406 A.2d 1060 (1979), convictions for violating § 4304 were based on failure to obtain timely medical treatment.

In light of these decisions, the Court must also examine what constitutes acts which if any, can be taken by a Defendant to negate intent.

> "An act which will negate intent is not necessarily one which will provide a successful outcome. However, the person charged with the duty of care is required to take steps that are reasonably calculated to achieve success. Otherwise, the meaning of 'duty of care' is eviscerated."

Cardwell, 515 A.2d at 315. Therefore "a parent's duty to protect his or her child requires affirmative performance to prevent harm and that failure to act may mean that the parent 'knowingly endangers the welfare of the child.' " *Cardwell, supra,* citing 18 Pa.C.S.A. § 4304. In *Cardwell*, the Superior Court found that after discovering her daughter was being sexually assaulted, Cardwell waited 10 months before she sought help or did anything to help her daughter until the daughter ran away to save herself. This lack of action was determined to be insufficient to protect the child's welfare.

The Commonwealth[11] asserts that the intent requirement can be implied from the surrounding circumstances. The Commonwealth cites *Commonwealth v. Winger,* 957 A.2d 325, 330 (Pa. Super. 2008), *abrogated by Com. v. Dantzler,* 135 A.3d 1109 (Pa. Super. 2016).

> "The *mens rea* required for [Section 4304] is a knowing violation of the accused's duty of care to the minor-victim." *Commonwealth v. Martir,* 712 A.2d 327, 328 (Pa. Super.1998). "Often, intent cannot be proven directly but must be inferred from examination of the facts and circumstances of the case." *Commonwealth v. Pond,* 846 A.2d 699, 707 (Pa.Super.2004) (citation omitted).

Therefore, the Commonwealth is not required to provide direct proof of Appellee's frame of mind. *Commonwealth v. Matthews,* 870 A.2d 924, 928–29 (Pa.Super.2005) (*en banc*), *affirmed,* 589 Pa. 487, 909 A.2d 1254 (2006). Instead, the Commonwealth can demonstrate its case through circumstantial evidence. *Id.* We can look at the totality of the

[11] Defense objects to the Courts consideration of the Commonwealth's brief as it was two days late. Due to the seriousness of the charge, the Court will still consider the issues raised.

circumstances to determine if Appellant's actions gave rise to a reasonable inference of the requisite *mens rea*. *Pond, supra.* Although a violation of the accused's duty of care under Section 4304 includes exposing a child to danger or putting a child at risk of harm:

> The "statute does *not* require the actual infliction of physical injury. Nor does it state a requirement that the child or children be in imminent threat of physical harm. Rather it is the awareness by the accused that [her] violation of [her] duty of care, protection and support is practically certain to result in the endangerment to [her] children's welfare, which is proscribed by the statute.

Commonwealth v. Wallace, 817 A.2d 485, 491-492 (Pa.Super.2002), *appeal denied,* 574 Pa. 774, 833 A.2d 143 (2003), *certiorari denied,* 541 U.S. 907, 124 S.Ct. 1610, 158 L.Ed.2d 251 (2004).

In *Winger*, the defendant was a daycare provider of a two-year-old, and after consuming alcohol, she transported the properly restrained child to its mother's house. 957 A.2d at 327. Since the child's mother did not know where the child was, she called the police who were waiting at the residence when Winger pulled up. *Id.* The Superior Court used the three-pronged analysis in determining intent. The Court found that while Winger knew she had a duty of care by putting the child in a car seat to satisfy the first prong and she was not violating the motor vehicle code in the operation of the vehicle recognizing her duty of care satisfying the second prong. However, the Superior Court found that being under the influence with a BAC of .252% while operating the vehicle with the properly restrained child still exposed the child to the risk of harm thus satisfying the third prong of the EWOC test. *Id.*

In *Commonwealth v. Miller,* 411 Pa. Super. 33, 40, 600 A.2d 988, 991 (1992), Miller was convicted of EWOC when she left her 22-month-old son in a room with a with a space heater having been told by the father of the child that a friend would watch him. The child was left unattended and died as a result of the improperly functioning space heater. The Superior

Court found that to establish the third prong of the test, that the accused must "be aware that she had placed her child in circumstances that threatened the child's physical or psychological welfare or that her failure to check on the alleged babysitting arrangements was unreasonable under [the law]." 600 A.2d at 991. The Court found that even if her behavior was reckless or negligent, she was not aware that her child was left unattended based upon statements made by the child's biological father that the Court found Miller could reasonably rely upon. *Id.* Utilizing a common sense of the community approach to interpret the specific intent element of the statute, the Superior Court found an implicit recognition that parents at times can make mistakes in judgment and that their children may be harmed as a result. However, for such mistakes to rise to the level of criminal culpability, parents must knowingly allow their children to be at risk with awareness of the potential consequences of their actions or of their failure to act. *Id.* at 992.

