IN THE SUPERIOR COURT OF PENNSYLVANIA

APPELLATE DOCKET 3678 EDA 2009

IN RE: T.B.

APPEAL OF T.B.

Appellant's Brief Appealing the Judgment and Order Entered on January 29, 2010, In the Court of Common Pleas of Pike County, Trial Court Docket No. 55-2009

BRIEF OF APPELLANT
CHILDREN'S FAST TRACK APPEAL

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Dated: *March 31, 2010*

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STATEMENT OF JURISDICTION

Jurisdiction of the instant Appeal lies with this Honorable Court by virtue of Pennsylvania Rule of Appellate Procedure 341 (2008).

ORDERS IN QUESTION

Order determining Competency:

AND NOW, this 30th day of September 2009, upon consideration of the Petition challenging the Competency of the Juvenile in this matter, Timothy Berger, and following a full hearing thereon, the Petition to declare Timothy Berger Incompetent is hereby Denied.

The evidence presented indicates that Timothy Berger has significant developmental limitations, including a limited understanding of the nature and seriousness of the charges, a limited understanding of the legal process, and a limited awareness of the roles of the parties.

He has a wide range of abilities demonstrated by his IQ with a full scale IQ AT an extremely low level of 63.

In addition, his verbal comprehension was very low at 57. Yet his reasoning, memory and processing speed were higher with his processing speed for answering questions testing in the normal range.

Based upon the evidence presented, the Court finds that the Juvenile's abilities, while limited, do not constitute incompetence as defined by the law. The Juvenile has an adequate understanding of the charges and procedures involved in this matter.

As indicated in his comments and descriptions to counselors and evaluators the Juvenile has demonstrated the ability to communicate with others, including counsel. Therefore, this Court cannot conclude that the Juvenile's low level of verbal skills and his inability to retain the verbal information necessary to communicate according to such skills constitutes legal incompetence.

Further, while the Juvenile has some inability to recall complex concepts, this limitation itself does not equal incompetency as defined by the law. The Juvenile knows right from wrong, can distinguish degrees of impropriety and can describe them in his own words.

While communication with the Juvenile will have to occur at the Juvenile's level of verbal skills this Court will not conclude that such limitation constitutes incompetency precluding an adjudication in these proceedings.

Therefore, counsel's Motion is Denied.

BY THE COURT:

(s) Joseph F. Kameen
Honorable Joseph F. Kameen, P.J.

Adjudication Order

AND NOW, this first day of October, 2009 after Adjudication Hearing held in this matter at which the Commonwealth met it's burden of proof as to the charge and offenses of Count I, one Count of Aggravated Assault, (F-2), Count II, one count of Simple Assault, (M-2); and Count III, one count of Resisting Arrest of Law Enforcement, (M-2), the Court hereby adjudicates the juvenile delinquent minor and finds him to be in

need of treatment, supervision, and rehabilitation of the Court, that he remain in the shared case management of Pike County Children and Youth Services and their contracted provider and the Pike County Probation Office.

It is further Ordered that to allow the juvenile to remain in the home would be contrary to the welfare of the juvenile and the community and the juvenile be placed at Tioga County Detention Center for a psychiatric re-evaluation.

The Court further notes that reasonable efforts to prevent out-of-home placement were considered but deemed inappropriate in that the juvenile has failed to benefit from community based services for the safety, protection and welfare of the community, and based upon the seriousness of the offense.

It is further Ordered that this matter be returned to Court for disposition upon completion of the psychiatric re-evaluation.

It is further Ordered that transportation of the juvenile in this matter be arranged by the Pike County Sherriff's Office.

BY THE COURT:

(s) Gregory H. Chelak
Honorable Gregory H. Chelak

Disposition Orders

Docketed October 19, 2009, 3:45pm

AND NOW, this 19th day of October 2009, it is the Order of this Court that the juvenile, Timothy Berger, remain in the shared case management of Pike County Children and Youth Services and their contracted provider, and the Pike County

Probation Office, for supervision of the placement at Loysville Youth Development Center in Loysville, PA, to be reviewed physically by the court within six months.

It is further Ordered that to allow the juvenile to remain in the home of his mothers, Susan Berger, would be contrary to the welfare of the juvenile and the community and that reasonable efforts have been made to avoid out of home placement in that the juvenile received a diagnostic evaluation that recommended residential placement for treatment, supervision, and rehabilitation; and the juvenile has received community based services but failed to benefit.

It is further Ordered that pending acceptance to Loysville Youth Development Center that the juvenile be placed at Tioga County Detention Center.

It is further Ordered that transportation in this matter be arranged by the Pike County Sheriff's Office.

It is further Ordered that the parent's right to be heard has been expressed and has been recorded in these proceedings.

BY THE COURT:

(s) Gregory H. Chelak
HON. Gregory H. Chelak

Docketed October 20, 2009 2:46pm

AND NOW, this 19th day of October, 2009 after a Hearing held in the above matter and the juvenile having previously been adjudicated a delinquent minor on one Count of Aggravated Assault, (F-2) one Count of Simple Assault (M-2) and one Count of

Resisting Arrest of Law Enforcement (M-2) it is hereby Ordered that the juvenile pay the costs of prosecution and all related costs and he be placed in the shared case management of Pike County Children and Youth Services and their contracted provider and the Pike County Probation Office for supervision of placement at Loysville Youth Development Center in Loysville, Pennsylvania to be reviewed physically by the Court within 6 months.

The Court further finds that to allow the juvenile to remain in the home with his Mother, Susan Berger, would be contrary to the welfare of the juvenile and the community and that reasonable efforts to prevent out of home placement were made in that the juvenile received a diagnostic evaluation which recommended residential placement for treatment, supervision, and rehabilitation and that the juvenile has received community based services but has failed to benefit from the same.

It is further Ordered that pending acceptance to Loysville Youth Development Center the juvenile be placed at the Tioga County Detention Center.

