

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**FABIAN PETERKIN,
Defendant**

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**No. 1423-2008
CRIMINAL**

OPINION AND ORDER

Before this Honorable Court is the Defendant's Motion for Habeas Corpus/to Dismiss Counts 1, 7, 8, 10, 12, 14, and 17 filed September 12, 2008. A hearing on the Motion was held on November 3, 2008.

On July 24, 2008, the Defendant was arrested and charged with Murder of the Third Degree at 18 Pa. C.S. § 2502(c), Voluntary Manslaughter, provocation by individual killed, at 18 Pa. C.S. § 2503(a)(1), Involuntary Manslaughter at 18 Pa. C.S. § 2504(a), six counts of Endangering the Welfare of Children at 18 Pa. C.S. § 4304, Aggravated Assault at 18 Pa. C.S. § 2702(a)(1), Flight to Avoid Apprehension, Trial, or Punishment at 18 Pa. C.S. § 5126(a), five counts of Simple Assault at 18 Pa. C.S. § 2701(a)(1), and Terroristic Threats at 18 Pa. C.S. § 2706. A Preliminary Hearing was held on August 29, 2008, before District Judge Allen P. Page, III, wherein all of the charges, except the Flight to Avoid Apprehension, Trial or Punishment charge, were held over for Court. The Defendant filed a timely motion challenging the testimony presented by the Commonwealth, alleging they failed to meet their burden of proof as to the Third Degree Murder, Endangering the Welfare of Children, and Terroristic Threat charges.

Background

The following is a summary of the facts presented at the Preliminary Hearing. Cassandra Guzman (Guzman) testified she moved to Williamsport in November of 2007. She related that when first moving here, the Defendant, who was her boyfriend, her two children, Michael, two and half years old, Marquise (victim), one and a half years old, and herself, first lived with her sister Jasmine. Guzman testified that while they all lived with Jasmine, the Defendant would frequently hit the children in their legs and would punch the victim in his chest. She related that when punched in the chest, the victim would start crying. Guzman then related after two weeks, she moved along with the Defendant and her children to her sister Priscilla Ramos' (Ramos) house. Again, she related the Defendant would hit the children. Guzman also testified the Defendant would choke her, slap her, punch her, give her black eyes, and threaten to find her if she left him. She related that on one occasion when she was telling the Defendant she was going to leave him due to his abuse of her children, he threatened to kill her.

Guzman testified that on April 10, 2008, she left for Philadelphia to show her mom her new baby. She related she left the other children with the Defendant because she trusted him. On April 12, 2008, while in Philadelphia, Guzman received a call around 10:00 a.m. from the Defendant telling her that the victim hit his head and then hung up the phone. Later, Guzman called the hospital and discovered the victim had died.

Ramos testified that while Guzman, Guzman's children, and the Defendant resided with her, she witnessed the Defendant hit the children with his fist about four or five times. She explained that the Defendant had an anger problem and always treated Guzman and the children badly. Ramos testified that on New Years Eve Guzman returned home with a black eye and scars on her neck from the Defendant. She related she asked Guzman what she was going to do about

it and Guzman said everything was okay. Ramos explained that she never called the police because she did not want to cause problems between her and Guzman. She also explained that she eventually kicked the Defendant out of her house because she was fighting with him regarding the physical abuse of her sister and the children.

Agent Stephen J. Sorage (Sorage) of the Williamsport Bureau of Police testified he responded to the Williamsport Hospital on April 12, 2008, where he was told the Defendant found the victim unresponsive in the bath tub. He was informed CPR was initiated at the scene and the victim transported to the hospital, where he was later pronounced dead.

Captain Raymond Kontz, III, of the Williamsport Bureau of Police testified that on July 29, 2008, he accompanied Sorage to Philadelphia to bring back the Defendant. After the Defendant was transported back to Williamsport, Kontz spoke with the Defendant concerning the death of the victim. The Defendant related to Kontz that on the morning of April 12, 2008, he had a lot of things to do before going to work, including getting the children ready to go to a baby-sitter's house for the day. The Defendant related the victim was not listening and running around, so he (Defendant) yelled at him to chill out. The victim did not listen, so the Defendant punched him with a closed fist in the chest. The victim continued to run around and not listen, so the Defendant punched him in the chest a second time. The Defendant related to Kontz the victim was breathing funny and went in and laid down. He indicated to Kontz that when he told the victim to chill out that meant to lie down, so he assumed the victim was lying down because he was told to do so. The Defendant then went about his morning business and about fifteen to twenty minutes later went to check on the victim and found he was not breathing.