Here, while the infant was still alive, Defendant brought it to the hospital for medical treatment. Gerst testified that outwardly, the infant did not appear to have anything wrong with it. There was no testimony that the death of the infant was directly related to the cutting of the umbilical cord or the fact that it was not clamped. There was no testimony presented that the infant bled out. With no evidence of the Defendant's medical experience or past history, from the Commonwealth's evidence presented, there does not appear to be anything that would have indicated to Defendant that the infant was in critical condition or required emergent treatment that she would have disregarded.

The evidence presented also showed that Defendant appeared to be uncertain as to what to do and was reaching out for help. She communicated with her own mother as well as called the hospital just prior to her taking the infant to the ED. It is clear that the Defendant was told

by her mother that the infant needed medical attention and she should call 911. Defendant's mother repeatedly told Defendant that she was concerned for her grandchild. As stated in *Miller, supra,* parents must knowingly allow their children to be at risk with awareness of the potential consequences of their actions or of their failure to act to satisfy the third prong of the EWOC statute.

The Court finds that the Defendant was aware of the seriousness of the situation with the premature birth of her infant and despite the repeated encouragement of her mother, delayed treatment for her infant for almost one hour after its birth. Defendant apparently indicated that she did not believe the child would survive and told her mother that the child was cold. The Commonwealth has established *prima facie* evidence that Defendant knowingly breached her duty of care to the infant specifically by failing to act in not bringing the infant to the hospital as soon as possible despite the urging of her mother and that delay or failure to act in a timely way could not have been reasonably expected to protect the child's welfare.

Grading

Also, before the Court it its *Habeas* motion is Defendant's assertion that the Commonwealth has charged the Defendant with the improper grading of the offense.

18 Pa C.S.A. §4304 (b) sets forth the requirements for the grading of the EWOC charge.

> **(b) Grading.--**
> (1) Except as provided under paragraph (2), the following apply:
> (i) An offense under this section constitutes a misdemeanor of the first degree.
> (ii) If the actor engaged in a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree.
> (iii) If, in the commission of the offense under subsection (a)(1), the actor created a substantial risk of death or serious bodily injury, the offense constitutes a felony of the third degree.

> (iv) If the actor's conduct under subsection (a)(1) created a substantial risk of death or serious bodily injury and was part of a course of conduct, the offense constitutes a felony of the second degree.
>
> (2) The grading of an offense under this section shall be increased one grade if, at the time of the commission of the offense, the child was under six years of age.

Defendant was charged with EWOC graded as a felony of the first degree. In reviewing the statute, the Court is uncertain how the Commonwealth arrived at that grading.

In order for the crime of EWOC to be graded as a first-degree felony, the Commonwealth must allege in the criminal information and present evidence at trial of the additional factor of course of conduct. *See Commonwealth v. Popow*, 844 A.2d 13, 18 (Pa. Super. 2004). Although the EWOC statute does not define "course of conduct," the phrase is clearly used in that context to differentiate the penalties for single and multiple endangering acts. In the context of the EWOC statute, grading based on a course of conduct requires proof of more than one act. *See Commonwealth v. Kelly*, 102 A.3d 1025, 1031 (Pa. Super. 2014) (*en banc*); ***see also*** Pa.S.S.J.I. (Crim.) 15.4304B (explaining that "[a] course of conduct means a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct").

The Commonwealth has not charged the Defendant on the information with a course of conduct. There was no testimony at the preliminary hearing that established multiple acts were taken by the Defendant to have contributed to the death of the infant. Therefore, in charging Defendant any grading cannot be based on a course of conduct.

The Commonwealth has established that the age of the child was under six, so the grading enhancement set forth in (b)(2) applies. The Commonwealth did not present evidence of a course of conduct thus eliminating sections (b)(1)(ii) and (b)(1)(iv) which grades the

offense as a felony three. Since the child died, the Commonwealth has presented *prima facie* evidence to establish (b)(1)(iii) which is also graded a felony of the third degree. Applying the grading enhancement, the offense against Defendant should be graded a felony of the second degree.

