IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CR-500-2019**
v.	:	
	:	
BRANDON CONFER,	:	**HABEAS**
Defendant	:	

OPINION AND ORDER

Brandon Confer (Defendant) filed a Petitioner for Habeas Corpus on August 15, 2019. A hearing on the Petition took place on September 16, 2019. At that hearing both Defendant and Commonwealth agreed to rely upon the testimony provided at the preliminary hearing and requested an opportunity to brief arguments. Defendant filed his brief on October 8, 2019 and the Commonwealth filed its brief on November 9, 2019. Defendant challenges the sufficiency of the Commonwealth's evidence as to one count of Criminal Attempt to Murder (Attempted Murder)[1] and three counts of Aggravated Assault.[2]

Preliminary Hearing Testimony

Trooper Johnathan Buynak (Buynak) of the Pennsylvania State Police and Mr. Ronald Sweet testified on behalf of the Commonwealth.[3] The testimony established the following. Buynak testified that on the morning of March 7, 2019, he was dispatched to a report of a burglary at the Boak Avenue trailer park. P.H. 3/19/19, at 4. Upon arriving, Buynak was instructed by Kelly Confer that her son, Defendant, had broken into the residence and stole $600 before fleeing. *Id.* at 4-5. Later that same morning, Buynak was dispatched to a McDonalds near the Boak Avenue trailer park for a report of a man loitering. *Id.* at 5. When Buynak arrived, he made contact with an individual who he believed to be Defendant. *Id.* at 6.

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[1] 18 Pa. C.S. § 901(a).
[2] 18 Pa. C.S. § 2702(a)(2).
[3] Mr. Sweet's testimony was brief and is irrelevant to the disputed charges in Defendant's Petition.

Although Defendant stated that he was not "Brandon Confer," Buynak had a photograph of Defendant and verified it was him. *Id.* at 6-7.

Defendant attempted to flee and Buynak grabbed ahold of him. *Id.* at 9. A struggled ensued and eventually Buynak managed to get him on his back on the ground. *Id.* at 9. At this point Buynak pulled out his taser and instructed Defendant to "get onto [his] belly and put [his] hands behind [his] back." *Id.* at 9. Buynak then put the taser on Defendant's back and cuffed his left hand. *Id.* at 10. Defendant then began to fight with Buynak again and the two started struggling over the taser. *Id.* at 10. While struggling over the taser, Defendant managed to point the taser back towards Buynak's face, discharge both cartridges, and strike Buynak in the ear and shoulder. *Id.* at 10-11. The taser was then out of cartridges and Buynak managed to discard the taser, but he "did sustain a wound to [his] head. [He] didn't recall exactly at what point. It was shortly, [he] think[s], thereafter with the taser that [he] noticed the blood dripping from [his] face into [his] eye." *Id.* at 13. Buynak then managed to get Defendant back on his belly and was again attempting to cuff him. *Id.* at 14. During the struggle for his right arm, Defendant pulled his right arm up above his head with a black knife in his hand. *Id.* Defendant was instructed to put the knife down and not to open the knife, but Defendant ignored those instructions and flipped open the knife. *Id.* at 15. "At that point [Defendant's] arm started to move – come – kinda come this direction toward [Buynak]." *Id.* Buynak describes the motion not as a thrust, but merely Defendant's hand "started moving back towards like he wanted to twist around and put his arm back." *Id.* at 39. At this point Defendant was still on his stomach and at best could see Buynak peripherally. *Id.* Buynak, who stated he was concerned about getting stabbed, then backed off Defendant and pulled out his pistol. *Id.* at 15. Buynak "told [Defendant] to put the knife down at that point; and [Defendant] jumped up. And [Buynak] was

prepared to shoot [Defendant]. [Buynak] was expecting [Defendant] to come at [him] with the knife, but at that point [Defendant] did not." *Id.* at 17. Defendant had the knife at his side down at a twenty degree angle. *Id.* at 41. Buynak stated Defendant never lunged at him or waved the knife at him in any manner. *Id.* Defendant then began back up with the knife before proceeding to flee. *Id.* at 17. The total injuries sustained by Buynak as a result of the altercation were "five stiches in [his] forehead, three stiches in [his] ear. And then just a lot of it just pain. [He] had a lot of scrapes, abrasions, small cuts on [his] knees and [his] shins and [his elbows] and the hands." *Id.* at 19. Buynak also stated he was afraid for his life when Defendant pulled the knife out and Buynak believed if Defendant had the opportunity to use the knife he would have. *Id.* It is also clear from the testimony that Buynak did not believe the taser caused the laceration to his head. *Id.* at 23-24.

