IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 798 CR 2016
	:	
SCOTT TIMOTHY WATKINS,	:	
Defendant	:	

Criminal Law - Challenging the Finding of a Magisterial District Judge that Evidence is Sufficient to Establish a *Prima Facie* Case of an Attempt to Commit Aggravated and Simple Assault - Writ of Habeas Corpus – Specific Intent to Cause Bodily Injury as a Necessary Element – Distinguishing Between Evidence which Establishes an Intent to Frighten and that Required to Establish an Intent to Cause Bodily Injury – Recklessly Endangering Another Person – Actual Present Ability to Inflict Harm as a Necessary Element – Pointing of an Unloaded Gun Insufficient - Custodial Interrogation - Necessity of Miranda Warnings Before Police Questioning - Public Safety Exception

1. A writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. Whether the evidence is sufficient to establish a *prima facie* case is a question of law in which the trial court is afforded no discretion.

2. 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.

3. When a defendant is charged with either aggravated assault or simple assault arising out of an attempt to cause bodily injury, a necessary element of the Commonwealth's case in chief is proof that the defendant's actions were undertaken with the specific intent to cause bodily injury.

4. The intent to threaten another with bodily harm is different from the intent to cause bodily injury. Conduct which evidences only an intent to threaten or intimidate another with bodily injury is insufficient to prove a specific intent to cause bodily injury: something more must

be shown.

5. The isolated act of pointing a gun at another person is insufficient to support a conviction for either attempted aggravated or simple assault, both of which require as a necessary element of the offense proof of a specific intent to cause bodily injury. To establish a specific intent to cause bodily injury something more than simply menacing another with a gun is required.

6. Where a defendant in addition to pointing a gun at another person verbally expresses his intent to shoot the other, unsuccessfully attempts to fire the gun, is prevented by the intended victim or a third person from firing the gun, or is prevented by the victim's escape from acting on his threat of shooting the victim, such other indicia manifesting an actual intent to harm is sufficient to establish the requisite specific intent to cause bodily injury to convict for the offenses of attempted aggravated or simple assault.

7. To sustain a conviction of recklessly endangering another person, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. Consequently, as a general matter, the mere pointing of an unloaded gun, without more, will not support a conviction for recklessly endangering another person.

8. As a general rule, a defendant in police custody cannot be questioned by the police without Miranda warnings first having been given before any statement made by the defendant will be deemed admissible against him.

9. No violation of Miranda exists where a suspect in custody without prompting spontaneously "blurts out" an incriminating statement before Miranda warnings have been given.

10. The public safety exception to Miranda allows police questioning of a suspect in custody before Miranda warnings have been given where the circumstances and purpose of the questioning is to ensure the public safety and not to elicit incriminating responses. Under such circumstances, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."

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Cynthia Dyrda-Hatton, Esquire — Counsel for Commonwealth
Assistant District Attorney

Brian J. Collins, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 6, 2017

When a defendant, without justification, points a gun at another, presses the barrel against the other's cheekbone, and fires, killing a defenseless person, those facts, standing alone, will support a conviction for murder - the unlawful, intentional killing of another, since "the use of a deadly weapon on a vital part of the body is sufficient to establish the specific intent to kill." Commonwealth v. Sepulveda, 855 A.2d 783, 786 (Pa. 2004). But suppose, instead of pulling the trigger, the defendant, after holding the barrel of the loaded gun against the other's cheekbone, lowers the weapon, turns around, and walks away, saying nothing. Will these facts support a conviction for attempted murder – more specifically, are they sufficient to establish the specific intent to cause death or serious bodily injury – or is something more required?

Suppose further, after the police respond a short time later to investigate the reported incident and have been apprised of what happened, they find the defendant, who is visibly intoxicated, standing at the scene of the occurrence with his hands in the air; he's ordered to keep his hands raised; and not knowing where the gun is, the police ask, and the defendant tells them. Must this response and the gun which is recovered based on that response be suppressed under Miranda?

These two questions encapsulate the issues discussed below.

PROCEDURAL AND FACTUAL BACKGROUND

On May 14, 2016, at approximately 10:30 P.M., Scott Timothy Watkins ("Defendant") exited his camper at the Sunny Rest Resort in Lower Towamensing Township, Carbon County, Pennsylvania, and drawing a handgun from his rear waistband, pointed the gun at one of two security guards who were standing in front of his camper. As Defendant exited the camper, a fully loaded magazine clip dropped to the ground.[1] Defendant then stepped forward and pressed the barrel of his pistol into the face of the security guard just below his left eye. For several moments Defendant said nothing, then returned the weapon to where it was drawn, told the security guard to "get the 'F' out of there," turned, and walked back to his camper.

