

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 1185-2005

VS :

HAROLD HOSKINS, : Post Sentence Motions
Defendant

OPINION AND ORDER

On April 12, 2011, Defendant Harold Hoskins filed a Post Sentence Motion and after the preparation of a trial transcript, newly appointed conflicts counsel filed an amended Motion on June 21, 2011. Argument on Defendant's Motion was held on July 8, 2011. Defendant argues three issues between the two motions: (1) that the Defendant's Motion for Judgment of Acquittal should be granted as the Commonwealth did not meet its burden of proving the Defendant attempted to kill victim James Drummond; (2) the Defendant's Motion for Judgment of Acquittal should be granted as to the two counts of Attempted Homicide as the Commonwealth neither proved the Defendant had the requisite intent to kill either of the two victims nor took a substantial step toward the commission of the offense of Criminal Attempt Homicide; and (3) that the Court erred in sentencing the Defendant using the Deadly Weapon Used matrix.

Background

Witnesses testified that on July 8, 2005 the Defendant had been drinking at a poker game at James Drummond's (Drummond) house and left the game after he became annoyed when he lost all of his money and no one would give him any more. Donnie Evans (Evans) Drummond and Drummond's paramour Linda Bower (Bower), along with neighbors at 311 East Church

Street, testified that the Defendant then came back to the residence waving a gun repeatedly saying that this was not an “f—ing joke.” After the Defendant pointed the gun at Evans head and pulled the trigger twice with no shot fired, but the sound of the gun mechanism clicks heard, Bower testified that the Defendant pulled a bullet from the gun and laid it onto the table. Immediately thereafter, the Defendant put the bullet back into the .38 revolver and pulled the trigger while Evans and Drummond were trying to take it from him. At the time Defendant pulled the trigger for the third time, Drummond stated that the gun was pointed at his stomach. After the trigger was pulled for the fourth time in an unknown direction, Evans and Drummond wrestled the gun away from the Defendant and the police arrived.

After a jury trial on February 2, 2007, before the Honorable William S. Kieser, the jury convicted Defendant of the offenses of Robbery, attempted serious bodily injury at 18 Pa.C.S. § 3701(a)(1)(ii) a felony of the first degree, Robbery, attempted bodily injury at 18 Pa.C.S. § 3701(a)(1)(iv) a felony of the second degree, one count of Persons not to Possess a Firearm at 18 Pa. C.S. §6105(a)(1) a felony of the second degree, one count of Firearms not to be carried without a license, at 18 Pa.C.S. § 6106 a felony of the third degree, Possession of an instrument of Crime, 18 Pa.C.S. § 907 a misdemeanor of the first degree, one count of Simple Possession of a controlled substance at 35 Pa. C.S. §780-113(a)(16), one count of Terroristic Threats, at 18 Pa.C.S. § 2706 a misdemeanor of the first degree, and two counts of Criminal Attempted Homicide at 18 Pa.C.S. §901, each graded a felony of the first degree.

Prior to trial, the Defendant was reporting to the Supervised Bail Coordinator Christopher Ebner. At the time of the jury’s verdict, Judge Kieser modified Defendant’s bail and placed him on the Intensive Supervised Bail Program with Harry Rogers. Since the program required the Defendant to be placed on an ankle monitor, Judge Kieser gave the Defendant three days to

report to the Lycoming County Prison to complete the change. The Defendant failed to report by February 8, 2007 and a bench warrant was issued for his arrest. The Defendant then failed to appear for his sentencing on March 27, 2007. Defendant was ultimately apprehended on March 23, 2011 by the U.S. Marshals and members of the Lycoming County Sheriff's Office. As Judge Kieser retired from active service on December 31, 2009, the Defendant came before this Court for sentencing. On April 7, 2011 the Defendant was sentenced to serve an aggregate period of state incarceration, the minimum of which was twenty-seven years (27) and the maximum of which was sixty (60) years.

Discussion

The Commonwealth did not present any evidence the Defendant attempted to murder

Drummond.

The first issue raised by Defense in the Post Sentence Motion is in the form of a Motion for Judgment of Acquittal alleging that the Commonwealth failed to meet its burden of proof on the evidence it presented at trial to sustain the charge of Criminal Attempted Homicide with the victim Drummond. Defense Counsel alleges that the Commonwealth offered no evidence to the jury that would permit them to find beyond a reasonable doubt the Defendant intended to kill Drummond.

“A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.” *Commonwealth v. Hutchinson*, 947 A.2d 800 (Pa. Super. 2008). A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material

element of the crime charged and the commission thereof by the accused beyond a reasonable doubt.” *Commonwealth v. Karkaria*, 625 A2d 1167 (Pa. 1993). When reviewing a sufficiency claim, the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991). In order to be convicted of an attempted murder a defendant must take a substantial step toward the commission of a killing with the specific intent in mind to commit such an act. *Commonwealth v. Jackson*, 955 A.2d 441 (Pa. Super. 2008).