It is further Ordered that transportation in this matter of the juvenile be arranged by the Pike County Sheriff's Office.

The Court further notes that the juvenile's Mother's rights to be heard have been expressed and recorded in these proceedings.

BY THE COURT:

(s) Gregory H. Chelak
HON. Gregory H. Chelak

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court erred in finding the juvenile competent to stand trial where evidence was presented on behalf of the juvenile consisting of testimony and a report from Dr. Kirk Heilbrun who found the juvenile, who has been diagnosed with pervasive developmental delay, mental retardation, and autism, was not competent to stand trial and the Commonwealth presented no expert testimony to the contrary.

   Suggested Answer in the Affirmative

2. Whether the trial court erred in adjudicating the juvenile delinquent on the count of resisting arrest as the Commonwealth's evidence was insufficient to establish that the Officer was attempting to effectuate a lawful arrest or other duty.

   Suggested Answer in the Affirmative

3. Whether the trial court erred in adjudicating the juvenile delinquent on the count of resisting arrest where the decision was against the weight of the evidence, as the Commonwealth failed to prove beyond a reasonable doubt that the Officer was attempting to effectuate a lawful arrest or other duty.

   Suggested Answer in the Affirmative

4. Whether the trial court erred in adjudicating the juvenile delinquent on the count of simple assault where the Commonwealth's evidence was insufficient to establish that the officer had suffered from substantial pain or an impairment of physical condition.

   Suggested Answer in the Affirmative

5. Whether the trial court erred in adjudicating the juvenile delinquent on the count

of simple assault as the decision was against the weight of the evidence, where the Commonwealth failed to prove that the alleged victim suffered substantial pain or an impairment of physical condition.

Suggested Answer in the Affirmative

6. Whether the trial court erred in adjudicating the juvenile delinquent of aggravated assault where the Commonwealth's evidence was insufficient to establish substantial pain or an impairment of physical condition rising to the level of simple assault and thus could not constitute aggravated assault based on the protected status of the victim.

   Suggested Answer in the Affirmative

7. Whether the trial court erred in adjudicating the juvenile delinquent of aggravated assault as the decision was against the weight of the evidence where the Commonwealth failed to prove that the alleged victim suffered substantial pain or an impairment of physical condition rising to the level of simple assault and thus could not constitute aggravated assault based on the protected status of the victim.

   Suggested Answer in the Affirmative

8. Whether the disposition of the juvenile was in error where the trial court ordered the child committed to Loysville Youth Development Center, a secure facility, when no less restrictive placements or services had been attempted consistent with 42 Pa. Cons. Stat. § 6352 (2009) and when there was no showing that the juvenile posed any danger to the community.

   Suggested Answer in the Affirmative

STATEMENT OF SCOPE AND STANDARD OF REVIEW

1. Although the decision of whether a juvenile is competent to stand trial rests in the sound discretion of the trial court, it must be an informed decision based on evidence. The court is required to conduct a "careful and complete" inquiry. *Commonwealth v. Knight*, 419 A.2d 492, 497 (Pa Super. Ct. 1980).
2. To establish that the trial court erred in adjudicating the juvenile delinquent on the counts of resisting arrest, simple assault, and aggravated assault based on the sufficiency of the evidence, the juvenile must prove that the Commonwealth's evidence was insufficient to prove each and every element of the offense beyond a reasonable doubt. The reviewing court is required to accept as true all of the evidence of the Commonwealth and all reasonable inferences arising therefrom upon which the trial court could have properly rendered its decision. *Commonwealth v. Biagini*, 644 A.2d 492, 497 (Pa. 1995).
3. To determine whether the trial court erred in adjudicating the juvenile delinquent on the counts of resisting arrest, simple assault, and aggravated assault because the decision was against the weight of the evidence, the appellate court "may only reverse the lower court's verdict if it is contrary to the evidence as to shock one's sense of justice. Where the lower court ruled on the weight claim below . . . appellate review is limited to whether the trial court palpably abused its discretion." *Commonwealth v. Champney*, 832 A.2d 403 (Pa. 2003).
4. The standard of review of a juvenile disposition is abuse of discretion. *Commonwealth v. Przybla*, 722 A.2d 183, 184 (Pa. Super. Ct. 1998). When selecting from disposition alternatives authorized by the Juvenile Act the court must order the least restrictive alternative, and if confinement is necessary, the

court shall impose the minimum amount of confinement that is consistent with the protection of the public and the rehabilitation needs of the child. 42 Pa. Cons. Stat. § 6352 (2009).

STATEMENT OF THE CASE

Form of Action and Procedural History

The juvenile, Timothy Berger ("Timmy B."), appeals the juvenile court's finding of competency and his adjudication and disposition on charges of simple assault, aggravated assault, and resisting arrest. At the conclusion of a competency hearing for Timmy B. held on September 30, 2009, The Court of Common Pleas of Pike County – Juvenile Court found Timmy B. to be competent to stand trial. (Trial Ct. Order Sep. 30, 2009.) An adjudication hearing was held on October 1, 2009 wherein the Juvenile Court adjudicated Timmy B. delinquent on charges of simple assault, aggravated assault, and resisting arrest. (Trial Ct. Order Oct. 1, 2009.) On October 19, 2009 a disposition hearing was held and the Juvenile Court committed Timmy B. to Loysville Youth Development Center. (Trial Ct. Order Oct. 19, 2009.) On November 6, 2009 the Juvenile Court denied Timmy B.'s Post-Disposition Motion. (Trial Ct. Order Nov. 6, 2009.) Timmy B. filed a Notice of Appeal *In Forma Pauperis* that was docketed with the Superior Court on December 22, 2009. Timmy B. filed an amended Notice of Appeal on January 7, 2010, with a Concise Statement, pursuant to Pa. R.A.P. § 1925(b) challenging the Juvenile Court's orders declaring Timmy B. competent to stand trial, adjudicating him delinquent, and committing Timmy B. to Loysville Youth Development Center. The Superior Court granted a Motion for Extension of Time for Appellant's Brief on March 17, 2010. (Trial Ct. Order Mar. 17, 2010.)

