

DISTRICT COURT, CLEAR CREEK COUNTY, COLORADO 405 Argentine Street, PO Box 367 Georgetown, Colorado 80444 Phone: (303) 569-0820	DATE FILED: April 7, 2023 3:02 PM
PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  ANDREW BUEN, Defendant	▲ COURT USE ONLY ▲  Case Number: 2022CR128  Div. C
<b>ORDER DENYING DEFENDANT’S MOTION TO DISMISS THE INDICTMENT</b>	

THIS MATTER comes before the court on Defendant’s Motion to Dismiss the Indictment (Motion to Dismiss). The court, having considered Defendant’s motion, the People’s Response, and the Defendant’s Reply, hereby FINDS and ORDERS as follows:

**I. PROCEDURAL HISTORY**

Defendant Andrew Buen was indicted by the Grand Jury of the Fifth Judicial District on charges of Second Degree Murder (a class 2 Felony), Official Misconduct (a class 1 Misdemeanor) and Reckless Endangerment (a class 2 Misdemeanor) on November 22, 2022. The Grand Jury met on November 14, 2022, and November 22, 2022. Agent Derek Graham of the Colorado Bureau of Investigation was the sole witness.

The Grand Jury heard testimony from Agent Graham, listened to the initial 911 with Mr. Glass, reviewed State Patrol dispatch recordings, reviewed the Defendant’s body cam footage, the body cam footage of Idaho Springs Officer Brittany Morrow, and

reviewed some crime scene pictures. Substantively, those exhibits demonstrated the following:

On June 10, 2022, Deputy Buen was dispatched to Silver Plume, Colorado to assist a driver, Christian Glass, who called 911 asking for help because he hit a boulder with his car and was stuck. During the 911 call, Mr. Glass expressed paranoid, delusional and/or hallucinatory thoughts, “which would indicate to anyone listening that he was . . . experiencing a mental health crisis.” Grand Jury Indictment (Indictment) p. 2. Deputy Buen was the officer in charge of the situation, assisted initially by Deputy Collins and then joined by numerous other law enforcement officers. For a significant period of time law enforcement engaged with Mr. Glass in an attempt to get him to leave his vehicle. When Deputy Buen first arrived, Mr. Glass had his car window down and offered to throw out the knives he had in his possession. But the deputies told him not too. Mr. Glass then rolled up his window and refused to get out of the car. Deputy Buen’s demeanor was aggressive at times, demanding Mr. Glass exit. Other officers attempted to deescalate the situation by engaging with Mr. Glass. Relatively early on in the contact, Deputy Buen called his supervisor, Sgt. Gould. Though the substance of that conversation was not recorded, Deputy Buen told other officers at the scene that they had been authorized to physically remove Mr. Glass from the vehicle. As time went on, the situation escalated from attempts to coax Mr. Glass from his car to a Deputy jumping on the hood of Mr. Glass’s vehicle, attempts to break out the car windows, shooting Mr. Glass with bean bags rounds, tasing Mr. Glass, and finally to the use of a firearm by Deputy Buen which resulted in Mr. Glass’s death.

The Defendant's first appearance in Clear Creek District Court was on December 12, 2022. He waived advisement of his rights and charges. After the second appearance in the case, the court set deadlines for the filing of motions related to the grand jury proceedings. On February 4, 2023, the Defendant filed his Motion to Dismiss the Indictment.<sup>1</sup>

The Defendant's Motion to Dismiss alleges prosecutorial misconduct related to the grand jury proceedings and a lack of probable cause, primarily as a result of what the defense alleges was a misstatement of the affirmative defenses provided to the Grand Jury for their consideration. The People respond that there was no prosecutorial misconduct, that there is no requirement that a grand jury hear exculpatory evidence or legal affirmative defenses and that there is probable cause to support the indictment.

## II. STANDARD OF REVIEW

Pursuant to C.R.S. § 16-5-204(4)(k):

The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

Review of grand jury proceedings pursuant to C.R.S. § 16-5-204(4)(k) is similar to a preliminary hearing in that the court's function is to determine whether probable cause exists to establish each element of the indicted offenses. *People v. Luttrell*, 636 P.2d 712, 714 (Colo. 1981). "The probable cause standard requires evidence sufficient to persuade

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<sup>1</sup> A Motion for Disclosure for Grand Jury Materials was also filed on February 4, 2023. Separate orders will be issued regarding that Motion.

a person of ordinary prudence and caution to have a reasonable belief that the defendant committed the crime charged.” *People v. Moyer*, 670 P.2d 785, 791 (Colo. 1983).

