

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**KRISTY ANN PHILLIPS,
Defendant**

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**No. 1620-2012
CRIMINAL**

OPINION AND ORDER

The Defendant filed a Petition for Habeas Corpus on November 9, 2012. By agreement of both parties, the Court will decide the Petition based on the transcripts of the Preliminary Hearing held in this matter on September 14, 2012 before Magisterial District Judge Jon Kemp.

Background

Dennis Kurtz (Kurtz) testified at the preliminary hearing that on August 12, 2012 he was bartending at the LRB Road House bar located at 140 Miller Avenue, Montgomery, PA. At approximately 2:07 AM, Kurtz first noticed Kristy Phillips (Defendant) enter the bar. The Defendant was following people through the bar and after a commotion began outside she and others exited the bar. After an undisclosed amount of time, the Defendant then re-entered the bar following a man. The Defendant then picked up two (2) cue balls and threw one at a juke box, which was shattered, and another at a door, which then hit a patron sitting in a chair. Kurtz told the Defendant to leave the bar and called the police.

While calling police Kurtz noticed the Defendant throwing a big rock into the back of Nick Koch's (Koch) truck. Seven (7) to eight (8) patrons of the bar went outside. Kurtz went outside and attempted to get the Defendant's car keys, as he believed that she was intoxicated and also wanted to prevent her from leaving before police arrived. Kurtz approached the

Defendant and she began to kick and punch. The Defendant also tried to swing at Anna Riddell (Riddell), who responded by hitting the Defendant. Afterwards, the Defendant got into her vehicle, backed it up, and began revving the engine. The Defendant then drove her vehicle towards Kurtz and Riddell and hit the back of a truck.¹ Kurtz jumped into the back of the truck and testified that if he had not jumped out of the way he would have been crushed by the Defendant's vehicle. Koch also testified that he dove out of the way of the Defendant's vehicle and that he was in fear of his safety. The Defendant then backed her vehicle into the side of a car, pushing it into a Jeep. Joshua Hoover (Hoover) was standing in between the two vehicles and moved moments before the Defendant wedged the vehicles together.

The Defendant then backed up her vehicle again and drove into the truck of which Kurtz was hiding in the back of and another car. The Defendant's vehicle pushed the truck with Kurtz into a Jeep with such an impact that Kurtz was thrown onto the hood of the Defendant's vehicle and to the ground. The Defendant's vehicle was then stuck in gear and Kurtz tried to punch the driver's side window out and grab her keys. The Defendant then "backed up again and she tore around, went all the way down the parking lot and slid sideways, come back, and then she left." N.T., September 14, 2012, p.11. While the Defendant was driving her vehicle into other vehicles, Kurtz stated that he was in fear for his safety. In addition, Kurtz sustained back injuries as a result of this incident. After the incident the police twice went to the Defendant's residence where her vehicle was parked. Despite the fact there was an individual in the residence, nobody answered the door.

¹ The truck was identified as belonging to Koch.

The Defendant was charged with seven (7) counts of Aggravated Assault,² a felony of the first degree; seven (7) counts of Aggravated Assault,³ a felony of the second degree; seven (7) counts of Recklessly Endangering Another Person,⁴ a misdemeanor of the second degree; seven (7) counts of Simple Assault,⁵ a misdemeanor of the second degree; six (6) counts of Simple Assault – Physical Menace,⁶ a misdemeanor of the second degree; ten (10) counts of Criminal Mischief,⁷ a misdemeanor of the second degree, and various summary offenses. In the Writ of Habeas Corpus, the Defendant alleges three (3) specific issues: 1) that all the charges of Aggravated Assault in the Information should all be dismissed for failure to state a *prima facie* case; 2) that the charges of Aggravated Assault, Recklessly Endangering Another Person, Simple Assault should all be dismissed for failure to state a *prima facie* case in that the Commonwealth has not proved evidence that the Defendant did attempt to cause or intentionally knowingly caused bodily injury to another; and 3) that all charges of Aggravated Assault, Recklessly Endangering Another Person and Simple Assault should all be dismissed for failure to state a *prima facie* case.