Prior Determination of Court and Judges Whose Determinations Are to be Reviewed

The Court of Common Pleas of Pike County – Juvenile Court made a prior determination in Timmy B.'s case, finding him competent to stand trial, adjudicated him delinquent, and entered a disposition order for Loysville Youth Development Center. The Honorable Joseph F. Kameen, President Judge of the Court of Common Pleas, ordered Timmy B. competent to stand trial on September 30, 2009. The Honorable Judge Gregory H. Chelak ordered Timmy B. adjudicated delinquent on October 2, 2009, and ordered a dispositional placement at Loysville Youth Development Center in orders from October 19, 2009 and October 20, 2009.

Statement of Facts

On June 10, 2009, Timmy B.'s mother, Susan B., called the Pennsylvania State Police at the request of her son's therapist, because the sixteen year-old mentally retarded, autistic juvenile was upset over an incident at school. (N.T. Adj. Hr'g p. 25-26, Oct. 2, 2009.) When the police arrived at the house, Timmy B. was crying on the stairs inside the house. (*Id.* at p. 28.) Mrs. Berger informed the officer that Timmy B.'s therapist was on the way and asked him to wait for the therapist before talking to her son. (*Id.* at p. 27-28.) The officer, Trooper Carl Ives, stated that he did not have time to wait and attempted to engage the juvenile in conversation. (*Id.* at p. 28) Timmy B. became upset and told the officer to leave but the officer reached for Timmy B.'s arm to try to move him. (*Id.* at p. 29-30) The pair tumbled down the stairs and ultimately, the officer landed on top of Timmy B., pinning him to the ground. (*Id.* at p. 30) At that point, the officer shot Timmy B. in the chest with his taser gun. (*Id.* at p.10, 31-32)

The juvenile was detained and charged with simple assault, aggravated assault, and resisting arrest. The juvenile was represented at the time by the Pike County Public Defender's Office. A detention hearing was held on June 15, 2009. (Trial Ct. Order June 15, 2009.) Timmy B. waived the detention hearing and entered an admission to the charge of aggravated assault. (N.T., H'rg, June 15, 2009).

Timmy B. was sent to Tioga County Detention Center for the purpose of a diagnostic evaluation and a disposition hearing was initially scheduled for August 5, 2009 (Trial Ct. Order July 20, 2009) and then continued until August 19, 2009. (Trial Ct. Order Aug. 6, 2009.) The juvenile obtained private counsel for the disposition hearing. A continuance was granted to allow counsel to file a written Motion for a Competency Evaluation and a Motion to Withdraw Admission to Delinquency.[1] (Trial Ct. Order Aug. 13, 2009.)

Competency Hearing

Timmy B.'s Motion for Competency Evaluation was granted. (Trial Ct. Order Aug. 18, 2009.) Timmy B. was evaluated by Dr. Kirk Heilbrun, Ph.D., Professor and Head of the Psychology Department at Drexel University, at the Lehigh County Detention Center on August 21, 2009. (N.T. Comp. Hr'g, Pet'r Ex. 2: Heilbrun Eval. p. 1, Sept. 30, 2009 [hereinafter "N.T. Heilbrun Eval."].) Dr. Heilbrun determined that the juvenile was not competent to stand trial. (N.T. Comp. Hr'g p. 31:1-4.) The Commonwealth did not request an additional competency evaluation and none was

[1] In this case, Timmy B.'s admission was withdrawn. When Timmy B. entered his admission it was clear that he was unable to understand the legal process and communicate with his attorney and the court. (N.T. Admission Hr'g. June 15, 2009.) When Timmy B.'s former attorney asked if he understood the charges against him and why he was in court, he responded "No." (*Id*. at 6.) When he was asked what part he did not understand he responded "about the legal stuff." (*Id*.) When asked if he observed Trooper Ives bleeding on the day of his arrest, he responded "I think I sees boo-boo's." (*Id*. at 7.)

requested by the court.

A Competency Hearing and Hearing on the Juvenile's Motion to Withdraw Admission was held on September 30, 2009. (N.T. Comp. Hr'g.) Timmy B. presented the testimony of Dr. Heilbrun. (*Id.* at p. 7-60.) The Commonwealth stipulated that Dr. Heilbrun is an expert in the field of psychology, juvenile delinquency, competency, and certification proceedings. (*Id.* at p. 7.) The report of Dr. Heilbrun, finding to a reasonable degree of psychological certainty that the juvenile was not competent to stand trial, was admitted into evidence. (*Id.* at p. 3.) Overall, Dr. Heilbrun concluded the following:

> Timothy appears to have some factual understanding of his charges and the roles of defense attorney, prosecutor, and judge. However, Timothy demonstrates very significant deficits in factual and rational understanding of the court process and plea bargaining. Timothy also demonstrates deficits in his ability to assist in his own defense. These deficits appear directly related to his low level of intellectual functioning measured in the Extremely Low (Mentally Retarded) range . . . We recognize and respect that the ultimate decision regarding Timothy's competence to stand trial is a legal one made by the judge. Our clinical opinion, to a reasonable degree of psychological certainty, is that Timothy is presently not competent to stand trial.

(N.T. Comp. Hr'g, p. 30:15-32:10; Heilbrun Eval. p. 14.)