In determining a motion to dismiss pursuant to C.R.S. § 16-5-204(4)(k), “the court must consider both the sufficiency of the evidence and whether prosecutorial misconduct infected the validity of the indictment by interfering with the grand jury’s ability to weigh the evidence independently in a calm and dignified atmosphere. *People v. Armstrong*, 664 P.2d 713, 714–15 (Colo. App. 1982), *rev’d on other grounds*, 701 P.2d 17 (Colo. 1985). “Prosecutorial misconduct during grand jury proceedings can result in dismissal if actual prejudice accrues to the defendant or the misconduct compromises the structural integrity of the grand jury proceedings to such a degree as to allow for the presumption of prejudice.” *People v. Bergen*, 883 P.2d 532, 543 (Colo. App. 1994).

In making the court’s probable cause determination, “The evidence presented must be viewed in the light most favorable to the prosecution; evidence sufficient to support a conviction is not necessary at this stage of the proceedings.” *Luttrell*, 636 P.2d at 714. Moreover, defendants are not entitled to present any defenses or gain the favor of any inferences to be drawn from the evidence at this stage of the proceedings. *Id.* If testimony or evidence conflicts, the court must leave resolution of the factual conflict for the jury at trial. *People v. Summers*, 593 P.2d 969, 970 (Colo. 1979).

### **III. FINDINGS AND ORDER**

#### **1. Prosecutorial Misconduct**

The defense’s claim of prosecutorial misconduct is articulated in the Motion to Dismiss as follows:

Here, the prosecution purposefully limited the affirmative defense of “Use of Physical Force in Making an Arrest or Preventing Escape” as applicable only to the criminal offense of “assault” and a vague reference to some other “unlawful use of force.” *Id.* Both prosecutors knew full well that the evidence in this case does, and has not, ever supported a finding that Mr. Glass engaged in behavior that falls under the legal definition of assault. That said, the prosecution was also very well aware of the fact that there is substantial evidence contained within discovery – and presented to the Grand Jury during the November 14 and November 22, 2022, proceedings to support a finding that Mr. Glass committed the requisite actions for the criminal offense of Felony Menacing under C.R.S. § 18-3-206. The purposeful distraction precluded the Grand Jury from properly considering the evidence presented in the context of the applicable law, especially when the jury was never instructed that at a jury trial, the prosecution would have to disprove the affirmative defenses beyond a reasonable doubt.

The prosecution has improperly shifted the Grand Jury’s focus with respect to the criminal charging analysis away from what Mr. Buen knew to be true at the time the decision to shoot was made; and instead, has shifted the Grand Jury’s focus to the lack of any bodily injury that resulted from Mr. Glass’s decision to ignore the lawful orders of multiple officers on scene and instead take a knife and swing it in Chief William’s [sic] direction through the broken rear window as Chief Williams attempted to open the driver’s side rear door.

Motion to Dismiss, p. 5, 7-8.

The prosecution bears no duty to present any exculpatory evidence during grand jury proceedings. *People v. Ager*, 928 P.2d 784, 788 (Colo. App. 1996); *United States v. Williams*, 504 U.S. 36, 51-55 (1992) (“To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury’s historical role, transforming it from an accusatory to an adjudicatory body.”). The defense concedes that in fact the prosecution did not have an obligation even to present the affirmative

defense instructions to the Grand Jury. Having done so, however, the defense argues that those instructions cannot be misleading. And in this case, it appears that the defense argues that the affirmative defense instructions given were misleading because they “limit[ed] the scope of the affirmative defense instructions to circumstances that are not even supported by evidence in the record (i.e. an unknown “assault”).”

After review of the grand jury transcripts and evidence presented in this case, including the instructions as provided to the grand jury; a review of the relevant affirmative defenses as set for in the Colorado Criminal Jury Instructions (COLJI-Crim (2022)) H:12 (Use of Deadly Physical Force – Defense of Person) and H:20 (Use of Physical Force in Making an Arrest or in Preventing An Escape – Peace Officer); and reviewing C.R.S. §18-1-707, the court does not find any prosecutorial misconduct or purposeful misleading of the jury. The defense’s argument relies on the prosecution’s inclusion of the language “assault or unlawful use of force” in the description of the offense allegedly being committed by Mr. Glass. While it is true, that language does not reference a specific criminal offense (i.e. menacing), it nevertheless describes the offensive conduct. It is not misleading. Otherwise, the instructions to the grand jury, and most importantly, the “elemental” instructions, mirror those found in the COLJI-Crim (2022) instructions.