Discussion

By way of background, the principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention. Commonwealth v. Mullen, 333 A.2d 755 (Pa. 1975). A preliminary hearing is not a trial and the Commonwealth only bears the

² 18 Pa.C.S.A. § 2702(a)(1).

³ 18 Pa.C.S.A. § 2702(a)(4).

⁴ 18 Pa.C.S.A. § 2705.

⁵ 18 Pa.C.S.A. § 2701(a)(1).

⁶ 18 Pa.C.S.A. § 2701(a)(3).

⁷ 18 Pa.C.S.A. § 3304(a)(1).

burden of establishing at least a *prima facie* case that a crime has been committed.

Commonwealth v. Prado, 393 A.2d 8 (1979).

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 committed the offense. 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. Weigle, 997 A.2d 306, 311 (Pa. 2010) (citing Commonwealth v. Karetny, 880 A.2d 505, 513 (Pa. 2005)). The Commonwealth need not establish guilt beyond a reasonable doubt. With this in mind, the Court will evaluate whether the Commonwealth established a *prima facie* case for the thirty-four (34) counts that the Defendant calls into question.

Aggravated Assault: Counts 1-7

A person commits the offense of Aggravated Assault under 18 Pa.C.S. § 2702(a)(1) 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.”⁸ When no serious bodily injury results from the accused's actions, the Commonwealth must prove that the accused attempted to cause another to suffer such injuries. See Commonwealth v. Lopez, 654 A.2d 1150 (Pa. Super. 1995). Attempt, in the context of an assault, is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another. Id. (citing Commonwealth v. Carter, 478 A.2d 1286, 1289 (Pa. 1984)).

⁸ 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.”

The Pennsylvania Supreme Court established an incomplete list of factors to assist whether there is intent to inflict serious bodily harm: 1) defendant is disproportionately larger or stronger than the victim; 2) defendant was not restrained from escalating his attack upon the victim; 3) defendant had no weapon or other implement to aid his attack; 4) defendant made no statements before, during, or after the attack which might indicate intent to inflict further injury upon the victim. Commonwealth v. Alexander, 383 A.2d 887 (Pa. 1978) (applying these factors in the context of a single punch without any comments made); Commonwealth v. Matthew, 909 A.2d 1254 (Pa. 2006) (reaffirming the application of these factors). While these factors are only specifically relevant in certain cases they show that the defendant being in a stronger position than the victim, the defendant escalating the attack, and comments/actions by the defendant are important in proving intent. As such, “[t]he intent to cause serious bodily injury may be proven by direct or circumstantial evidence.” Commonwealth v. Hall, 830 A.2d 537, 542 (Pa. 2003).

Here, there are many facts that indicate the intent of the Defendant. First, the Defendant starting throwing cue balls inside the bar, which shattered a juke box and hit a patron. Second, after being told to leave and that police were called, the Defendant started throwing large rocks in the bed of a truck. Third, after being asked for her vehicle keys, the Defendant began to punch and kick at Kurtz and Riddell. Fourth, the Defendant got inside her vehicle, backed the vehicle up, revved the engine, and at numerous times drove her vehicle towards unprotected individuals. Finally, the Defendant fled the scene, failed to check on the of the health victims, and refused to answer the door at her residence when police knocked. The Defendant did not merely make threats of serious bodily harm, but actively pursued it and fled. The Defendant’s actions shows on their own the Defendant’s intent to cause serious bodily harm and extreme indifference to the value of human life. Commonwealth v. Riggs, 2012 PA Super 187, p.12-14 (Pa. Super. Ct. 2012)

(sustaining a conviction of aggravated assault when defendant ran a red light and hit a vehicle, had a history of running red lights, and fled without checking on the status of the individuals in the hit vehicle); Commonwealth v. Allen, 833 A.2d 800 (Pa. Super. 2003) (finding sufficient *mens rea* for third-degree murder and aggravated assault when an intoxicated defendant driving a vehicle hit a guard rail prior to hitting a pedestrian and failing to stop).