Discussion

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove Defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). 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 likely committed the offense. *Id.* 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. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed. While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only

demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Commonwealth v. Ripley*, 833 A.2d 155, 159-60 (Pa. Super. 2003). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

Attempted Murder

The Commonwealth has charged Defendant with one count of Attempted Murder. To satisfy this charge the Commonwealth is required to prove that Defendant, “with intent to commit [Murder], he [did] any act which constitute[d] a substantial step toward the commission of [Murder].” 18 Pa. C.S. § 901(a). Specifically, the Commonwealth must show Defendant possessed the “specific intent to kill and took a substantial step towards that goal.” *Commonwealth v. Blakeney*, 946 A.2d 645, 652 (Pa. 2008). Both the *mens rea* and *actus reus* elements must be present to satisfy Attempted Murder. *Commonwealth v. Predmore*, 199 A.3d 925, 929 (Pa. Super. 2018) (*en banc*). The *mens rea* element may only be satisfied if a defendant possesses the specific intent to commit Murder of the First Degree. *See Commonwealth v. Griffin*, 456 A.2d 171, 177 (Pa. Super. 1983) (Second Degree and Third Degree Murder by definition do not satisfy the *mens rea* requirement because the crimes do not require the intent to kill). Such specific intent may reasonably be inferred from an accused's use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Hobson,* 604 A.2d 717, 720 (Pa. Super. 1992). “The *actus reus* element of the offense is the commission of one or more acts which collectively constitute a substantial step toward the commission of a killing.” *Predmore*, 199 A.3d at 929.

Pennsylvania courts have found a number of different factual circumstances which satisfy the specific intent requirement of Attempted Murder. *See Blakeney*, 946 A.2d at 652 (stabbing an individual in the chest and choking her until she was unconscious constituted Attempted Murder); *Commonwealth v. Tucker*, 143 A.3d 955, 964-65 (Pa. Super. 2016) (shooting into a group of individuals, although only striking the victim in the leg, satisfied the specific intent to kill element); In re *R.D.*, 44 A.3d 657, 679 (Pa. Super. 2012) (luring the victim into secluded area and striking her in the head with a hammer demonstrated specific intent to kill); *Commonwealth v. Packard*, 767 A.2d 1068, 1071-72 (Pa. Super. 2002) (using a vehicle to strike an elderly woman satisfied a *prima facie* showing of Attempted Murder). The Pennsylvania Superior Court has found that a defendant need not physically see their intended victim, and have gone as far to uphold an Attempted Murder conviction when an individual did not commit any physical act against the victim. *See Commonwealth v. Cannavo*, 199 A.3d 1282, 1292 (Pa. Super. 2018) (a defendant firing through his door at a group of people abdomen high satisfied Attempted Murder); *Commonwealth v. Donton*, 654 A.2d 580, 585 (Pa. Super. 1995) (the defendant telling his son he was going to kill his wife, leaving behind a note expressing such, driving ninety miles to her house, and possessing a loaded rifle while driving by her house constituted enough to satisfy both the *mens rea* and *actus reus* components of Attempted Murder).

The Commonwealth relies on *Commonwealth v. Jackson* to support its position that a *prima facie* case of Attempted Murder has been satisfied. In *Jackson*, the defendant was firing shots in the direction of officers before he fled. *Commonwealth v. Jackson*, 955 A.2d 441, 443 (Pa. Super. 2008). One of the officers followed the defendant and upon turning the corner saw the defendant turn towards him and begin to raise his arm towards the officers, as an individual