Search Warrant

In her Motion, Defendant also contends that the search warrant affidavits for the search of her residence, medical records from both UPMC and Geisinger as well as her cellular phone did not contain probable cause to search for evidence of a crime concerning the circumstances surrounding the birth or were overly broad. Defendant alleges that using the search warrant to investigate the commission of a crime is an improper use of the tool. The Commonwealth in its brief argues that Defendant's motion fails to comply with the Rules of Criminal Procedure in that it does not plead facts with specificity and should be dismissed.

The first warrant was issued March 8th and contained the following in its affidavit of probable cause.

> On March 7, 2023, at about 1847 hours, though Lycoming County Coroner's office was notified of an infant death at UPMC Williamsport Emergency Department. Additionally, an RN with the Labor and Delivery department related that the incident began as an OB trauma arrest in the Williamsport emergency room department. CHEMARI TRAUX (sic) delivered a 23-week gestation infant at her residence 411 Fifth Ave. CHEMARI explained that she had been feeling nauseated and as if she was going to have diarrhea, so she went to the bathroom and subsequently delivered the infant on the bathroom floor of her home residence. CHEMARI said that the infant was breathing, but did not believe the child would survive. She then cut the umbilical cord, but did not clamp it. After approximately one hour of the infant continuing to breathe, CHEMARI transported herself to UPMC emergency department. Shortly after arriving at the emergency department, the infant went into cardiac arrest. 20 minutes of resuscitative efforts were unsuccessful and the infant was pronounced deceased at 1623 hours.
>
> It was further learned that approximately two weeks prior CHEMARI was seen at Geisinger Muncy for abdominal pain. At that time, CHEMARI was notified that she was pregnant. CHEMARI had previously been to a clinic in Harrisburg in November

> 2022 for an abortion which was unsuccessful. Also, during the visit to Geisinger Muncy, it was learned that CHEMARI was positive for cocaine. Medical staff requested a urine sample from CHEMARI and inquired if she had been using cocaine on this date, however, CHEMARI did not provide a urine sample and immediately signed herself out against medical advice.
>
> With these facts in mind that I respectfully request the medical records for the 07 March 2023 ER visit pertaining to the evaluation and treatment of mother Chemari May TRUAX (DOB: 03/08/2002) and 23-week gestation infant Asaya May TATE. The presentation of these medical records will help in determining the contributing factors leading up to and including the death of baby TATE.

The next warrant requested at the same time contained the same information with the additional paragraph requesting permission to search the residence.

> Due to the facts and circumstances set forth, Your affiant submits that there is probable cause to believe that located inside the residence at 411 Fifth Ave. (Specifically the bathroom) is evidence of the infant's birth. Additionally, Your affiant believes that there is probable cause to believe that contained within the residence is evidence of narcotics and or the use of narcotics and related paraphernalia and implements of the umbilical cord being severed.

An additional warrant was requested later the same day for Defendant's Apple Iphone. For that warrant, this paragraph was substituted for the last paragraph in the original search warrants.

> On this date, while executing the search warrant at 411 1/2 Fifth Ave. CHEMARI TRAUX (sic) was detained pending a blood draw, in her possession she had an apple iPhone. Your affiant knows that cell phones are used as a primarily means of communication. Additionally, your Affiant has observed during previous criminal investigations, persons using cell phones to communicate about the crimes they have committed. Your affiant submits that there is probable cause to believe that contained within the cell phone belonging to CHEMARI TRAUX is evidence that would further assist with this investigation.

The next day, police requested an additional search warrant for the medical records for Defendant from her earlier visit to Geisinger Muncy on February 15, 2023. The additional paragraphs come after the first two in the original warrant.

> After approximately one hour of the infant continuing to breath, CHEMARI transported herself to the UPMC Emergency Department. Shortly after arriving at the emergency

> department, the infant went into cardiac arrest. 20 minutes of resuscitative efforts were unsuccessful and the infant was pronounced deceased at 1623 hours.
>
> It was learned through hospital staff reports that on 15th February 2023, CHEMARI was seen at Geisinger Muncy for abdominal pain. At that time, CHEMARI was notified that she was pregnant. CHEMARI had previously been to a clinic in Harrisburg in November 2022 for an abortion which was unsuccessful. Also, during the visit to Geisinger Muncy, it was learned through hospital staff reports that CHEMARI was positive for cocaine. Medical staff requested a urine sample from CHEMARI and inquired if she had been using cocaine on this date, however, CHEMARI did not provide a urine sample and immediately signed herself out against medical advice.