Furthermore, the Defendant pursued “serious bodily injuries” by attempting to hit and pin bystanders with her vehicle. Based on the testimony at the preliminary hearing, Kurtz, Riddell, Koch, and Hoover would have been seriously injured if they had not personally fled out of the way of the vehicle.⁹ The Commonwealth has offered sufficient evidence of a *prima facie* case in regards to Kurtz, Riddell, Koch, and Hoover. The Commonwealth, however, only offered evidence that Danielle Minier, Thomas Grafius, and Sue Demi were outside the bar during the incident and therefore a *prima facie* case was not proven regards to these individuals. N.T., September 14, 2012, p.7, 27, 32, 40-41, 42, 48, 59-60, 64-65.

Aggravated Assault: Counts 7-14

A person commits the offense of Aggravated Assault under 18 Pa.C.S. §2702(a)(4) if that person “attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.” “Deadly weapon” is defined to include “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.” 18 Pa.C.S. § 2301.

In Packard, a defendant deliberately steered his vehicle into an elderly pedestrian at approximately fifteen (15) miles per hour. Commonwealth v. Packard, 767 A.2d 1068, 71 (Pa.

⁹ Kurtz and Koch also testified that they were in fear for their safety. This is also indicated by the fact that Kurtz tried to punch out the driver side window of the vehicle while it was out of gear.

Super. 2001). The pedestrian suffered permanent paralysis over much of her body. Id. at 1070. The Superior Court found that a vehicle directed toward another person is a “deadly weapon” and is sufficient evidence to allow a jury to decide the issue. Id. (citing Commonwealth v. Scales, 48 A.2d 1205, 1209 (Pa. Super. 1994), Commonwealth v. Battiato, 619 A.2d 359 (Pa. Super. 1993)). In that case, the Superior Court found that that the actions of the driver were *prima facie* for Attempted Homicide and he they had the specific intent to kill. Id. at 1071-72. The Superior Court was not persuaded by the fact that the defendant braked right before hitting the victim. Id.

Here, the Defendant is charged with Aggravated Assault and not Attempted Homicide. The facts, however, indicate that the Defendant did have intent to cause bodily injury to another with a deadly weapon. The evidence shows that the Defendant directed her vehicle towards Kurtz, Riddell, and Koch outside the bar. In addition, the Defendant backed her vehicle into another vehicle, almost pinning Hoover between two vehicles. The Defendant’s vehicle hit the parked vehicle with such force that it caused it to collide with another vehicle. After backing up, the Defendant then tried to hit Kurtz again, by hitting the back of the truck where he was located, which was done with such force that it caused him to be thrown from the truck. The Court finds from the entirety of preliminary hearing that the Commonwealth established a *prima facie* case that the Defendant was using her vehicle as a deadly weapon and in doing so had intent to cause bodily injury upon Kurtz, Riddell, Koch, and Hoover. Again, as the only evidence provided for Danielle Minier, Thomas Grafius, and Sue Demi was that they were outside of the bar during the incident, the Commonwealth has failed to prove a *prima facie* case in regards to these three counts of Aggravated Assault. N.T., September 14, 2012, p.7, 27, 32, 40-41, 42, 48, 59-60, 64-65.

Recklessly Endangering Another Person: Counts 15-21

A person commits Recklessly Endangering Another Person “if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” 18 Pa.C.S. § 2705. The defendant must have consciously disregarded a known risk of death or great bodily harm to another person. Commonwealth v. Cottam, 616 A.2d 988, 1004 (Pa. Super. 1992).