would when raising a firearm. *Id.* at 443-45. The officer then fired a shot at the defendant before he had an opportunity to fire. *Id.* The defendant argued that the Commonwealth failed to prove: He had a gun when raising his arm; He was aiming at the officer; or He fired at the officer. *Id.* at 445. The Superior Court found that because evidence was presented that the defendant was armed prior a jury could infer that the defendant was raising a firearm towards the officer. *Id.* The Pennsylvania Superior Court later differentiated *Jackson* in *Predmore*. *See Predmore*, 199 A.3d at 930-31. It determined that *Jackson* only dealt with the *actus reus* requirement of Attempted Murder. *Id.* The Superior Court went on to determine that although the defendant satisfied the substantial step element, as in *Jackson*, he did not satisfy the *mens rea* element. *Id.* at 931. Notably the Superior Court determined that shooting an individual in the calf while only a yard away did not satisfy a *prima facie* finding of a specific intent to kill. *Id.* The Superior Court proffered that "[a]bsent invocation of a relevant presumption of law [such as aiming a deadly weapon at a vital part of the body] . . . or some relevant analysis of the manner in which the circumstantial evidence (including, but not limited to, the acts which satisfy the *actus reus* element)," *mens rea* is not established. *Id.* at 930.

Therefore, this Court disagrees with the Commonwealth's contention that it is strictly a jury question as to whether Defendant had a specific intent to kill. Although a specific intent to kill can be established based on inferences obtained as a result of circumstantial evidence, an action which satisfies the *actus reus* does not *per se* do so. *See id.* at 932 ("the Commonwealth must still produce *some* evidence of specific intent to kill") (emphasis in original). The Commonwealth here, as it did in *Predmore*, relies solely on arguments pertaining to the *actus reus* to satisfy the *mens rea*. The act of opening a knife and refusing to drop it in the presence of a police officer may be sufficient to satisfy a substantial step, but no evidence has been

provided to establish Defendant's specific intent to kill. To the contrary, Buynak's testimony seemingly cuts against a specific intent to kill. As testified to, Defendant at the outset of the altercation asked Buynak to just let him run. P.H. 3/19/19, at 8. When Defendant opened the blade while on his stomach and being held down by Buynak, he had his right hand above his head and could only peripherally see Buynak. *Id.* at 14-15, 39. Buynak stated Defendant did not thrust the knife at him, but instead just started moving his arm with the knife back. *Id.* at 39. Buynak then disengaged Defendant, who came up with the knife down at his side and began walking backwards, as opposed to towards Buynak. *Id.* at 17, 40-41. Buynak stated that Defendant's "motive was he wanted to flee." *Id.* at 19. Buynak testified that Defendant never lunged at him or waved the knife at him and throughout the altercation Defendant never made any threatening statements to Buynak. *Id.* at 41. Based on the facts submitted by the Commonwealth at the preliminary hearing, it has failed to establish its *prima facie* burden that Defendant acted with the specific intent to kill Buynak or present facts with which a jury could reach that conclusion based on circumstantial evidence.

Aggravated Assault

The Commonwealth has charged Defendant with three counts of Aggravated Assault under 18 Pa. C.S. § 2702(a)(2). To substantiate the charges the Commonwealth is required to prove that Defendant "attempt[ed] to cause or intentionally, knowingly or recklessly cause[d] serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c)." 18 Pa. C.S. § 2702(a)(2). A police officer qualifies as an individual enumerated under subsection (c). *See* 18 Pa. C.S. § 2702(c)(1). Serious bodily injury is defined 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."

18 Pa. C.S. § 2301. Where the injury actually inflicted did not constitute a serious bodily injury, the charge of aggravated assault can be supported only if the evidence supports a finding of intent to inflict serious bodily injury existed, therefore constituting an attempt to cause serious bodily injury. *Commonwealth v. Martuscelli*, 54 A.3d 940, 948 (Pa. Super. 2012). When evaluating an alleged aggravated assault, "an 'attempt' is found where the accused, with the required specific intent, acts in a manner which constitutes a substantial step toward perpetrating a serious bodily injury upon another." *Id.* The intent of a defendant may be proven by direct or circumstantial evidence. *Commonwealth v. Matthew*, 909 A.2d 1254, 1257 (Pa. 2006). Additionally, to prove a defendant intended to cause serious bodily injury the Commonwealth need not show the injury in itself be life threatening. *Commonwealth v. Rightley*, 617 A.2d 1289, 1295 (Pa. Super. 1992).