Another search warrant was requested on the next date for the toxicology records from Defendant's visit to Geisinger Muncy on February 15, 2023. The only change to the affidavit of probable cause was to add to the request for medical records to include toxicology results from her visit to Geisinger Muncy on February 15, 2023 as

> These records will help in determining if TRAUX (sic) had been under the influence of any substances that may have contributed to the death of baby TATE and will aid in determining the contributing factors leading up to and including the death of baby TATE.

A final warrant was requested from MDJ Aaron Biichle on March 14, 2023 seeking permission to search for any electronic devices including any photographs depicting the deceased infant and a T-Mobile tumbler. However, it was revealed at the hearing on the motion and the parties agreed that the photograph depicting the deceased infant seized from Defendant in the seventh search warrant was not taken by the Defendant and would not be used as evidence against Defendant in any legal proceeding.

Was there sufficient probable cause for the search warrants

Both the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution protect citizens from unreasonable, searches and seizures. *Commonwealth v. Burgos*, 64 A.3d 641, 648 (Pa. Super. 2013). The Fourth

Amendment has a strong preference for searches conducted pursuant to warrants. *Commonwealth v. Leed*, 186 A.3d 405, 413 (Pa. 2018). Search warrants may only issue upon probable cause and the issuing authority may not consider any evidence outside of the affidavits. Pa. R. Crim. P. 203 (B). The affidavit of probable cause must provide the magistrate with a substantial basis for determining the existence of probable cause. *Leed*, supra (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

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

"Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Leed,* supra (quoting *Commonwealth v. Johnson*, 615 Pa. 354, 42 A.3d 1017, 1031 (2012) (internal quotation marks and citation omitted). The affidavit of probable cause "must provide the magistrate with a substantial basis for determining the existence of probable cause[.]" *Gates*, 462 U.S. at 239, 103 S.Ct. 2317. It is "not require[d] that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location." *Commonwealth v. Forster,* 385 A.2d 416, 437-38 (Pa. Super. 1978). A magistrate must simply find that "there is a fair probability

that contraband or evidence of a crime will be found in a particular place." *Commonwealth v. Manuel*, 194 A.3d 1076, 1081 (Pa. Super. 2018). Courts must construe applications for warrants in a common sense, nontechnical manner. *See Commonwealth v. Burno*, 154 A.3d 784, 781 (Pa. 2017)(arrest warrant); *Commonwealth v. Baker*, 615 A.3d 23, 25 (Pa. 1992)(search warrant).

Defendant asserts that Levan did not have sufficient probable cause generally as the first three paragraphs of the warrants did not contain any facts that Defendant would have committed a crime or possessed contraband. In fact, Defense asserts that paragraphs two and three allege that the information in the affidavit was neither relevant nor evidence of a crime.

Defendant argues that search warrants are not permitted to be used as an investigative tool. Since pursuant to 18 Pa. C.S.A. §2608(a) Defendant cannot be criminally liable for acts toward her unborn child, the police could not have been investigating a crime.

A search warrant may be issued to search for and to seize:

> (a) contraband, the fruits of a crime, or things otherwise criminally possessed;
> (b) property that is or has been used as the means of committing a criminal offense;
> (c) property that constitutes evidence of the commission of a criminal offense; or
> (d) a person for whom a bench or arrest warrant has been issued.

Pa. R. Crim. P. 201. Pursuant to this rule, a warrant may be used as an investigative tool to search for and seize property that may constitute "mere evidence" concerning a crime that has been committed. *Commonwealth v. Jones*, 988 A.2d 649, (Pa. 2010) certiorari denied 131 S.Ct. 110, 562 U.S. 832, 178 L.Ed.2d 32, dismissal of post-conviction relief affirmed 82 A.3d 1080, for text, see 2013 WL 11261344, appeal denied 83 A.3d 414, 623 Pa. 761, *habeas corpus* denied 2015 WL 4131781, certificate of appealability denied, dismissal of post-conviction

relief affirmed 220 A.3d 637, for text, see 2019 WL 2929059, appeal denied 225 A.3d 1099, 657 Pa. 463, dismissal of post-conviction relief affirmed 301 A.3d 870.

