

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**HERRON MILLS,
Defendant**

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**No. 276-2011
CRIMINAL**

OPINION AND ORDER

The Defendant filed a Petition for Habeas Corpus on April 26, 2011. A hearing on the Petition was held June 13, 2011.

Background

On December 17, 2010, Lycoming County Prison (LCP) inmates William Blackwell (Blackwell), Herron Mills (Defendant), Kevin Webster (Webster), along with several other LCP inmates, were in the LCP gymnasium at approximately 7:00 a.m. At the Preliminary Hearing in this matter held before Magisterial District Judge Allen Page on February 25, 2011, the Commonwealth presented a video of an incident that occurred in the gym on December 17, 2010. Brad Shoemaker (Shoemaker), Deputy Warden of the LCP, testified at the hearing and identified the Defendant, Blackwell and Webster as they appeared in the video, and their actions at various times throughout the video. Shoemaker testified that at the beginning of the video, the Defendant and Blackwell are standing in the gym and Webster is sitting down. Blackwell then approaches Webster from behind, and as he does so Webster gets up, turns around, and proceeds in the direction of Blackwell. At the time Blackwell begins to approach Webster, it appears from the video that the Defendant runs over to the door of the gym, from which action it appears he is acting as a lookout. At this point, Webster and Blackwell are engaged in a face to face, mutual

combat fight. It appears that the Defendant then approaches Webster from behind and strikes Webster somewhere in the side of the head, knocking Webster to the floor. While Webster is still on the floor, Blackwell continues to hit or kick him in the top portion of his body. The Defendant walks away for a moment while continuing to look back at the fight, but then returns to kick Webster at least three times in the stomach area while Blackwell continues to kick and step on Webster's head. The Defendant then walks away from the fight, but subsequently returns to where Webster is now lying on the ground. The Defendant and Blackwell then both walk away from Webster, but Blackwell returns as Webster stands up and stumbles back into the wall. Blackwell then walks away and there is no further confrontation. A little while later, Webster, along with several of the other inmates present in the gym, then proceed to clean up blood off of the ground. Following the altercation, Webster had injuries on his face consistent with being assaulted and was taken to the hospital. As a result of the incident, the Defendant was charged with Conspiracy to commit Aggravated Assault, Aggravated Assault, Assault by a Prisoner with a Deadly Weapon, Simple Assault, and Harassment.

Discussion

In his Petition for Habeas Corpus, the Defendant contends that the charges of Aggravated Assault, Conspiracy to commit Aggravated Assault, and Assault by a Prisoner with a Deadly Weapon should all be dismissed for failure of the Commonwealth to present a prima facie case for each. "A prima facie case consists of evidence produced by the Commonwealth which sufficiently establishes that a crime has been committed and that the accused is probably the perpetrator of that crime." Commonwealth v. McConnell, No. 1795 C 2009, 2009 Pa. Dist. & Cnty. Sept. LEXIS 252 at 9 (Pa. Dist. & Cnty. Sept. 10, 2009) (See Commonwealth v. McBride,

595 A.2d 589, 591 (Pa.1991). “Every element of the crime charged must be supported by the evidence; however the Commonwealth need not establish guilt beyond a reasonable doubt.”

McConnell at 9. (See Commonwealth v. Lopez, 654 A.2d 1150, 1153 (Pa. Super. 1995). “The Commonwealth establishes a prima facie case as long as the evidence presented establishes sufficient probable cause to warrant the belief that the accused committed the offense.”

McConnell at 9. (See Lopez at 1153.)

The Defendant contends that the Commonwealth failed to show that he attempted to cause or that he did cause serious bodily injury to Webster. In support of this argument, the Defendant contends that the fight between Blackwell and Webster was a mutual combat fight, while the Defendant did participate in the fight, his actions did not constitute an attempt to cause, or actually cause serious bodily injury, and that Webster got up unassisted after the fight and walked around the basketball court. A person commits the offense of 18 Pa.C.S. §2702(a)(1) Aggravated Assault if that person attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa.C.S. §2301 defines serious bodily injury as bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. In establishing an aggravated assault charge, the Commonwealth must only show that the defendant attempted to cause serious bodily injury, not that serious bodily injury actually occurred. Commonwealth v. Galindes, 786 A.2d 1004, 1011 (Pa. Super. 2001) (See Commonwealth v. Elrod, 572 A.2d 1229, 1231 (Pa. Super. 1990). Attempt to commit aggravated assault is found where “the accused intentionally acts in a manner which constitutes a

substantial or significant step toward perpetrating serious bodily injury upon another.” Galindes at 1011. (quoting Commonwealth v. Lopez, 654 A.2d 1150, 1154 (Pa. Super. 1995).