[1] It is unknown whether this clip was intentionally ejected from the gun as Defendant swung the gun in the guard's direction or was a spare clip which fell to the ground as Defendant reached for his gun and was pulling it from his waistband.

Earlier in the evening, the two security guards had been making their rounds at the Sunny Rest Resort, a private campground,[2] when they came upon Defendant and his wife, Lisa Watkins, partying at another camp site. Both were drinking alcoholic beverages. Mrs. Watkins asked if the guards could help take her back to her camper since she needed to use the bathroom. The guards agreed to assist and drove Mrs. Watkins on their golf cart approximately one hundred yards to her camper where she invited them inside and offered them some candy. The guards were inside the camper for less than five minutes and were already outside the camper by the time Defendant drove up in a separate vehicle. For some reason Defendant was angry, and as he stormed past the guards and entered the camper, he mumbled something the guards were unable to hear clearly. He was also intoxicated.

From where the guards were located, they heard Defendant screaming at his wife. One of the guards also saw Defendant strike his wife three times in the face. When he told this to the second guard, the second guard walked up to the camper and knocked on the camper door. Defendant screamed, "Are you serious?" It was at this point that Defendant opened the camper

[2] Sunny Rest Resort is a clothing optional campground. There is no evidence in the record that anyone was other than fully clothed on the date of this incident.

door and walked toward the first guard with his gun drawn and pointed at the guard.

The incident was immediately reported to the Pennsylvania State Police barracks which, at 10:35 P.M., dispatched two troopers who arrived at the Sunny Rest Resort within approximately ten minutes. Upon their arrival, the police first briefly interviewed the two guards in an office building near the gated front entrance and then, accompanied by security personnel, drove to Defendant's campsite. When the police reached Defendant's camper, they observed Defendant standing in front of his camper with his hands in the air. The officers directed Defendant to keep his hands in the air.

As Defendant was being taken into custody, he was either asked where the gun was or he volunteered this information spontaneously: the arresting officer's testimony on this point supports either version. (N.T. 6/8/16 (Preliminary Hearing), pp.84, 92). In accordance with what Defendant told the police, the police found the gun which Defendant had pointed at the security guard lying on a picnic table directly in front of Defendant's camper. It was a black and silver FNH .40 caliber pistol. There was no magazine in this gun, however, the gun was loaded and had one round in the chamber.

Defendant was taken into custody and transported to the Pennsylvania State Police barracks in Lehighton. After being

advised of his Miranda rights, Defendant admitted to exiting his camper with a pistol and pointing it at the security guard. He also admitted that the pistol he used was the one the police retrieved from the outside table. Defendant justified his actions by stating he felt threatened by the security guards, however, he was unable to explain what the security guards had done which caused his concern.

Defendant and his wife had been drinking the night of the incident and both were highly intoxicated. Both exhibited slurred speech and were off-balance while walking. It is unclear why Defendant was angry with his wife the evening of the incident or why he was carrying a gun. The magazine clip which dropped to the ground as Defendant exited the camper was picked up by Defendant's wife when she left the camper after Defendant pointed the gun at the security guard. Mrs. Watkins handed this clip to the first security guard who found her walking along the road away from the camper after the incident was over. This ammunition clip was provided to the Pennsylvania State Police when they first arrived at the Sunny Rest Resort that evening.

As a result of this incident, Defendant has been charged with one count of Aggravated Assault,[3] two counts of Simple

[3] 18 Pa.C.S.A. § 2702(a)(4) (attempt to cause bodily injury to another with a deadly weapon).

Assault,[4] one count of Recklessly Endangering Another Person,[5] and one count of Harassment.[6] At a preliminary hearing held on June 8, 2016, all charges were bound into court.

On August 17, 2016, Defendant filed an Omnibus Pretrial Motion in which Defendant challenges by way of a Petition for Writ of *Habeas Corpus* the sufficiency of the evidence to establish a *prima facie* case of either aggravated or simple assault by attempting to cause physical injury and of recklessly endangering another person.[7] In his Omnibus Motion, Defendant also seeks to suppress his statement to the police describing where the gun was located as being an inculpatory statement made while he was in police custody in response to police questioning and before he was informed of his Miranda rights. A hearing on this Motion was held on September 30, 2016.