"The particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. These are two separate, though related, issues. A warrant unconstitutional for its lack of particularity authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize. This will result in the general "rummaging" banned by the fourth amendment". *See Marron v. United States,* 275 U.S. 192, 195, 48 S.Ct. 74, 75, 72 L.Ed. 231 (1927). A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. The officers executing such a warrant will not rummage, but will "cart away all documents." *Application of Lafayette Academy,* 610 F.2d 1, 3 (1st Cir.1979). An overbroad warrant is unconstitutional because it authorizes a general search and seizure. *Commonwealth v. Santner,* 308 Pa.Super. 67, 69–70 n. 2, 454 A.2d 24, 25 n. 2 (1982), *cert. denied,* 468 U.S. 1217, 104 S.Ct. 3585, 82 L.Ed.2d 883 (1984).

In interpreting the particularity requirement set forth in Article I, Section 8 of the Pennsylvania Constitution, the Supreme Court has said:

> The language of the Pennsylvania Constitution requires that a warrant describe the items to be seized "as nearly as may be...." The clear meaning of the language is that a warrant must describe the items as specifically as is reasonably possible. This requirement is more stringent than that of the Fourth Amendment, which merely requires particularity in the description. The Pennsylvania Constitution further requires the description to be as particular as is reasonably possible. *See Commonwealth v. Reese,* 520 Pa. 29, 31–32, 549 A.2d 909, 910 (1988) (Nix, C.J., dissenting) (Pennsylvania particularity requirement more stringent than that of the Fourth Amendment because Pennsylvania particularity requirement precedes probable cause requirement).
> It is settled Fourth Amendment jurisprudence that a warrant must specifically list the things to be seized. *Lo–Ji Sales, Inc. v. New York,* 442 U.S. 319, 99 S.Ct. 2319, 60

> L.Ed.2d 920 (1979); *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). The more rigorous Pennsylvania constitutional provision requires no less.
>
> Although some courts have treated overbreadth and ambiguity as distinct defects in warrants, e.g. *Commonwealth v. Santner,* 308 Pa.Super. 67, 68 n. 2, 454 A.2d 24, 25 n. 2 (1982), both doctrines diagnose symptoms of the same disease: a warrant whose description does not describe as nearly as may be those items for which there is probable cause. Consequently, in any assessment of the validity of the description contained in a warrant, a court must initially determine for what items probable cause existed. The sufficiency of the description must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause and the description in the warrant requires suppression. An unreasonable discrepancy reveals that the description was not as specific as was reasonably possible.

Commonwealth v. Grossman, 521 Pa. 290, 296–297, 555 A.2d 896, 899–900 (1989) (footnote omitted).

The use of a search warrant as a general investigatory tool is prohibited by both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. "A search warrant serves to authorize the seizure of identifiable and existing property. It is not available as a general investigatory tool to be used in place of a grand jury." *In re Casale,* 512 Pa. 548, 555, 517 A.2d 1260, 1263 (1986). "[M]ere suspicions do not constitute probable cause to support a search warrant." *Commonwealth v. Smith,* 511 Pa. 36, 47, 511 A.2d 796, 801 (1986), *cert. denied,* *198 479 U.S. 1006, 107 S.Ct. 643, 93 L.Ed.2d 700 (1986). See also: *Commonwealth v. Corleto,* 328 Pa.Super. 522, 528–529, 477 A.2d 863, 866 (1984); *Commonwealth v. Kanouff,* 315 Pa.Super. 392, 394–395, 462 A.2d 251, 252 (1983). A search warrant "may not be issued unless the affidavit alleges a preexisting crime." Pa. R. Crim. P. 201, cmt. See: *United States ex rel. Campbell v. Rundle,* 327 F.2d 153, 162–163 (3d Cir.1964); *Commonwealth ex rel. Ensor v. Cummings,* 416 Pa. 510, 512–513, 207 A.2d

230, 231 (1965). See also: Pa.R.Crim.P. 206(e). *Commonwealth v. Bagley*, 408 Pa. Super. 188, 197–98, 596 A.2d 811, 815 (1991).

In *Bagley*, in the course of investigating the suspicious death of Bagley's wife, the police obtained and executed twelve warrants. The police were authorized to search for "any evidence related to the death of [Defendant's wife.]" The trial court found that four of the warrants failed to describe any crime which had been committed and did not particularly describe the evidence sought. The Superior Court affirmed the suppression of the warrants, as not being permitted to be used as an investigative tool.

Here, the police in the first warrant had had confirmation of a preterm infant presenting to the ED, and were requesting the medical records of the Defendant "The presentation of these medical records will help in determining the contributing factors leading up to and including the death of baby TATE." Based upon the review of the impact of 18 Pa C.S.A. §2608, the police were not investigating any crime, as anything the defendant did before she gave birth to the infant could not be used as evidence of a crime against her. Therefore, the first warrant was not valid.