Dr. Heilbrun provided a summary of Timmy B.'s relevant family, medical, psychiatric, educational, social, and offense history. (N.T. Comp. Hr'g p. 13) Timmy B. displayed several developmental delays as a young child and was later diagnosed in the autism spectrum. (*Id.* at p.13-14.) He was in Early Intervention programming for three years, and then special education, occupational therapy, and speech therapy, and therapeutic support staff (TSS) services, pursuant to his Individualized Education Plan (IEP).[2] (*Id.* at p. 14, 15.) In high school Timmy B.'s behavior appeared consistent with

[2] Timmy B.'s IEP reveals that he required learning support for Reading, English, Mathematics, Science,

severe obsessive compulsive disorder which manifested as excessive hand washing and showering. (*Id.* at p. 14.) He has no history of substance abuse and no prior arrest history. (N.T. Heilbrun Eval. p. 8, 9.)

Dr. Heilbrun also assessed Timmy B.'s current clinical condition. Timmy B.'s speech was slow and halting. (N.T. Comp. Hr'g p. 17.) Timmy B. had to be reminded repeatedly as to the purpose of the evaluation and the limits of confidentiality. (*Id.* at p. 16-17.) Dr. Heilbrun concluded that Timmy B. did not have a meaningful understanding of the parameters of the evaluation. (*Id.* at p. 16.) Based on tests administered by Dr. Heilbrun, Timmy B. has a full scale IQ of 63 (*id.* at p. 18), placing him in the Extremely Low level of verbal comprehension. (*Id.* at p. 18.) His scores were inconsistent across component indices, ranging from Extremely Low to Average (Verbal Comprehension Index = 57, Perceptual Reasoning = 71, Working Memory Index =71, Processing Speed Index = 91). (*Id.* at p. 18; N.T. Heilbrun Eval. p. 8.)

Dr. Heilbrun assessed Timmy B.'s understanding and appreciation of charges, pleas, and penalties and concluded that Timmy B. had a limited factual understanding of the charges against him and the serious nature of the charges. (N.T. Comp. Hr'g p. 22.) Timmy B. reported that he had been charged with "grand theft." (N.T. Heilbrun Eval. p. 9.) Upon further discussion, Timmy B. could not report the names for the offenses, but was able to report that they involved "hitting a cop." (*Id.*) Timmy B. did not know the consequences that could result from the charges, and merely stated, "I don't know, bad

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and Social Studies. (N.T. Heilbrun Eval. p. 7.) His intelligence was tested to be the age equivalent of a nine year old. (N.T. Disp. Hr'g p. 13.) Timmy B. was continuously enrolled in the special education program in the Wallenpaupack School District, aside from a brief placement at Kids Peace in 2008 to develop a medication regimen to address his obsessive compulsive disorder. (N.T. Heilbrun Eval. p. 7.) In early 2009, Timmy B. was placed in the Kids Peace day program after a recurrence of obsessive compulsive behaviors. (*Id*. at. p. 6.)

things happen." (*Id.*) Dr. Heilbrun also found Timmy B. had difficulty comprehending and retaining factual information and applying the information to reasoning about decision-making relevant to his defense. (*Id.* at p. 10.)

Dr. Heilbrun also assessed Timmy B.'s understanding and appreciation of the respective roles of the prosecutor, defense attorney, probation officer and Judge. (N.T. Comp. Hr'g p. 24-27.) Based on his responses, Dr. Heilbrun concluded that Timmy B.'s factual understanding of the respective roles of the judge, prosecutor and defense attorney was quite limited and that he did not have a satisfactory overall appreciation of these various parties and their roles and responsibilities in court. (*Id.* at p. 26-27.) He displayed no awareness that the Judge is a neutral decision maker who considers evidence presented by both sides. (N.T. Heilbrun Eval. p. 11.)

Dr. Heilbrun assessed Timmy B.'s ability to assist counsel and found that throughout the interview, Timothy often misunderstood questions, did not know correct responses, gave incomplete answers, and had difficulty retaining simple factual information after it had been provided to him. (N.T. Comp. Hr'g p. 27-28.) Dr. Heilbrun concluded that Timmy B. had a very limited potential to assist counsel and provide testimony. (*Id.* at p. 22- 23.)

Finally, Dr. Heilbrun assessed Timmy B.'s ability to make decisions, including entering a plea. (*Id.* at p. 28-30.) Timmy B. displayed confusion and showed particular difficulty understanding the possible consequences of pleas and making a rational decision regarding a plea. (*Id.* at p. 29-30.) Dr. Heilbrun again concluded that this was related to Timmy B.'s intellectual deficits. (*Id.* at p. 30.)

At the competency hearing, the Commonwealth presented, over objection, the

testimony of two individuals who are not experts in juvenile competency. The first witness was a child care worker at Tioga County Department of Human Services Detention Unit, Mr. Rodney Missel. Mr. Missel testified to authenticate a Behavioral Observation Report that he prepared which the Commonwealth presented to display Timmy B.'s factual recitation of events (*id.* at p. 61); however, on cross examination the witness admitted that the items quoted in the report were not actually quotes from Timmy B. (*Id.* at p. 70-72.) Mr. Missel had prepared the report from notes of his interview with Timmy B. and had edited it grammatically and corrected the sentence structure. (*Id.*) He never questioned Timmy B. about any matters relevant to the legal competency standard, i.e. his understanding of the judicial process, the roles of the prosecutor, defense attorney, Judge, and probation officer, his ability to communicate with his attorney, or his ability to understand and make rational decisions regarding plea bargaining. (*Id.* at p. 72-73.)

The Commonwealth also called the arresting officer, Trooper Ives, who testified that he attempted to have a conversation with Timmy B. and that Timmy B. told him he wanted him out of the house. (*Id.* at p. 76.) On cross examination, Mr. Ives admitted that he did not question Timmy B. regarding any matters relevant to the legal standard of competency. (*Id.* at p. 76-77.)

At the close of testimony, counsel for Timmy B. requested that the Court grant the Motion to Withdraw Admission (*id.* at p. 82-84), deeming the juvenile incompetent to stand trial, and transfer the case from delinquency to dependency. The Court found the juvenile competent to stand trial (*id.* at p. 81), but granted the Juvenile's Motion to Withdraw Admission finding that given the juvenile's limitations, a lengthier colloquy was necessary (Trial Ct. Order Oct. 2, 2009.).