In Henck, a defendant was pulled over for going straight in an intersection that only allowed right turns. Commonwealth v. Henck, 478 A.2d 465, 466 (Pa. Super. 1984). After being pulled over, the defendant drove away during the stop and in the process disregarded two stop sign intersections and one light controlled intersection. Id. While fleeing through one of the intersections the defendant narrowly missed an accident. Id. The Superior Court stated that “we have no evidence to indicate that [defendant] was not conscious that he had disregarded a stop sign at the Duncansville intersection and ‘narrowly missed’ causing a collision with at least one vehicle traveling east-bound on Third Avenue. It was only the defensive driving of the lead vehicle and trailing vehicle that averted a serious accident and not, as counsel for the appellant would have us believe, the excessive speed at which the accused was moving.” Id. at 281. Based on the proximity of the vehicles and the speed at which the defendant drove, the Superior Court found that the defendant recklessly engaged in conduct which placed another person in danger of death or serious bodily injury. Id.

In this case, the Defendant engaged in similar reckless behavior as in Henck. The Defendant repeatedly drove her vehicle towards people. If it was not for the actions of these individuals diving and fleeing from her vehicle they would have been struck. The “narrow

misses” were the result of split second reactions by these individuals and not that of the Defendant. The Defendant’s intentional conduct placed these individuals in clear danger of serious bodily injury or even death and therefore the Commonwealth established a *prima facie* case of Recklessly Endangering Another Person for Kurtz, Riddell, Koch, and Hoover.

Simple Assault: Counts 22-28

A person commits a Simple Assault if s/he “attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another.” 18 Pa.C.S. § 2701(a)(1). Under the Doctrine of Merger, Simple Assault merges into both Aggravated Assault and Recklessly Endangering Another Person.¹⁰ Commonwealth v. Cavanaugh, 420 A.2d 674, 76 (Pa. Super. 1980).

The elements of this offense are necessarily included in the crime of aggravated assault, which is defined as conduct by which one “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. § 2702(a)(1), and also in the crime of reckless endangering another person, which is defined as conduct by which one “recklessly engages in conduct which places or may place another person in danger or death or serious bodily injury,” 18 Pa.C.S. § 2705.

Id.

As reviewed in the analysis of evidence presented by the Commonwealth on the charge of Aggravated Assault, this Court found that the Defendant had intent to cause “serious bodily harm.” Since Simple Assault requires only an attempt to cause “bodily injury to another,” the Court finds that the Commonwealth has established a *prima facie* case for the offense of Simple Assault in regards to Kurtz, Riddell, Koch, and Hoover.

¹⁰ “The principle of merger prevents double punishment for a lesser offense when it is a necessary ingredient of the greater offense for which the defendant has also been indicted, convicted and punished.” Id.

Simple Assault – Physical Menace: Counts 29-34

A person commits the offense of 18 Pa.C.S. §2701(a)(3) Simple Assault if they attempt by physical menace to put another in fear of imminent serious bodily injury. “The elements which must be proven are intentionally placing another in fear of imminent serious bodily injury through the use of menacing or frightening activity.” Commonwealth v. Reynolds, 835 A.2d 720 (Pa. Super. 2003); see also Commonwealth v. Little, 614 A.2d 1146 (Pa. Super. 1992). As stated above for Aggravated Assault and the other charges of Simple Assault, this Court finds that the Commonwealth established a *prima facie* case that the Defendant put another in fear of imminent serious bodily injury by driving her vehicle towards Kurtz, Riddell, Koch, and Hoover.

ORDER

AND NOW, this _____ day of January, 2013, based on the foregoing Opinion, the Defendant's Petition for Habeas Corpus is hereby GRANTED in part and DENIED in part. The Defendant's Petition is GRANTED as to the charges of Aggravated Assault, Recklessly Endangering Another Person, Simple Assault, and Simple Assault – Physical Menace in regards to Danielle N. Minier, Thomas M. Grafius III, and Sue E. Demi. Therefore, it is ORDERED AND DIRECTED that counts 4, 5, 7, 11, 12, 14, 18, 19, 21, 25, 26, 28, 32, and 33 are hereby DISMISSED. The Defendant's Petition is DENIED for all remaining charges at issue.

By the Court,

Nancy

L. Butts, President Judge

cc. DA
John A. Gummo, Esq.