The Court disagrees with Defense Counsel’s argument that the one punch the Defendant delivered to Webster’s head would not be enough to establish an attempt to commit serious bodily injury. The court in Commonwealth v. Dailey, 828 A.2d 356 (Pa. Super. 2003) stated that the determination of whether an action is done with the intent to cause serious bodily harm should be determined on a case-by-case basis. The Dailey Court went on to say that “[i]t is similarly clear, however, that, depending on the other circumstances, even a single punch may be sufficient.” The Court believes that the totality of the evidence presented in this case does establish the specific intent required for an attempt to commit serious bodily injury. The Court finds that the evidence presented is sufficient even if the Court were to agree with Defense Counsel’s argument, which is similar to the reasoning in Commonwealth v. Alexander, 383 A.2d 887 (Pa. 1978) where the Pennsylvania Supreme Court found that the mere fact that one punch was delivered to the head of the victim, without more, was insufficient evidence from which to conclude that the actor intended to cause serious bodily injury to the victim. This Court finds that the totality of the evidence presented in this case provides the “without more” needed to establish that the Defendant did in fact have the specific intent to cause serious bodily injury to Webster. Once the fight between Blackwell and Webster began, the Defendant joined in and punched Webster in the head with such force that Webster was knocked to the ground. The Defendant then kicked Webster at least three times while Webster was still lying on the ground. Furthermore, as discussed below, the Court finds that the Defendant committed the offense of Conspiracy by acting in agreement with Blackwell. As a co-conspirator, the Defendant is criminally responsible for the actions of Blackwell, including Blackwell’s actions in hitting or

kicking Webster in the top portion of his body, and in kicking and stepping on Webster's head. Finally, while the video did show that Webster got up unassisted after the fight, this fact has no bearing on whether or not the Defendant's actions constituted an attempt to cause serious bodily harm. Considering this evidence collectively, the Court finds that the Commonwealth presented sufficient evidence to establish a prima facie case that the Defendant committed the offense of Aggravated Assault.

The Defendant contends that the Commonwealth failed to present a prima facie case for the charge of Conspiracy in that they failed to show that a prior agreement to engage in the fight existed and because no evidence of an attempted aggravated assault was shown. A person commits the offense of 18 Pa.C.S. §903(a)(1) Conspiracy if, with the intent of promoting or facilitating the commission of a crime, that person agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. "Because it is difficult to prove an explicit or formal agreement to commit an unlawful act, such an act may be proved inferentially by circumstantial evidence, i.e., the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators." See Commonwealth v. Galindes, 786 A.2d 1004 (Pa. Super. 2001).

The evidence presented establishes that the Defendant intended to commit the unlawful act of Aggravated Assault, as discussed above. That the Defendant acted in agreement with Blackwell to commit the crime can be inferred from their conduct. At the time Blackwell approaches Webster to begin the fight, it appears as though the Defendant runs to the door of the gym to presumably act as a lookout. Furthermore, while the fight initially began between Blackwell and Webster, the Defendant quickly joins in and delivers a blow to Webster's head with such force that Webster falls to the ground. The Defendant then continues to participate in

the fight by kicking Webster while Blackwell continues to kick and step on Webster's head. While other inmates were present in the gym at the time, the Defendant is the only other person to participate in the fight, from which conduct the Court infers the Defendant acted in agreement with Blackwell to form a Conspiracy.

As to the offense of Assault by a Prisoner with a Deadly Weapon, the Defendant contends that the Commonwealth failed to show that he used any device that could be construed as a deadly weapon, and that they failed to show that he created a substantial risk of serious bodily injury or that he caused serious bodily injury. A person commits the offense of 18 Pa.C.S. §2703 Assault by a Prisoner with a Deadly Weapon if that person, while confined in any local or detention facility, jail or prison... intentionally or knowingly commits an assault upon another with a deadly weapon or instrument, or by any means or force likely to produce serious bodily injury....

That the Defendant was confined at the LCP at the time of the incident appears to be uncontested; however, this fact is established by the video of the incident. Furthermore, the Court discussed above at length the circumstances surrounding the fight, and determined that the Defendant did in fact have the requisite intent to cause serious bodily harm to Webster. The Commonwealth contends that the manner in which the Defendant used his feet and shoes to effectuate the assault constituted a deadly weapon. 18 Pa.C.S. §2301 defines a deadly weapon as

Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.

However, case law is clear that in order for a weapon to be considered a deadly weapon, said weapon does not have to be inherently dangerous. See Commonwealth v. Thomas, 656 A.2d

514 (Pa. Super. 1995) where a vehicle, although not inherently dangerous when used properly, was found to be a deadly weapon after considering the manner in which it was used. Similarly, in this case shoes and feet are not inherently dangerous; however, considering the manner in which the Defendant used his shoes and feet to repeatedly kick Webster in the stomach, the Court finds that they could be considered a deadly weapon in this case. Alternatively, the Court finds that a minimum, the use of the shoes and feet in this case would have been likely to cause serious bodily injury due to the multiple blows Mills endured in the stomach area. Accordingly, the Court finds that the Commonwealth has presented sufficient evidence to establish a prima facie case that the Defendant committed the offense of 18 Pa.C.S. §2703 Assault by a Prisoner with a Deadly Weapon.

ORDER

AND NOW, this ____ day of July, 2011 based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc. Ken Osokow, Esq.
Jeana Longo, Esq.