The Defendant also related to Kontz that it was common for him to strike the children and he did not think anything of it because he did it several other times without incident. He

explained he had become so accustomed to acting that way towards the children that he did not see it as being wrong.

The autopsy examination reported the cause of death as “blunt force injuries to torso.” Autopsy report, 4/13/08 p. 1. Among other injuries, the autopsy showed contusions to the chest, right buttock, pancreas, adrenal gland, lung and thymus, fractures of the right ribs, and lacerations of the heart. The autopsy reported the manner of death as homicide.

Discussion

In Defendant’s Motion for Issuance of Writ of Habeas Corpus he asks the Court to dismiss the Third Degree Murder, Endangering the Welfare of Children, and Terroristic Threats charges against him. Defendant alleges the Commonwealth failed to present a prima facie case by not establishing that: (1) the Defendant acted with malice as required for the Third Degree Murder charge; (2) the Defendant had the intent required for the charge of Terroristic Threats; and (3) the Defendant had the intent to hurt the victim as required for the Endangering the Welfare of Children charge.

The burden the Commonwealth bears at the Preliminary Hearing is they must establish a prima facie case; the Commonwealth must present sufficient evidence that a crime has been committed and that the accused is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975). See also Commonwealth v. Prado, 393 A.2d 8 (Pa. 1978). The evidence must demonstrate the existence of each of the material elements of the crimes charged and legally competent evidence to demonstrate the existence of the facts which connect the accused to the crime. See Commonwealth v. Wodjak, 466 A.2d 991, 996-97 (Pa.

1983). Absence of any element of the crimes charged is fatal and the charges should be dismissed. See Commonwealth v. Austin, 575 A.2d 141, 143 (Pa. Super. 1990).

Motion to Dismiss the Charge of Third Degree Murder

Defendant alleges that not only was there no prima facie showing of malice, there is no evidence of a manner of death that would support the charge of third degree murder. Defendant specifically alleges that malice cannot be established as he had hit the victim on numerous prior occasions where nothing ever happened and did not think it would hurt him this time.

To be guilty of Third Degree murder at 18 Pa. C.S. § 2502(c), the Commonwealth must prove the victim is dead, the Defendant is the one who killed him, and the Defendant acted with malice. See also Commonwealth v. Kling, 731 A.2d 145 (Pa. Super. Ct. 1999) (malice is required for a conviction of aggravated assault and third degree murder). “Malice exists ‘where there is a wickedness of disposition, hardness of the heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.’” Commonwealth v. Fierst, 620 A.2d 1196, 1203 (Pa. Super. Ct. 1993) (quoting Commonwealth v. Reilly, 549 A.2d 503, 510 (1988)). When “malice is based on the recklessness of consequences . . . it must be shown that the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm.” Fierst, 620 A.2d at 1203. When fists are used to commit a killing, malice may not be presumed, rather it may be inferred from certain circumstances. Commonwealth v. Smouse, 594 A.2d 666, 671 (Pa. Super. Ct. 1991). When determining the existence of malice, in a case where fists are used to cause a death, some of the circumstances that should be considered “are the size of the assailant,

the ferocity of the attack, its duration, the provocation for it, and the manner in which the fists were used.” Id.

Here, the Court finds the evidence sufficient to satisfy the malice requirement for murder of the third degree. The Defendant, an adult male, admittedly punched the victim a slender, one and a half year old male infant, in the chest two times as punishment for his misbehavior. The autopsy shows the blunt force injuries to the torso included fractures of the right ribs and lacerations of the heart. Defendant admitted to Kontz that it was normal for him to punch the victim in the chest and had become accustomed to doing so. The Court notes that despite the fact Defendant’s prior instances of abuse caused no injury does not negate the mental state of the Defendant. The Defendant’s actions in punching the victim, a small child, in the chest multiple times to the point he actually broke some of his ribs, ultimately resulting in the child’s death, is sufficient prima facie evidence to establish the element of malice for the third degree murder charge.