Adjudication Hearing

The adjudication hearing was scheduled the next morning. Prior to the start of the adjudication hearing, counsel for the juvenile noted her continuing objection to the adjudication hearing taking place based upon the juvenile's continued inability to communicate with counsel and understand the nature of the proceedings against him. (N.T. Adj. Hr'g p.5, October 1, 2009.) Nevertheless, the adjudication hearing commenced. The Commonwealth called Trooper Carl Ives; the Timmy B. called his mother, Susan B. The testimony revealed the following:

Susan B. picked her son up at the bus stop after school on the day of the alleged offenses. Timmy B. had been upset at school earlier that day about an incident involving his cell phone. His therapist talked with Timmy B. at the school and calmed him down. On the drive home from the bus stop, Susan B. attempted to talk to Timmy B. about what had happened at school that day. He got upset. He stepped out of the car and said he was walking home. (*Id.* at p. 25-26, 33-34.) Susan B. called the therapist and asked if she would come to the house to try to calm Timmy B. down. The therapist told her to call 911, have the police wait for her, and then they would talk to Timmy B. Susan B. thought she was following protocol, and made the phone call to the police. (*Id.* at p.25-26, 27.)

When Trooper Ives arrived at the home, he was met by Mrs. Berger. He was notified that Timmy B. was mentally disabled, autistic, and had become upset over an incident at school. He was also told that Timmy B.'s therapist was en route to the residence. (*Id.* at p. 27-28.) Timmy B.'s mother testified that she had requested that the officer wait for the therapist before speaking with her son, but the officer refused, stating

that he did not have time to wait. (*Id.* at p. 27-28.) Trooper Ives admitted that he knew the therapist was on her way. (*Id.* at p. 7.)

Timmy B. was sitting on the stairs that go to the second floor, inside the house, crying when the officer arrived. (*Id.* at p. 7, 28.) Despite Mrs. Berger's request for him to wait for the therapist, and his admitted lack of training in dealing with special needs children, Trooper Ives confronted Timmy B. (*Id.* at p. 15-16, 28-30.) Timmy B. immediately told the officer to leave the house and that he hated police. (*Id.* at p. 7-8, 29.) Again, rather than waiting for the therapist, the officer confronted Timmy B. about why he hated police. (*Id.* at p. 8, 29-30.) Timmy B. once again, albeit profanely, demanded that the officer leave his house. (*Id.* at p. 8-9, 29.)

Timmy B.'s mother testified that she repeated her request for the trooper to wait for the therapist and told him that the therapist had just called and was right around the corner. (*Id.* at p. 29.) She also explained to him again that Timmy B. was autistic. Once again, despite this request to wait, the officer confronted Timmy B. and attempted to get him to go outside. (*Id.* at p. 29-30.)

According to Susan B., the officer reached for Timmy B.'s arm and Timmy B. flailed. The officer then wrestled Timmy B. to the ground and the two tumbled down the stairs on to the living room floor. The officer pinned Timmy B. on his back and reached for his weapon. Timmy B. yelled, "I don't care, go ahead and shoot me." The officer ordered Timmy B.'s mother out of the house, and then shot Timmy B. in the chest with a taser gun. (*Id.* at p. 29-32.)

Trooper Ives testified that he could not remember his exact conversation with Susan B. or Timmy B. He could not remember whether she had asked him to wait for the

therapist. (*Id.* at p. 15.) He could not remember if she told him that Timmy B. was autistic, mentally retarded, had obsessive compulsive disorder, or that he was in special education. (*Id.* at p. 15.) He could not recall if Timmy B. was crying. (*Id.* at p. 16-17.) He could not remember what he talked to Timmy B. about. (*Id.* at p. 17.) He could not recall if he broke his conversation off with Timmy B. and went back to talk to Susan B. (*Id.* at p. 18.)

Trooper Ives also had difficulty remembering the details of the physical altercation with Timmy B. Trooper Ives testified that Timmy B. took a few steps toward him on the steps before the officer put him to the ground.[3] He could not recall if Timmy B. said anything as he came towards him. (*Id.* at p. 19.) He could not recall if he hit any type of railing on the stairs. (*Id.* at p. 20.) He could not recall the exact location of how they struck the floor after they fell down the stairs. (*Id.* at p. 20.) He could not recall where his hands where when he pinned Timmy B. down on the ground before striking him with the taser. (*Id.* at p. 21.) He could not recall if he instructed Timmy B.'s mother to leave the house before shooting Timmy B. with the taser gun. (*Id.* at p. 21.)

The officer testified that Timmy B. told him repeatedly to get out of his house. (*Id.* at p. 18.) Timmy B. then took a couple of quick steps down the stairs toward the officer. (*Id.* at p. 19.) Trooper Ives did not order him to stop or back up. There was no testimony that Timmy B. threatened the officer in any way. The officer did not attempt to take a step backwards. He did not call for back up. (*Id.* at p.19.) Rather, he made the decision to put his hands on Timmy B., grab his arm, and "put him to the ground." (*Id.* at

[3] The trial court opinion states that the juvenile leapt towards the trooper and both individuals fell to the ground where the trooper attempted to restrain the juvenile. (Trial Ct. Op. p. 6.) This is not supported by the record. Trooper Ives testified that, "he was seated on the steps, he stood up and came down toward me in a quick fashion, more or less like a leap I would say. At which point I had grabbed Mr. Berger and put him to the ground as both of us went to the ground." (N.T. Adj. Hr'g p. 9.) Trooper Ives also testified that as the juvenile came towards him, he made the decision to use physical contact. (*Id.* at p. 19.)

p. 9, 19-20.)