The second warrant the police obtained requested the following:

> Your affiant submits that there is probable cause to believe that located inside the residence at 411 Fifth Ave. (Specifically the bathroom) is evidence of the infant's birth. Additionally, Your (sic) affiant believes that there is probable cause to believe that contained within the residence is evidence of narcotics and or the use of narcotics and related paraphernalia and implements of the umbilical cord being severed.

At the time the warrant was requested, the police knew that the infant came to the ED alive and died shortly thereafter. Evidence of a birth, even at home, is not any evidence of a crime. Even if there is evidence of narcotics and paraphernalia, and even if the Defendant would have used them prior to the child's birth, under §2608 that is not evidence of a crime.

The police do not offer any facts which would have supported the seizure of any evidence to suspect that defendant has committed the crime of EWOC. Therefore, this warrant should not have been issued.

The next warrant challenged was the search of the Defendant's iPhone which contained the history of text messages and phone calls the Defendant made immediately after the birth of the infant. In the warrant, police offered the following as the justification for the search of the iPhone:

> On this date, while executing the search warrant at 411 1/2 Fifth Ave. CHEMARI TRAUX (sic) was detained pending a blood draw, in her possession she had an apple iPhone. Your affiant knows that cell phones are used as a primarily means of communication. Additionally, your Affiant has observed during previous criminal investigations, persons using cell phones to communicate about the crimes they have committed. Your affiant submits that there is probable cause to believe that contained within the cell phone belonging to CHEMARI TRAUX (sic) is evidence that would further assist with this investigation.

Again, there is no indication by the police of the evidence of a crime they are seeking by the search of the Defendant's iPhone. The evidence of the blood draw which may have related to activities the Defendant engaged in prior to the birth of the infant is not evidence of a crime under §2608. There are no facts alleged by the police that establish that the iPhone contained any evidence of a crime whatsoever. The request by the police is based merely on the belief that if the Defendant was engaged in illegal conduct, there may be some record of it on her phone. Since this warrant does not comply with Pa. R. Crim. P. 201, it is not valid.

The final warrant requested by the police was for medical records of the Defendant when she appeared at Geisinger-Muncy on February 15, 2023. The purpose for which those records were requested was as follows:

> These records will help in determining if TRAUX (sic) had been under the influence of any substances that may have contributed to the death of baby

> TATE and will aid in determining the contributing factors leading up to and including the death of baby TATE.

As discussed above, the Defendant is not liable for her actions while pregnant pursuant to 18 Pa. C.S.A. §2608, and so the police were not requesting evidence of a crime. Therefore, the warrant is not valid.

Despite the fact that the Court will invalidate the search warrants which resulted in the discovery of most, if not all, of the evidence the Commonwealth developed to establish the crime of EWOC, the court cannot dismiss the EWOC charge on this basis as "the remedy for illegally obtained evidence is suppression of the evidence and its exclusion at trial, not dismissal of the case. *See Commonwealth v. Keller*, 823 A.2d 1004, 1111-1112 (Pa. Super. 2003), *abrogated on other grounds in Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 & n.5 (Pa. Super. 2016).

Conclusion

This Court finds that pursuant to 18 Pa. C.S.A. §2608(a)(3) the Defendant cannot be charged with any offenses relating to her unborn child which may have resulted in its untimely birth. However, the Commonwealth has established that Defendant knowingly violated her duty of care, protection or support as a result of her actions after the premature birth of her child and presented a *prima facie* case for the charge of Endangering the Welfare of Children based on her failure or her delay in seeking medical attention for the infant.

The Commonwealth did not have sufficient probable cause to believe there was a fair probability that evidence of a crime could be found in Defendant's residence, cell phone and medical records and the search warrants issued by this Court were not valid. The evidence obtained as a result of the use of invalid warrants must be suppressed.

ORDER

AND NOW, this 17th day of December, 2024, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Omnibus Pretrial Motion in the nature of a Petition for Habeas Corpus is hereby DENIED. For the reasons given in the opinion, the charge of Endangering the Welfare of Children shall be graded as a felony of the second degree.

Defendant's Omnibus Pretrial Motion in the nature of a Suppression motion is hereby **GRANTED** with respect to the warrants authorized to search for medical records, the Defendant's home and iPhone. It is **ORDERED AND DIRECTED** that any evidence obtained as a result of those search warrants is hereby **SUPPRESSED.**

By the Court,

Nancy L. Butts, President Judge

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