In reviewing the evidence in the light most favorable to the Commonwealth as the verdict winner, together with all the reasonable inferences drawn there from, it is clear that the Commonwealth has established all of the elements of the charge of Criminal Attempt Homicide. Witnesses testified that on the night of July 8, 2005 they saw the Defendant in possession of a handgun. Drummond’s testimony from the preliminary hearing August 12, 2005 was used at trial to establish the Defendant’s actions in pointing the gun at Drummond’s stomach and pulling the trigger. (N.T., 2/2/2007 at pp. 146-149). The jury was free to believe all or part or none of the victim Drummond’s testimony. Clearly the jury chose to believe the Commonwealth’s theory that although the gun did not discharge the actions of the Defendant in pulling the trigger of the gun after unloading and reloading the gun were sufficient to establish that the Defendant intended to harm Drummond by pointing the weapon toward his stomach. Therefore, the Defendant’s argument fails.

The Commonwealth did not meet its burden of proving the Defendant attempted to murder Evans and Drummond

Defense counsel next asserts that both charges of Criminal Attempt Homicide should be dismissed as the Commonwealth failed to prove that the Defendant either acted with the intent to kill or took a substantial step toward the commission of the murder of either intended victim.

After a careful review of the trial transcripts, the Court finds that the Commonwealth did meet its burden of proving beyond a reasonable doubt the elements of Criminal Attempt Homicide as to both Evans and Drummond.

The Crimes Code defines criminal attempt as follows:

- (a) Definition of attempt.--A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 Pa.C.S. § 901(a). The elements of criminal attempt are: (1) an intent to commit a specific crime; and (2) any act constituting a substantial step toward the commission of that crime.

Commonwealth v. Pasley, 743 A.2d 521, 523 (Pa. Super. 1999). “The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime.” *Commonwealth v. Gilliam*, 273 Pa. Super. 586, 417 A.2d 1203, 1205 (Pa. Super. 1980) cited by *Commonwealth v. Donton*, 654 A.2d 580 (Pa. Super 1995). Using that substantial step analysis, the Court must determine if the Commonwealth showed the Defendant had the intent to kill and possessed the means to carry out his intent. *Id.* at 585. In fact, for the Commonwealth to prove its case, it need not establish that appellant fired a shot at the intended victim, or even aimed a gun at them, before being apprehended. *Id.*

In viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, and applying the analysis in *Donton*, this Court finds the Commonwealth presented sufficient evidence to establish both required elements. The evidence showed that the Defendant left 311 East Church Street sometime after 9:30 PM and within a short period of time returned with the .38 revolver to the poker game. When Evans grabbed the money from the Defendant, the Defendant pointed the gun at Evans' head and pulled the trigger twice so that Evans could hear the clicks of the gun. After the gun did not discharge, Defendant opened the gun up, took a bullet out and placed it on the table. Once the Defendant reloaded the gun, both Evans and Drummond attempted to take it from him and while doing so, the Defendant pointed the gun towards Drummond's stomach and again pulled the trigger. The Defendant's words and actions showed he wanted to injure both Evans and Drummond in vital areas of their body, and the Defendant clearly had the means to inflict the injury intended as he had in his possession a loaded revolver. The Court finds the Commonwealth did prove the Defendant took a substantial step in the commission of both offenses of Criminal Attempt Homicide. Therefore, Defendant's Motion for Judgment of Acquittal on counts 8 and 9 is dismissed.

The Court erred in using the Deadly Weapon used matrix as the Defendant did not use the gun in the commission of the crime

In sentencing the Defendant, this Court used the Deadly Weapon Used matrix to determine the appropriate guideline ranges. Defense Counsel argues that the Court erred in using this matrix since the gun did not discharge a projectile, and was therefore only possessed and not used by the Defendant.

The deadly weapons enhancement provision of the sentencing guidelines provides, in

relevant part, as follows:

When the court determines that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.18). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:

- (i) Any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded, ...

204 Pa.Code § 303.10(2)(i) (1994).

A deadly weapon is defined in 18 Pa.C.S. § 2301 as [a]ny 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. A firearm is defined within 42 Pa.C.S. § 9712 as any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

In this case, the Court finds the .38 revolver meets both the definition of a deadly weapon and a firearm for use within the Sentencing Guidelines. The revolver possessed by the Defendant and which he pointed toward both Evans and Drummond, was a device designed as a weapon, and with only the proper ammunition loaded, was readily capable of expelling a projectile. Since the Defendant did not merely possess the gun, but affirmatively pointed it in the direction of the victims and pulled the trigger, the Defendant used the gun in the commission of these crimes regardless of the fact that the gun did not discharge. Accordingly, the Court believes the Deadly Weapon Used matrix was correctly applied.

ORDER

AND NOW, this 10th day of August, 2011, the Defendant's Post Sentence Motion is hereby DENIED.

By The Court,

Nancy L. Butts, Judge

xc: Kenneth Osokow, Esq.
Donald F. Martino, Esq.