DISCUSSION
Sufficiency of the Evidence

A defendant may be convicted of aggravated assault graded as a felony of the first degree if he "attempts to cause or

[4] 18 Pa.C.S.A. §§ 2701(a)(1) (attempt to cause bodily injury) and 2701(a)(3) (attempt by physical menace to place another in fear of imminent serious bodily injury).
[5] 18 Pa.C.S.A. § 2705.
[6] 18 Pa.C.S.A. § 2709(a)(1).
[7] A petition for a writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa.Super. 2016) (*en banc*). Whether the Commonwealth, at this stage of the proceedings, has met its burden of presenting a *prima facie* case showing that a crime has been committed and that the accused is the one who committed it is a question of law on which the trial court is afforded no discretion. *Id.*

intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa.C.S.A. § 2702(a)(4). Similarly, he may be convicted of simple assault as a misdemeanor of the second degree if he "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa.C.S.A. § 2701(a)(1). For each of these offenses with which Defendant has been charged, since no physical injury was caused to the security guard, Defendant correctly states that to withstand dismissal, the Commonwealth's evidence must be sufficient to prove a *prima facie* case of attempted aggravated and simple assault. *Cf.* Commonwealth v. Martuscelli, 54 A.3d 940, 948 (Pa.Super. 2012) ("Where the victim does not suffer serious bodily injury, the charge of aggravated assault can be supported only if the evidence supports a finding of an intent to cause such injury.").

"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.A. § 901(a). When a defendant is charged with either aggravated assault or simple assault because of an attempt to cause bodily injury, the Commonwealth must prove the defendant's actions were undertaken with the specific intent to cause such injury. Commonwealth v. Sanders, 627 A.2d 183, 186 (Pa.Super. 1993), *appeal denied*, 634 A.2d 220 (Pa. 1993). "A person acts

intentionally with respect to a material element of an offense when. . . it is his conscious object to engage in conduct of that nature or to cause such result. . . ." 18 Pa.C.S.A. § 302(b)(1)(i). "Criminal intent may be proved by direct or circumstantial evidence." Commonwealth v. Alexander, 383 A.2d 887, 889 (Pa. 1978).

Defendant argues the most the Commonwealth has proven is his intent to threaten and intimidate the security guard by pointing a loaded weapon in his direction and pressing it against his left cheek, but that by itself this is not enough to evidence the requisite specific intent to actually cause physical injury. As argued by Defendant, the intent to threaten someone with physical injury is different from the intent to cause physical injury. Consequently, proof which evidences a threat only is insufficient to prove a further intent to carry out that threat: something more must be shown.[8]

In Alexander, the Pennsylvania Supreme Court held that whether the necessary specific intent to cause bodily injury has been proven for a charge of aggravated assault must be determined on a case-by-case basis under the totality of the

[8] Nevertheless, a threat to cause serious bodily injury by pointing a gun at another can itself constitute simple assault as an "attempt[] by physical menace to put another in fear of imminent serious bodily injury." 18 Pa.C.S.A. § 2701(a)(3); Commonwealth v. Repko, 817 A.2d 549, 554 (Pa.Super. 2003). Defendant has in fact been charged with simple assault on this basis as well.

circumstances.[9] Alexander, 383 A.2d at 889. Such circumstances include but are not limited to evidence of a significant difference in size or strength between the defendant and the victim, any restraint on the defendant preventing him from escalating the attack, the defendant's use of a weapon or other implement to aid his attack, and statements made by the defendant before, during, or after the attack which might indicate his intent to inflict injury. *Id.* at 889. The fact that a defendant had ample opportunity to inflict bodily injury, but did not do so, is also a factor but, like the other factors, is not alone determinative of an intent to inflict bodily injury. Commonwealth v. Matthew, 909 A.2d 1254, 1258 (Pa. 2006).

In Commonwealth v. Gruff, 822 A.2d 773 (Pa.Super. 2003), *appeal denied*, 863 A.2d 1143 (Pa. 2004), the Superior Court

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[9] At the time of the Supreme Court's decision in Alexander, the Crimes Code defined aggravated assault as follows:

> A person is guilty of aggravated assault if he:
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> (1) 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;
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest;
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest; or
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

18 Pa.C.S.A. § 2702(a)(1973).

found the evidence sufficient to uphold the defendant's conviction for aggravated assault where the defendant grabbed the victim from behind, placed a bayonet blade against his throat, and verbally threatened to kill him, at which point the victim pulled loose and ran into the woods. The defendant made no attempt to hold on to the victim or to chase him when he escaped.