The prosecutor was not required to instruct the grand jury that the prosecution would have to disprove the affirmative defenses beyond a reasonable doubt. “[T]he issue of whether the defendant’s use of force was reasonable, under the circumstances of the case, is properly left for resolution at trial.” *Summers*, 593 P.2d at 970. The grand jury’s charge was rather to determine whether there was probable cause for the charges

presented to them. Certainly, if the prosecution had chosen not to instruct the jury on the affirmative defenses, there would be no basis to challenge the indictment on the grounds of prosecutorial misconduct. Because the prosecution has no affirmative duty to present exculpatory evidence or affirmative defenses but in fact did so, does not implicate any question of impropriety. The validity of any defenses is a matter properly left for trial.

## 2. Probable Cause

### a. Second Degree Murder.

The elements of the crime of Murder in the Second Degree, C.R.S. §18-3-103 are 1) that the defendant; 2) in the State of Colorado on or about the date and place charged; 3) knowingly; 4) caused the death of another person. Transcript of Indictment, November 22, 2022, p. 83, l. 13-16.; C.R.S. §18-3-103. “A person acts knowingly or willfully with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such a circumstance exists. A person acts knowingly or willfully with respect to a result when he is aware that his conduct is practically certain to cause a result.” Tr. November 22, 2022, p 77, l. 22-25, p. 78, l. 1-3; C.R.S. §18-1-501(6).

The bodycam evidence in this case set forth sufficient facts to support the Defendant’s indictment on this charge. There is no question, based upon the visual evidence and the testimony regarding the autopsy report, that the Defendant caused the death of Mr. Glass. The Defendant shot Mr. Glass five times in the chest. The Defendant and indeed any reasonable person would be aware that such conduct would be

practically certain to cause death. There is probable cause to believe that the defendant knowingly caused the death of Mr. Glass.

b. First Degree Official Misconduct

The elements of the crime of First Degree Official Misconduct are: 1) that the defendant; 2) in the State of Colorado on or about the date and place charged; 3) was a public servant; and 4) with intent 5) to obtain a benefit for himself or another or maliciously to cause harm to another; 6) knowingly; 7) committed an act relating to his office but constituting an unauthorized exercise of his official function. Tr. November 22, 2022, p. 84, l. 13-20; C.R.S. §18-8-404. "A person acts intentionally or with intent when his conscious objective is to cause the specific result prescribed by the statute defining the offense. It is immaterial whether or not the result actually occurred." Tr. November 22, 2022, p. 76, l. 18-22; C.R.S. §18-1-501(5). Knowledge is as defined above.

In reviewing the transcript of proceedings and the evidence presented in this case, and in viewing the evidence in the light most favorable to the People, the court finds that there is probable cause to believe that the Defendant, while acting as a deputy with the Clear Creek County Sheriff's Office, intentionally and maliciously caused harm to Mr. Glass by shooting and killing him, which exceeded the authority of his official function as a Deputy Sheriff. The malicious intent can be inferred from the aggressive demeanor and the ultimate action of the Defendant shooting Mr. Glass as seen in the bodycam footage.

c. Reckless Endangerment



The elements of the crime of Reckless Endangerment as read to the Grand Jury are: 1) that the defendant; 2) in the State of Colorado on or about the date and place charged; 3) recklessly; 4) engaged in conduct which created a substantial risk of serious bodily injury to another person. Tr. November 22, 2022, p. 85, l. 4-9; C.R.S. §18-3-208. Recklessness is defined as “consciously disregard[ing] a substantial and unjustifiable risk that a result will occur or that a circumstance exists.” Tr. November 22, 2022, p. 77, l. 4-6; C.R.S. §18-1-501(8).

The substantial likelihood of the death of Mr. Glass once the Defendant shot him five times through the chest supports a finding of probable cause with respect to the Reckless Endangerment charge.

#### IV. CONCLUSION

The court does not find any prosecutorial misconduct in the framing of the jury instructions in this matter, and as such the request for dismissal on those grounds is denied. The court further finds that there is probable cause to support all charges against the Defendant and so likewise denies the Defendant’s Motion to Dismiss to the extent it alleges a lack of probable cause.

SO ORDERED this April 7, 2023.

BY THE COURT:

*Catherine J. Chernick*



DISTRICT COURT JUDGE