IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 98-11,374**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
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CLARENCE PHIPPEN,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence dated October 7, 1999 and docketed October 13, 1999. The relevant facts are as follows. In June 1998, the defendant's wife Marla Phippen took the defendant's pistol and hid it in her sewing tin because she thought the defendant was suicidal. Several days later, the defendant found the gun. He told his wife she had no reason to touch his gun and he hid it where she wouldn't find it. Two mornings later when they were in the kitchen getting coffee, the defendant whispered in his wife's ear, "You would look real nice on the kitchen floor in a pool of blood." This statement upset Mrs. Phippen and made her fearful for her safety as well as the safety of her family. She diligently searched the house for the pistol. When she found the gun in a notebook in the defendant's basement office several days later, she took it to the bank and put it in a safety deposit box.

On July 26, 1998, Mrs. Phippen was in the kitchen making sure the doors were locked for the evening when she heard the defendant stomping up the basement steps. He was very angry and asked her, "Where is my f'ing gun." Mrs. Phippen ignored

him. He asked again and she ignored him again. Then he said, "Marla, I told you this a thousand times, don't touch my stuff. Where is my f'ing gun." N.T., July 15-16, 1999, at p. 76. When Mrs. Phippen started to turn around, the defendant grabbed her by the bathrobe and her necklace, held a knife in front of her face, and said, "Where is my f'ing gun.[1] He also said, "I'm never, ever going to tell you this again, you weren't allowed to touch my stuff. You're never going to touch my f'ing stuff again. N.T., July 15-16, 1999, at pp. 77-78.

Hearing a commotion, the defendant's and Mrs. Phippen's daughter, Erin, came into the room. When she saw her father holding a knife to her mother, she screamed "Dad, what are you doing?" The defendant replied, "Your mother took my gun and I want my gun back." Erin started screaming "mommy, give him the gun." Mrs. Phippen said, "I don't have the gun. It's in the safety deposit box at the bank and I will get the gun in the morning." At that point the defendant said to his wife, "Bitch, you're never going to see the morning, you're going to die tonight." When he said this, the knife was under his wife's chin, touching her throat. The defendant then began waving the knife at Erin and told her to get on her hands and knees and beg her mother to give him the gun. Mrs. Phippen said, "I will get it in the morning." At that point the defendant told his wife to get on the floor. He gave her a shove and pointed to where he wanted her to go with the knife. He pushed her onto the floor with his left hand and, as she went down, her finger was cut on the knife in his right hand.

When she was on the floor, the defendant straddled her over the hip area.

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[1]The defendant grabbed his wife so forcefully that she had a bruise/rug burn on her neck the next day.

He started lecturing the kids, saying "this would be a lesson they would never forget, Erin would not be a bitch like her mother, he would see to it that Erin would never grow up with her mother as he was going to kill her. Then he took the knife and repeatedly lunged at his wife, coming within inches of her face.

The children began screaming "Daddy, don't do it." Erin demanded that the defendant stop and begged him to let her call the police so it could stop. The defendant agreed to let Erin call the police. Erin then called 911, and told them her parents were having a fight and her dad had a knife. When she started to give directions to the residence, though, the defendant terminated the call.[2]

The communications center traced the call and within a few minutes attempted to call the Phippen residence. The defendant would not let Erin pick up the phone and the answering machine came on. The communications center called back a second time and this time the defendant let Erin answer the phone. She tried to finish giving the directions to the residence, but she was so distraught she couldn't complete the directions. The defendant then got on the phone and gave the police the rest of the directions to get to the residence.[3]

The police arrived at the residence and Trooper Akers entered with his gun drawn because it was a domestic situation involving weapons. The police asked the defendant several times to give them the knife and he refused. Eventually he complied and

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[2]The defendant claimed he terminated the call because Erin was telling the police her parents had a fight and her dad had a knife, when the truth was his wife stole his gun.

[3]The defendant claimed he wanted the police to come to the residence so they could arrest his wife for taking his gun.

went out on the porch with Trooper Stipcak. Trooper Akers then asked Mrs. Phippen to give him the gun and let him see her hands. Mrs. Phippen explained she didn't have a gun and brought her hands out. Trooper Stipcak interviewed the defendant on the porch and Trooper Akers interviewed Mrs. Phippen in the kitchen regarding the incident. The police then arrested the defendant on assault and related offenses and transported him to the State Police barracks in Montoursville.

The defendant was charged with attempted homicide; aggravated assault - attempt to cause serious bodily injury; simple assault; recklessly endangering another person, terroristic threats, and harassment. On July 14, 1999, the Honorable Nancy L. Butts granted the Commonwealth's motion to amend the Information to include a charge of aggravated assault with a deadly weapon. On July 15, 1999, the Commonwealth dropped the attempted homicide charge.

A jury trial was held July 15, 16 and 19, 1999. The jury found the defendant guilty of aggravated assault - attempt to cause serious bodily injury; aggravated assault - cause bodily injury with a deadly weapon, simple assault, terroristic threats and recklessly endangering another person. On October 7, 1999, the Court sentenced the defendant to incarceration at a state correctional institution for a minimum of forty-two (42) months and a maximum of fifteen (15) years. The Court applied the sentencing enhancement for use of a deadly weapon.

On November 3, 1999, the defendant filed the instant appeal. In his Statement of Matters Complained of on Appeal, the defendant raises four (4) issues: (1) the trial court erred in not granting the defendant's request for a non-jury trial; (2) the trial

court erred in allowing testimony concerning the defendant's prior record; (3) the court erred in allowing the Commonwealth to amend the Information to add the charge of aggravated assault with a deadly weapon; and (4) the evidence was insufficient to prove beyond a reasonable doubt that the defendant had the intent to commit any of the crimes charges and it was also insufficient to prove beyond a reasonable doubt that any attempt was made by the defendant to commit the crimes charged.