In Matthew, the Pennsylvania Supreme Court affirmed the defendant's conviction of aggravated assault where the defendant placed a loaded gun against the victim's throat, pointed the gun at the victim as he frantically searched through a burning car, and verbally threatened to kill the victim immediately before fleeing when a passerby appeared at the scene. *See also* Sanders (finding evidence sufficient to sustain conviction of aggravated assault under Section 2702(a)(4) where the defendant pulled out a loaded gun, pointed the gun at the victim's chest, walked up to the victim, placed the gun against his head, and verbally threatened to blow his head off, whereupon the victim attempted to wrestle the gun away from the defendant which ultimately was taken from defendant's hand by a third party); Commonwealth v. Chance, 458 A.2d 1371 (Pa.Super. 1983) (upholding conviction of aggravated assault under Section 2702(a)(4) where the defendant pointed a gun at the victim and the victim heard the gun click several times while he was struggling with the defendant).

Conversely, in Commonwealth v. Mayo, 414 A.2d 696 (Pa.Super. 1979), the Superior Court reversed the defendant's conviction of aggravated assault under Section 2702(a)(4) where the defendant entered the victim's apartment in the early morning hours, placed a knife to the victim's throat, stated he kills people who falsely accuse him of things he hasn't done (this occurring immediately after the victim had accused him of taking her wallet), and then used the knife to make faint scratches on the victim's chest before removing the victim's clothes and raping her. Critical to the Court's decision was its finding that notwithstanding defendant's obvious opportunity and ability to inflict serious injury on the victim, he did not do so, and that defendant's actions "all point[ed] decisively to an intent not to inflict bodily injury, but to frighten and/or humiliate. . . ." *Id.* at 703. The rationale of Mayo was expressly reviewed and approved by the Supreme Court in Matthew as adhering to the totality of the circumstances test set forth in Alexander. Matthew, 909 A.2d at 1258.

Merely menacing another with a gun, without discharging the weapon or without some other indicia manifesting intent, is insufficient to demonstrate an intent to inflict bodily injury. In Commonwealth v. Alford, 880 A.2d 666 (Pa.Super. 2005), *appeal* denied, 890 A.2d 1055 (Pa. 2005), defendant's conviction for aggravated assault under 18 Pa.C.S.A. §§ 2702(a)(1) and

2702(a)(4) was reversed where the defendant, an escaped prisoner, pointed a handgun at the victim through a front-door window and demanded to be let into her home, at which point the victim ran out the kitchen door to a neighbor's house. No explicit threats of bodily injury were made and the handgun was never placed directly against the victim's face or throat.

In Alford, the Superior Court equated defendant's words and actions to an implied conditional threat, "*i.e.*, *either* let me into the house *or* I may shoot you." *Id.* at 672. According to the Court, "[s]uch a threat, conditioned on the victim's performance of some act, is insufficient to prove aggravated assault." *Id.* The Court further noted that defendant's "[r]unning to [the victim's] house after escaping [from police] custody, pounding on her front door, and pointing a gun at her through the front door window after being denied entry was simply not enough to support the inference that aggravated assault was the *true* intention of [defendant]." *Id.* (emphasis added). *But see* Commonwealth v. Fortune, 68 A.3d 980 (Pa.Super. 2013) (6-3 decision) (affirming defendant's conviction for aggravated assault under Section 2702(a)(1) where the defendant pointed a gun at the middle of the victim's forehead and verbally threatened to kill her if she didn't turn over the keys to her car, whereupon the victim handed over the keys and ran away; defendant argued that the threat was a conditional one

intended only to scare the victim into giving him the keys to her vehicle, that his actual intent was to steal the car and not to physically harm the victim), *appeal denied*, 78 A.3d 1089 (Pa. 2013).