After tumbling down the stairs, Trooper Ives pinned Timmy B. on his back. (*Id.* at p. 20.) During the struggle, the officer stated he was struck in the face and the lip. He did not know if it was with an open hand or a closed hand. Timmy B. also scratched the officer's face. (*Id.* at p. 9-10.) The officer ordered him to go face down and to stop resisting. The officer then stepped back and deployed his taser into Timmy B.'s chest. (*Id.* at p.10.) He then rolled Timmy B. over and handcuffed him. The officer testified that it was necessary to deploy his taser in order to make an effective arrest. (*Id.* at p. 11.)

As a result of the struggle, Trooper Ives had a few scratches on his face. He stated he did not even realize they were there until Susan B. pointed them out. (N.T. Adj. Hr'g p. 11, Commonwealth's Ex. 1.) The officer also testified that he had a swollen lip, although this is barely, if at all, visible on the pictures introduced by the Commonwealth. (N.T. Adj. Hr'g, p. 13, Commonwealth's Ex. 2.) The officer never testified that he was in any pain or that he received any medical attention, that he missed any time from work, or that he had any problems talking or eating as a result of his alleged injuries.

Timmy B. had marks from the taser entering his chest. He was not taken to the hospital after he was shot. (N.T. Adj. Hr'g, p. 23.) An internal investigation with the Pennsylvania State Police was conducted into the officer's use of his taser. Trooper Ives did not know whether the investigation was ongoing. (*Id.* at p. 22.)

After the hearing, Timmy B. was convicted of all charges: aggravated assault, simple assault, and resisting arrest. Over objection, Timmy B. was sent for a psychiatric re-evaluation at Tioga County Detention Center which the probation department alleged

was necessary in order to obtain funding for placement.

Disposition Hearing

At the disposition hearing Probation Officer Peter Yolango testified. He testified that Timmy B. was in the ninth grade and received special education services, had just begun to receive in-home behavioral health services when he was arrested, and that he had a past behavioral health hospitalization at Kids Peace. (N.T. Dispo Hr'g p. 6, 7, Oct. 19, 2009.) Yolango also testified that the recommendations given in the diagnostic, psychiatric and psychological evaluations submitted to the court were for "a residential program that would enable the juvenile the opportunity to acquire a sense of independence and the skills necessary to facilitate the same," and mentioned the specific recommendation of Devereux Kanner Residential Treatment Program. (*Id*. at p. 15.) Yolango testified that he recommended that Timmy B. be placed in Loysville Youth Development Center, which is one of the most restrictive placements in the juvenile justice system. (*Id*. at p. 21.) Yolango also testified that the residential placement facilities that Timmy B. was referred to were not appropriate because funding was not available for them. (*Id*. at p. 25, 27.)

Yolango testified that this was Timmy B.'s first time in the juvenile justice system, his behavior in school was adequate (i*d.* at p. 31), and that the family struggled with Timmy B.'s Obsessive Compulsive Disorder (OCD) issues, but that Timmy B. did not display any anger management concerns or violent behavior. (*Id*. at p. 32.)

Erin Longendorfer, the Child and Adolescent Services Program Coordinator (CASSP) and Jeffrey Elston, the children and youth worker assigned to the case, both testified and recommended that Timmy B. remain in the community with treatment

services. (*Id.* at p. 42, 58.) Longendorfer explained that Timmy B. was not approved for residential treatment because it was too restrictive given his needs and that there were services in the community that still should be tried. (*Id*. at p. 48.) Ms. Logendorfer also confirmed that family-based services had just begun when Timmy B. was arrested. (*Id*. at p. 56.) Both Logendorfer and Elston testified that their recommendations for services in the community were based on Timmy B.'s needs as well as the safety of the community and the seriousness of the offense. (*Id*. at p. 45, 59-60.) Elston also confirmed that Timmy B.'s case would have shared case management between the child welfare agency and probation. (*Id*. at p. 58.)

Susan B., Timmy B.'s mother, testified that Timmy B. has had a history of mental health disorders, including Obsessive Compulsive Disorder, Mild Mental Retardation, and Autism. (*Id*. at p. 69.) She explained when she called the police on June 10, 2009, she did so to get help for her son, not because she was fearful of him, (*id.* at p. 65.) and that she did so at the request of Timmy B.'s therapist who was on her way to the family's home. (*Id*. at p. 73.) She explained that Timmy B. has had one inpatient psychiatric hospitalization and has participated in one mental health day program. (*Id*. at p. 65-66.) At the time of Timmy B.'s arrest on June 10th, family based therapy had been in place for only three weeks. (*Id*. at p. 78.) She testified that various staff members at the detention center told her that Timmy B. had been very well behaved for the five months he was detained. (*Id.* at p. 71.) She stated that she was able to support Timmy B. in the home and would work with service providers she already had in place or with anyone else suggested by the court if it would benefit Timmy B. and had arranged her work schedule so she could be there to supervise Timmy B. when he was home from school. (*Id.* at p.

69, 67.)

The Court ordered that Timmy B. be placed at Loysville Youth Development Center at the end of the disposition hearing. (*Id*. at p. 90.)

Following disposition, counsel related to the Court that she could not engage in a post-disposition colloquy with Timmy B. because she had been unable to determine if her client understood the proceedings and their consequences given his developmental delays and mental health issues. (*Id.* at p. 91.) Timmy B. did not sign the Post-Disposition Proceeding Colloquy. Rather, counsel requested that the Court apprise the juvenile of his Post-Disposition rights. (*Id.*)

In response to the Court's two page explanation of Timmy B.'s right to file a post disposition motion and appeal and his right to the assistance of counsel, Timmy B. responded: "Um, I don't know what you are trying to say to me. . . . I'm very sorry, Your Honor." (*Id.* at p. 93.) The court continued:

> Let me explain it this way. Do you understand that you can communicate with your lawyer and that your lawyer, on your behalf can file papers with this Court after today's Hearing, among other things asking the Court to reconsider it's ruling or asking another Court to look and decide whether I made the right decision here?