At the outset both the Commonwealth and Defendant agree Buynak did not suffer serious bodily injury and therefore only an attempt to commit serious bodily injury is at issue. Also the Commonwealth agrees, as shown through Buynak's testimony, that Buynak was not assaulted or struck by the taser itself and that Count Four for Aggravated Assault should be dismissed. Therefore, only two counts are left at issue: Count Two for Aggravated Assault charged due to Defendant having and brandishing a knife; and Count Three for Aggravated Assault charged due to Defendant discharging a taser at Buynak. For both of these remaining counts the Commonwealth relies on *In the Interest of C.E.H.*, which the Commonwealth submits is "virtually on all fours" with the present case. In *C.E.H.*, the Pennsylvania Superior Court found sufficient evidence to uphold an adjudication of guilt for Aggravated Assault under 18 Pa. C.S. § 2702(a)(2). *In the Interest of C.E.H.*, 167 A.3d 767, 770-71 (Pa. Super. 2017). The Superior Court in rendering its decision on the issue stated in full:

> With regard to C.E.H.'s attempt to cause serious bodily injury, the testimony provided by the four eyewitnesses circumstantially proves C.E.H.'s intent to attempt to inflict bodily harm. After witnessing the arrest of his Stepfather, C.E.H. contacted Officer Owens by jumping on his back and tugging at his waist area, which was lined with several tools including a firearm, taser, impact weapon, pepper spray, and knives. Viewing the evidence most favorably to the Commonwealth as the verdict winner, we find the evidence supports the trial court's determination that C.E.H. committed the delinquent acts of both simple and aggravated assault.
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> *Id.* at 771 (internal citations omitted).

Based on the decision rendered in *C.E.H.* this Court agrees with the Commonwealth that it has satisfied its *prima facie* burden for Counts Two and Three of Aggravated Assault. Certainly if the act of pulling on an officer's belt, which contained knives and a taser, constitutes an attempt to commit serious bodily injury this Court must find struggling over, pulling out, and utilizing such weapons during an altercation with a police officer shall also satisfy the burden.

Specifically for Count Two, or the brandishing of the knife, the *prima facie* requirement is met as a jury could find that taking a knife out during an altercation with a police officer was with the intent to cause serious bodily injury. This Court predicts that both the Commonwealth and Defendant will argue that this finding is inconsistent with the Court's determination on Count One above. This contention would be misplaced. Count One and Count Two are different due to Count One's requirement of a specific intent to kill. *See Commonwealth v. Johnson*, 874 A.2d 66, 71 (Pa. Super. 2005) ("Attempted murder includes an element that is not required to commit aggravated assault under section 2702(a)(2). That element is a specific intent to kill."). Likewise *C.E.H.*, which the Commonwealth would argue also applies to Count One, does not apply to a specific intent to kill and the narrow factual scenario only provides analysis for sufficiency to uphold an adjudication of intent to commit serious bodily injury, but would certainly not satisfy a higher specific intent to kill.

As for Count Three, regardless of *C.E.H.*, a *prima facie* standard has been met as the evidence clearly shows an indication that Defendant pulled the trigger of the taser twice while pointing it at Buynak's face. Defendant pointing a taser specifically at Buynak's face and pulling the trigger twice shows Defendant's intent to cause "serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. C.S. § 2301.

Conclusion

Therefore, this Court finds the Commonwealth had presented enough evidence at the preliminary hearing to establish a *prima facie* case for the charges of Aggravated Assault pertaining to the deployment of the taser and the brandishing of a knife, but has failed to establish a *prima facie* case for Attempted Murder and Aggravated Assault pertaining to the allegation that Defendant hit Buynak with the taser itself. Defendant's Petition for Writ of Habeas Corpus is granted in part and denied in part.

ORDER

AND NOW, this 15th day of November, 2019, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that**:**

1. Defendant's Petition for Writ of Habeas Corpus for Counts Two and Three, Aggravated Assault, is hereby **DENIED**.
2. Defendant's Petition for Writ of Habeas Corpus for Count One, Attempted Murder, and Count Four, Aggravated Assault, is hereby **GRANTED**. It is hereby **ORDERED AND DIRECTED** that the Counts One and Four be **DISMISSED**.

BY THE COURT,

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Nancy L. Butts, P.J.

cc: DA (KO)
PD (MW)