In the instant case, under the line of cases which require something more than the mere act of pointing a loaded gun at another person to establish the specific intent to cause injury, that something more is not present. That Defendant was intoxicated, arguing with his wife, hitting her, and making bad decisions is not in question. That Defendant was upset and felt the security guards were meddling in a dispute between him and his wife which did not concern them when they knocked on the camper door and he replied in disbelief "Are you serious?" is equally clear. That he had the means to inflict bodily injury on the security guard and threatened to do so, albeit nonverbally, by pointing a loaded weapon at the security guard, cannot be disputed. Yet there is no evidence that he expressed verbally his intent to shoot the guard, that he attempted to fire his weapon, that the security guard or anyone else prevented him from doing so, or that the security guard escaped before Defendant lowered his weapon. Defendant of his own accord withdrew from his confrontation with the security guard, warned the guard to "get the 'F' out of there," and voluntarily retreated to the interior of his camper. This notwithstanding

that Defendant had the clear opportunity to shoot and seriously maim or kill the guard. Instead, Defendant's actions all point decisively, as in Mayo, "to an intent not to inflict bodily injury," but rather to an intent to frighten and scare the guard so as to be left alone. There is no evidence that Defendant's intent was anything other than to scare and intimidate the security guard.

Suppression

When the Pennsylvania State Police first encountered Defendant on May 14, 2016, he was standing in front of his camper with his hands in the air. The police instructed Defendant to keep his hands where they could see them. As this was happening, Defendant told the police where the gun was, and this is where the police found it. Because, according to Defendant, he was in police custody[10] and was responding to a

[10] We have accepted for purposes of Defendant's argument that Defendant was in custody when he advised the police where the gun was, although this is by no means clear.

> An encounter becomes an arrest when, under the totality of the circumstances, a police detention becomes so coercive that it functions as an arrest. Commonwealth v. Revere, 814 A.2d 197, 200 (Pa.Super. 2002), *aff'd on other grounds* 585 Pa. 262, 888 A.2d 694 (2005). The numerous factors used to determine whether a detention has become an arrest are the cause for the detention, the detention's length, the detention's location, whether the suspect was transported against his or her will, whether physical restraints were used, whether the police used or threatened force, and the character of the investigative methods used to confirm or dispel suspicions. *Id*.

Commonwealth v. Stevenson, 894 A.2d 759, 770 (Pa.Super. 2006) (finding police officer's request to defendant, who was exiting a convenience store, to raise his hands or place them on his head where police suspected defendant was carrying a handgun and wanted to ascertain whether he had a permit to carry a concealed weapon constituted an investigatory stop, not an arrest), *appeal*

question asked by the police when he told the police where to find the gun, and because Defendant was not first advised of his Miranda rights before this question was asked, Defendant argues his statement and the evidence the police discovered which derived from this statement must be suppressed.[11] *See*, *e.g.*, Sepulveda, 855 A.2d at 790 ("Once in custody, and prior to interrogation, a person must be provided with Miranda warnings before any statement he makes will be deemed admissible.").

In evaluating Defendant's Motion, it is unclear, first, whether Defendant was questioned at all before he told the police where to find the gun. The police had just arrived at Sunny Rest Resort when they were advised by the first security

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denied, 917 A.2d 846 (Pa. 2007). *See also* Commonwealth v. Gwynn, 723 A.2d 143, 149 (Pa. 1999) (concluding that a police officer's placement of the defendant in a patrol car, and subsequent handcuffing of the defendant, did not rise to the level of an arrest under the circumstances presented in the case).

[11] As argued by Defendant, the only evidence the police have to prove that the gun was loaded at the time it was pointed at the security guard is the round the police discovered in the gun's chamber when they first examined this weapon. As previously indicated, the gun examined by the police did not contain a magazine clip. Instead, a magazine clip for this weapon had earlier been picked up by Defendant's wife where she found it lying on the ground in front of the camper after the Defendant had pointed the gun at the security guard. Accordingly, if the evidence of the round in the handgun's chamber is suppressed, and absent any other evidence to prove that the gun was loaded at the time it was pointed at the security guard, the charge of recklessly endangering another person must also be dismissed because, to convict the Defendant of reckless endangerment, it must be proven that at the time the gun was pointed at the security guard, Defendant in fact was placing the guard in danger of death or serious bodily injury. To sustain a conviction of recklessly endangering another person, "the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so." Commonwealth v. Hopkins, 747 A.2d 910, 915 (Pa.Super. 2000); *see also* Commonwealth v. Reynolds, 835 A.2d 720, 728 (Pa.Super. 2003) ("[A]s a general matter, the mere pointing of an unloaded gun, without more, does not constitute [recklessly endangering another person].").

guard what Defendant had done and were accompanied by this guard to Defendant's camper. When they found Defendant standing in front of his camper with his hands in the air, that the person they saw was the person they were looking for could not have been in question. According to one version of what happened next, the police directed Defendant to keep his hands in the air, which Defendant did, and Defendant immediately volunteered that he didn't have a gun, that it was on the outside table by his camper. Under this scenario, there is no Miranda violation. Commonwealth v. Baez, 720 A.2d 711, 720-21 (Pa. 1998) (finding no violation of Miranda where a suspect in custody spontaneously "blurts out" an incriminating statement).