(*Id*.) To which Timmy B. responded, "[s]o what is my choice again?" (*Id*.) Following another attempt to gage Timmy B.'s understanding of his rights, Timmy B. responded, "[i]s that my final choice?" (*Id*.) The hearing was soon concluded.

Order under Review

The juvenile, Timmy Berger, appeals from the orders of the Court of Common Pleas of Pike County – Juvenile Court finding him competent to stand trial on September 30, 2009, adjudicating him delinquent on October 1, 2009, and ordering him placed at

Loysville Youth Development Center on October 19 and October 20, 2009.

Statement of Place of Raising or Preservation of Issues

Appellant has preserved his right to appeal the trial court's competency determination, the adjudications of delinquency, and the disposition order placing him at Loysville Youth Development Center by filing a post dispositional motion and through this appeal. Appellant reiterated her objection to the court's ruling on competency at the beginning of both the adjudication hearing and dispositional hearings. (N.T. Adj. Hr'g p. 5; Disp. Hr'g p. 91).

Discretionary Aspects of Disposition on Appeal[4]

Appellant argues that the trial court abused its discretion in ordering that Timmy B. be placed at Loysville Youth Development Center when no less restrictive alternatives where attempted prior to the choice of this disposition, Timmy B. was not identified as a threat to the community in any way, and where this was his first contact with the juvenile justice system.

SUMMARY OF ARGUMENT

Appellant, a learning disabled youth with multiple behavioral health disabilities, challenges the trial court's determination that he was competent to stand trial, that his adjudication was properly based on sufficient evidence, and that, assuming *arguendo* that

[4] It is unclear whether the requirements of Pa. Appellate Rule 2119(f) apply to appeals from juvenile disposition orders. *In re L.A.*, 853 A.2d 388 (Pa. Super. Ct. 2004) (finding appellant juvenile's failure to include a Rule 2119(f) statement in her appellate brief did not preclude review of her appeal of the disposition order entered after a delinquency adjudication). Appellant has included this section to ensure proper preservation of all issues on appeal.

his adjudication was proper, that his disposition was consistent with the law.

The trial court erred in finding Timmy B. competent where only expert evidence finding the youth incompetent was presented. Dr. Kirk Heilbrun was found by the court to be an expert in competency evaluation. Dr. Heilbrun completed a comprehensive evaluation that was submitted to the court and presented extensive testimony that concluded that Timmy B. was not competent to stand trial. The Commonwealth did not present an expert to support a determination of competency and the court did not order any additional evaluation. Nevertheless the court, in error, determined that Timmy B. was competent without relying on any credible findings to support such a determination.

The court adjudicated Timmy B. delinquent of resisting arrest, simple assault, and aggravated assault. These adjudications must be reversed as they were made absent sufficient evidence and with a manifest abuse of discretion. On June 10, 2009, Trooper Ives arrived at the Berger home in response to a call from Timmy B.'s mother, not based on an arrest warrant. Timmy B. had had a difficult day at school and was upset at what had occurred. He was not exhibiting any violent or uncontrollable behavior. He was sitting on the steps within his home when the Trooper arrived. Despite the requests of Timmy B.'s mother to wait for the therapist who had telephoned and was on her way and despite Timmy B.'s multiple requests for the Trooper to leave the home, the Trooper continued to confront and approach the youth, which resulted in a scuffle between the Trooper and the youth. Because Trooper Ives cannot demonstrate that he was making a lawful arrest, a prerequisite of a resisting arrest charge, the adjudication based on resisting arrest must be reversed.

The adjudications based on simple and aggravated assault must also be reversed

because sufficient evidence was not presented to demonstrate that Trooper Ives suffered "bodily injury" as required to make out the simple assault charge. Timmy B. was charged with aggravated assault because Trooper Ives is a law enforcement official. Under Pennsylvania law the simple assault of a law enforcement official is considered aggravated assault. Because appellant argues that the simple assault charge was not made out, the aggravated assault charge must also be reversed if the court determines that the Commonwealth did not present sufficient evidence to show that Trooper Ives suffered "bodily injury."

Finally, were the court's adjudication of Timmy B. to be sustained, ordering Timmy B. to be placed at Loysville Youth Development Center was an abuse of discretion. Until June 10, 2009, Timmy B. had not had any contact with the juvenile justice system. Any misbehavior at school was only minor and Timmy B.'s struggles at home related mostly to his behavioral health issues, for which his mother was seeking assistance. After the events of June 10, Timmy B. was detained and had not been returned home since that time. From this first point of contact with the juvenile justice system, no efforts or services were provided or attempted with Timmy B. and his family – no community or school-based supervision, no enhanced treatment such as family functional treatment or therapeutic foster care, community service or restitution were attempted. – even though there was no demonstration that Timmy B. posed any threat or danger to the community. While the court has a great deal of discretion in designing a disposition for a juvenile, the court cannot choose a disposition, as it did in this case, that has no correlation to an assessment of the risk Timmy B. poses to the community, that ignores all less restrictive alternatives and services, disrupts the unity of the family, and

places him in one of the most restrictive placement available in the juvenile justice system.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING TIMMY B. COMPETENT TO STAND TRIAL.

Pursuant to Pennsylvania's Mental Health Act, "whenever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues." 50 Pa. Stat. § 7402 (2009). It is axiomatic that juveniles found to be incompetent are likewise ineligible for trial; adjudicating an incompetent juvenile delinquent violates due process:

> A man's right to a fair trial and a meaningful defense strike at the heart of due process of the law. If a defendant is incapable of cooperating with his defense counsel, because of mental illness he cannot take advantage of the basic protections the law affords to all men. Moreover, the United States Supreme Court, as well as this Court, have consistently ruled that legal counsel is an absolute necessity in a criminal trial, and, yet, if a man is provided with counsel, but unable to cooperate with his counsel because of mental illness, the protections which counsel can provide become a nullity.