Motion to Dismiss the Endangering the Welfare of Children Charges

Defendant alleges he did not have the intent to harm the victim as required for the charge of endangering the welfare of children. Specifically Defendant asserts that on numerous occasions he punched the victim in the chest and nothing serious ever happened.

“A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.” 18 Pa.C.S.A. § 4304(1). The statute defines “person supervising the welfare of a child” as “a person other than a parent or guardian that provides care, education, training or control of a child.” Id. at (4). According to the Pennsylvania Supreme Court, “a baby-

sitter is by definition one who is temporarily entrusted with the responsibility of ensuring a child's safety and caring for its needs (i.e. ensuring its welfare) in the parent's absence.”

Commonwealth v. Gerstner, 656 A.2d 108, 113 (Pa. 1995). The Pennsylvania Crimes Code at 18 Pa.C.S. § 302(b), which in relevant part states:

- (2) 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.

In the instant case, Defendant was taking care of Guzman’s two young children, while she was in Philadelphia because she trusted the Defendant to do so; therefore, Defendant had a duty of care and protection to the children. The Defendant admittedly violated his duty of care and protection to both children by repeatedly striking them. The Defendant specifically admitted he routinely punched the victim in the chest. Again, the Defendant’s argument that in the past nothing happened to the victim after he was punched does not negate his knowledge that punching a one and a half year old in the chest is practically certain to cause harm. Therefore, the Court finds the Commonwealth presented a prima facie case as to the endangering the welfare of children charge.

Motion to Dismiss the charge of Terroristic Threats

Defendant asserts he did not have the intent to terrorize Guzman as necessary for the charge of terroristic threats.

A person commits the crime of terroristic threats if he/she makes a threat to commit a crime of violence and communicated the threat with intent to terrorize. 18 Pa.C.S. § 2706(a)(1). The statute does not require “the ability to carry out the threat, nor a belief by the person

threatened that the threat will be carried out . . .” Commonwealth v. Reynolds, 835 A.2d 720, 730 (Pa. Super. Ct. 2003) (quoting In the Interest of J.H., 797 A.2d 260, 262 (Pa. Super. 2002)). “Rather, the harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another's sense of personal security.” Reynolds, 835 A.2d at 730 (quoting Commonwealth v. Tizer, 684 A.2d 597, 600 (Pa. Super. Ct. 1996). The statute ““is not meant to penalize mere spur-of-the moment threats which result from anger.”” Reynolds, 835 A.2d at 730 (quoting In the Interest of J.H., 797 A.2d 260, 262-63 (Pa. Super. Ct. 2002). “However, ‘being angry does not render a person incapable of forming the intent to terrorize.’” Reynolds, 835 A.2d at 730 (quoting In the Interest of J.H., 797 A.2d at 263). In determining whether the threat was the result of a heated verbal exchange or confrontation, the Court is to look at the totality of the circumstances. Id.

At the Preliminary Hearing, Guzman testified the Defendant would punch, choke, and slap her, cause her to have black eyes, and often threatened to find her if she left him. Guzman related that on one occasion she confronted the Defendant about hitting her children and the Defendant reacted by choking her and while doing so, he threatened to kill her. See Commonwealth v. Green, 429 A.2d 1180 (1981) (defendant's threats to kill the victim established his intent to terrorize). The Court finds this evidence is sufficient to show the Defendant had the intent to terrorize Guzman. The threats expressed by the Defendant were not mere spur-of-the-moment or as a result of anger as the Defendant repeatedly threatened Guzman. However, in this specific instance the threat rose and became a death threat. Based upon the totality of the circumstances, as presented by the victim, the Court finds the Commonwealth has presented sufficient prima facie evidence for the charge of terroristic threats.

ORDER

AND NOW, this ____day of December 2008, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion for Habeas Corpus/Dismiss Counts 1, 7, 8, 10, 12, 14, and 17 is DENIED.

By the Court,

Nancy L. Butts, Judge

cc. DA (KO)
PD (WM)
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)