Even if we were to accept that in addition to Defendant being directed to keep his hands in the air, the police asked Defendant where the gun was and it was in response to this question that Defendant told them, Defendant's answer is admissible under the United States Supreme Court's decision in New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), wherein the Court created a public safety exception to the requirements of Miranda. As stated in Commonwealth v. Bowers, 583 A.2d 1165 (Pa.Super. 1990), *appeal denied*, 598 A.2d 281 (Pa. 1991):

> Normally the fact that a suspect is in custody will require that Miranda warnings be given to the suspect prior to any police questioning. However, in New York v. Quarles, [ ] the United

> States Supreme Court held that in certain situations the requirements of Miranda will be excused where police asked questions to ensure the public safety and not to elicit incriminating responses.

Id. at 1170.

In Bowers, the police responded to a report of a shooting in front of defendant's residence. When the police arrived at the scene they learned that defendant had shot a person walking past his home with a shotgun. The defendant was found hiding in an abandoned house located next to his home, but the police did not know where the gun was. Defendant was arrested and placed in handcuffs and asked several times where the gun was. At first, defendant refused to provide this information. After the police told defendant they wanted to know where the gun was so it wouldn't be found by a child or another person and someone was hurt, defendant informed the police where to look. These statements, which were made after defendant was in handcuffs and obviously in custody, and which were not preceded by Miranda warnings, were found admissible under the public safety exception to the Miranda Rule.

Here, any police inquiry as to the location of the gun was clearly prompted by a concern for the officers' own safety and that of the surrounding campers. The police knew that Defendant was intoxicated, that he had recently been physically abusive of his wife, that Defendant had access to a gun and had recently

pointed it at a security guard and pressed it against his face, that Defendant was not thinking clearly, and that the situation they were then confronting was potentially highly volatile. It was extremely important to know where the gun was and whether Defendant still had it in his possession.

Under these circumstances, the police asked Defendant only one question, where the gun was, and did not seek to elicit any other information for the purpose of incriminating Defendant. Because we conclude that overriding considerations of public safety justified this single, focused question to determine whether Defendant was armed so as to ensure the safety of the officers and the public before Miranda warnings were given, and that the question was not motivated for the purpose of having Defendant incriminate himself, this scenario is one where "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Quarles, 467 U.S. at 657.

CONCLUSION

Because intent is a subjective state of mind, it is of necessity difficult of direct proof and must often, as here, be demonstrated by circumstantial evidence. This is especially difficult in a case of this nature where a gun is pointed but no shots are fired, making the line between threatening bodily

injury and attempting to cause bodily injury with a deadly weapon oftentimes difficult to discern and extremely fact dependent. The distinction, however, is a critical one in determining Defendant's true intent, as it separates two different states of mind: the intent to threaten bodily injury and the intent to cause bodily injury.

"[T]he mere act of pointing a gun at another person is not sufficient to support a conviction for aggravated assault. Something more is required in order to establish a specific intent to cause injury to the person at whom the gun is being pointed." Sanders, 627 A.2d at 187. Absent this something more, such conduct evidences at most a threat to cause bodily injury - an intent, perhaps, to frighten - but not the requisite intent to actually cause bodily injury. Without further indicia of the specific intent to harm, concluding otherwise would rest solely on impermissible suspicion or surmise. For this reason, Defendant's Omnibus Pretrial Motion requesting dismissal of count one of the criminal information, aggravated assault as an attempt to cause bodily injury to another with a deadly weapon, and count two, simple assault as an attempt to cause bodily injury, will be granted.

With respect to Defendant's Motion seeking to suppress his statement regarding the location of the gun because he was not given his Miranda warnings before being asked where the gun was,

the immediately preceding attendant circumstances and the immediate necessity of ascertaining the whereabouts of the gun for the safety of the police and the public justified such inquiry under the public safety exception to the requirement that Miranda warnings be given before questioning by officers. Accordingly, the Defendant's response, as well as the information derived from this response, is not subject to suppression.

BY THE COURT:

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P.J.