The defendant first asserts the trial court erred in not granting the defendant's request for a non-jury trial. This Court cannot agree. While the defendant has the right to a trial by jury, there is no absolute right to a bench trial. Commonwealth v. Puksar, 740 A.2d 219, 228 (Pa. 1999). Rather, the decision to grant a request for a non-jury trial is within the sound discretion of the trial court. Id. The Court also notes that the Commonwealth has the right to a jury trial under the Pennsylvania Constitution, Art. I, §6. Therefore, absent a waiver of that right, the Court cannot order a non-jury trial. Here, the Commonwealth initially agreed to the case proceeding non-jury. The Court conducted a colloquy with the defendant to ensure that his waiver of a jury trial was intelligent, knowing and voluntary. The Court dictated an Order accepting the defendant's waiver of his right to a jury trial. Immediately thereafter, and before the jury was released, the Commonwealth indicated the victim changed her mind and wished to proceed with the jury trial, and therefore the Commonwealth wished to change its position as well. Given this change in circumstances, the Court was not comfortable proceeding non-jury. Since the jury had not been released, the Court was not inclined to take the position that it was too late for either

side to change their mind and the case proceeded as a jury trial.[4] N.T., July 15-16, 1999, at pp. 329-339.

The defendant next contends the court erred in allowing testimony concerning the defendant's prior record. The only reference in the record that the Court could find relating to prior conduct of the defendant is as follows:

Q Sir, were you once involved in an incident in Massachusetts in late 60's or early 70's with the police? That you can recall of?

A What do I call that, Bill Clinton youthful–

Q Do you recall being involved in an assault in Massachusetts in the 60's and early 70's?

A Yes, yes.

MR. PHIPPEN: Does that get entered in, Your Honor?

THE COURT: Are you objecting to it?

MR. PHIPPEN: Yes, I am.

MR. OSOKOW: Your Honor, the Defendant opened the door, he testified he had never been in trouble or arrested in his life.[5]

MR. PHIPPEN: I didn't get arrest for that.

MR. OSOKOW: Were you involved in an incident, though?

MR. PHIPPEN: I object.

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[4]The case had actually started and, in fact, the jury had heard a significant amount of evidence when the defendant decided he wanted to waive his right to a jury trial.

[5]In his testimony on direct examination, the defendant stated he had never been in jail before in his life until he came to Pennsylvania.

THE COURT: Sustained.

N.T., July 19, 1999, at pp. 29-30. The Court notes the defendant initially answered the question before objecting and did not make a motion to strike the question and answer or a motion for the Court to instruct the jury to disregard the initial question and answer. Therefore, the defendant waived any objection to the initial question and answer remaining in the record. The Court sustained the objection to the second question and the matter was not discussed any further.[6]

The defendant also claims the Court erred by allowing the Commonwealth to amend the Information to add a count of aggravated assault with a deadly weapon. Again, this Court cannot agree. Where the crimes specified in the original information involve the same basic elements and arose out of the same factual situation as the crimes specified in the amended information, the defendant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to the defendant results. Commonwealth v. Picchianti, 600 A.2d 597, 599 (Pa.Super. 1991). If there is no showing of prejudice, amendment of an information to add an additional charge is proper even on the day of trial. Id. Here, the defendant was charged with aggravated assault which caused or attempted to cause serious bodily injury, simple assault, recklessly endangering another person, terroristic threats, and harassment. On the eve of trial, the Commonwealth sought to add a charge of aggravated assault, causing bodily injury with a deadly weapon.

[6] In its instructions to the jury after the close of evidence, the Court noted that if the Court sustained an objection, the jury should disregard whatever that was and not allow that matter to take part in the jury's deliberations. N.T., July 19, 1999 at p. 99.

All the charges arose out the same incident, i.e., the defendant wielding a knife, lunging at his wife with it, and threatening to kill her. The affidavit of probable cause and the criminal complaint clearly put the defendant on notice that the defendant cut the victim's finger with the knife when he pushed her to the floor. Since the defendant was put on notice and there was no prejudice, allowing the amendment in this case was proper.

The defendant's final appeal issue is that the evidence was insufficient to show that he attempted to commit or had the intent to commit any of the crimes charged.

A person is guilty of aggravated assault if he "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). Attempt, for aggravated assault purposes, can be found where " the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another." Commonwealth v. Lopez, 654 A.2d 1150, 1154 (Pa.Super. 1995). The Commonwealth can establish intent from the circumstances.

The Court finds the evidence presented was sufficient to show that the defendant had the requisite intent and attempted to cause serious bodily injury to his wife. The defendant repeatedly lunged at his wife with a knife, barely missing her face while stating he was going to kill her. The repeated lunging a knife at his wife constituted a substantial or significant step toward causing serious bodily injury to her. He statements to the effect that he was going to kill her and she would die tonight are sufficient to infer an intent to cause serious bodily injury. While the defendant may argue that he only intended to scare his wife, this is an argument of factual inference for the jury, which is free to agree

or disagree with it. See Commonwealth v. Woods, 710 A.2d 626, 630 (Pa.Super. 1998). Thus, the Court finds the evidence was sufficient to prove aggravated assault beyond a reasonable doubt.[7]

DATE: 6/21/00

By The Court,

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Kenneth D. Brown, J.

cc: Kenneth Osokow, Esquire (ADA)
George Lepley, Esquire
Law Clerk
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

[7]The Court's sentence for terroristic threats was totally concurrent to the aggravated assault and the other charges merged for sentencing purposes. Therefore, the Court will not address the sufficiency of the evidence for these counts as it would not affect the outcome of this case.