

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-934-2012
 :
 KYLE STOUFFER, : Opinion and Order re Commonwealth's
 Defendant : Motion to Preclude Testimony

OPINION AND ORDER

This matter came before the court on March 2, 2016 for a hearing and argument on the Commonwealth's motion to preclude testimony, which was filed on February 16, 2016.

By way of background, Defendant Kyle Stouffer ("Stouffer") is charged with aggravated assault on a police officer, resisting arrest, simple assault, driving under the influence of alcohol or controlled substance, and summary offenses arising out of a two-vehicle crash in the city of Williamsport.

Sometime after the incident, Stouffer was interviewed by Roy Lubit, MD, Ph.D. Following the interview and a review of Stouffer's medical records, Dr. Lubit wrote a letter/report in which he rendered opinions to a reasonable degree of medical certainty that Stouffer sustained a concussion in the accident, Stouffer "was not aware of where he was or what was happening in the period after the accident," and Stouffer's "agitation and combativeness were the direct result of the head injury he suffered." Defense counsel provided a copy of the letter/report to the Commonwealth.

On February 12, 2016, the Commonwealth filed a motion to preclude any testimony by defense witnesses and any argument to the jury that asserts diminished

capacity. The Commonwealth's interpretation of the letter was that Stouffer was seeking to offer an affirmative defense of diminished capacity at trial through the expert testimony of Dr. Lubit. The Commonwealth sought to preclude such testimony because the defense of diminished capacity is limited to first degree murder; therefore, any evidence of diminished capacity would be inadmissible in this case.

Defense counsel contended that expert testimony should be permitted regarding the effects of the concussion on Stouffer's ability to form the intent necessary to support a charge of aggravated assault. At the argument on this matter, defense counsel argued that Stouffer lacked the mens rea or intent to cause serious bodily injury; instead, it was as if Stouffer had a seizure or the equivalent. Citing *Commonwealth v. McHale*, 858 A.2d 1209, 1213 (Pa. Super. 2004) in his memorandum to the court, defense counsel asserted that malice, which must be shown in order to support a conviction for aggravated assault, is defined as "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." He also noted that the Pennsylvania Supreme Court upheld the admissibility of expert testimony concerning the effect that concussions would have on defendants in *Commonwealth v. Towles*, 106 A.3d 591 (Pa. 2013) and *Commonwealth v. Hitchko*, 123 A.3d 731 (Pa. 2014). He then averred that the legal principle permitting expert testimony in those cases was applicable in this case. The court cannot agree.

Defense counsel's argument that the effects of Stouffer's concussion rendered him unable to form the intent necessary to support a charge of aggravated assault is a

diminished capacity argument. Diminished capacity is a very limited defense to first-degree murder. It is directed exclusively to the negation of the specific intent to kill, not malice. *Commonwealth v. Taylor*, 583 Pa. 170, 876 A.2d 916, 926 (2005). “First degree murder is unique in both the severity of the penalty and the quality of the intent required by the legislative definition: ‘willful, deliberate and premeditated’ intent to kill.” Pa.SSJI 5.01B, subcommittee note; 18 PA. CONS. STAT. ANN. § 2501 (d)(defining an ‘intentional killing’ as killing “by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”) “When the crime charged is not first degree murder, the probative value of psychiatric evidence of diminished capacity would be outweighed by dangers of unduly complicating the issues, confusing the jury and prolonging the trial.” *Commonwealth v. Swartz*, 335 Pa. Super. 457, 484 A.2d 793, 795 n.4 (1984); Pa. SSJI 5.01B, subcommittee note. For these reasons, diminished capacity “is not available as a defense for other specific intent, non-homicide offenses.” *Commonwealth v. Russell*, 938 A.2d 1082, 1092 (Pa. Super. 2007); see also *Commonwealth v. Garcia*, 505 Pa. 304, 479 A.2d 473, 477 (1984)(“Proper *psychiatric* testimony is admissible only to negate the specific intent required to establish first degree murder[; t]herefore, the determination of whether Garcia formed an intent to rob, and if so, when he formed such intent, was required to be made on the basis of the factual circumstances surrounding the criminal episode as developed by demonstrative evidence and testimony other than psychiatric expert testimony.”).

Defense counsel’s reliance on *Towles* and *Hitcho* is misplaced, as the defendant in those cases was charged with first-degree murder.

Accordingly, the following order is entered:

ORDER

AND NOW, this ____ day of March 2016, the court grants the
Commonwealth's motion to preclude testimony

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)
George Lepley, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file