Commonwealth v. Kennedy, 305 A.2d 890, 893-94 (Pa. 1973).

The standard to determine competency to stand trial in Pennsylvania has been made clear:

> [T]he test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial ... is ... his ability to comprehend his position as one accused of [a crime] and to cooperate with his counsel in making a rational defense. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational

> understanding, and have a rational as well as a factual understanding of the proceedings against him.

Commonwealth ex rel. Hilberry v. Maroney, 227 A.2d 159, 160 (Pa. 1967) (internal citations omitted).

A. Timmy B. Met His Burden of Proving Incompetence.

The defendant carries the burden to prove his incompetence for trial. 50 Pa. Stat. § 7402(a). The "determination of competency rests in the sound discretion of the trial court." (Trial Ct. Op. p. 3, Sept. 30, 2009.) However, in deciding the question of competency, "the judge should enter upon a 'careful and complete' inquiry, and the decision should be an informed one, based on evidence. Where the decision is not based on proper or sufficient evidence" the case will be reversed. *See Commonwealth v. Knight*, 419 A.2d 492, 497 (Pa. Super. Ct. 1980).

A lower court's finding of competency may be reversed where there is no affirmative testimony on the record that appellant was competent to stand trial and the defendant presented substantial evidence of incompetence. *See Kennedy*, 305 A.2d at 892. In *Kennedy*, a finding of competency was reversed where two experts determined that the defendant was incompetent to stand trial and the third, while unable to testify with certainly, "had serious reservations as to [the defendant's] ability to cooperate with counsel." *Id.* Absolutely no evidence, expert or otherwise, was presented to support the trial court's competency finding.

The trial court below found that Timmy B. "has significant developmental limitations, including a limited understanding of the nature and seriousness of the charges, a limited understanding of the legal process, and a limited awareness of the roles of the parties..." (Trial Ct. Op. p. 3.) In its Order, the court found that Timmy B. had a

full scale IQ of 63 and a verbal comprehension score of only 57.[5] (Order p. 1, Oct. 7, 2009.) The court also found that the juvenile had low verbal skills and an "inability to retain the verbal information necessary to communicate according to such skills." (*Id*. at p. 2.) Additionally, the court found that the juvenile did not have the ability to recall complex concepts. (Trial Ct. Op. p. 4.) Despite these severe limitations, the court found that the juvenile had the ability to communicate with counsel and declared that the juvenile was competent because "he knows right from wrong, can distinguish degrees of impropriety, and can describe them in his own words." *Id.*

As a threshold matter, the trial court did not apply the correct standard in determining Tommy's competence to stand trial. Whether Timmy B. "knows right from wrong" is irrelevant to a competency determination:

> The test to be applied in determining the legal sufficiency of [the defendant's] mental capacity to stand trial, or enter a plea at the time involved, is not the M'Naghten 'right or wrong' test, but rather his ability to comprehend his position as one accused . . . and to cooperate with his counsel, in making a rational defense. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him.

Kennedy, 890 A.2d at 892 (citations omitted). The trial court's finding failed to consider or address whether Timmy B. understood the judicial proceedings or could assist his defense attorney. *See Knight,* 419 A.2d at 502 ("there are two questions to be considered in determining the appellant's competency; first his ability to understand the nature and

[5] For educational use, an IQ score of 69 or below is considered in the extremely low or intellectually deficient range. David Wechsler, *Wechsler Adult Intelligence Scale* (3d ed. 1997). For psychiatric use an IQ in the range of 55 to 70 would put an individual in the Mild Mental Retardation range. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

object of the proceedings; and second, his ability to participate and assist in his defense").

Timmy B. presented substantial evidence, through his expert Dr. Kirk Heilbrun, of his incompetence to stand trial. The court found that Dr. Heilbrun was "an expert witness in the field of juvenile proceedings and in the field of juvenile competency…" (N.T. Comp. Hr'g p. 8.) Dr. Heilbrun concluded that while "Timothy appears to have some factual understanding of his charges and the roles of defense attorney, prosecutor, and judge . . . Timothy demonstrates very significant deficits in factual and rational understanding of the court process and plea bargaining. Timothy also demonstrates deficits in his ability to assist in his own defense. These deficits appear directly related to his low level of intellectual functioning measured in the Extremely Low (Mentally Retarded) range." (Heilbrun Eval. p.14.) Dr. Heilbrun concluded, "Our *clinical* opinion, to a reasonable degree of psychological certainty, is that Timothy is presently not competent to stand trial." (*Id*.)

B. The Commonwealth Failed to Present Any Compelling Evidence to Contradict Timmy B.'s Incompetence.

1. No Expert Testimony was Presented to Challenge Dr. Heilbrun's Expert Opinion Determining Timmy B. to be Incompetent.

The Commonwealth offered no expert testimony on the issue of Timmy B.'s competency, and the court did not request that any other expert examination be completed. Nevertheless, the court found Timmy B. to be competent.

While the competency determination does indeed rest on the *sound* discretion of the court, *Commonwealth v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), the determination must be supported by facts present in the record. *See Knight*, 419 A.2d at 497 ("Where

the decision is not based on proper or sufficient evidence we will order the case remanded so that the judge may make an informed decision."). Strikingly, no expert opinion was presented to counter the conclusions of Dr. Heilbrun. In addition, the court does not question the credibility of Dr. Heilbrun or the facts upon which his recommendations were based. *Cf. Hughes*, 555 A.2d at 1271 (court rejected the conclusions of an expert because the expert "relied on contradictory factual conclusions and possible biased motives.") Further, neither the court in its Order or Opinion nor the Commonwealth in their argument cited any cases that support rejecting the unrefuted and credited conclusion of an expert. *Cf. id.* at 1269-71 (competency determination of trial court was based on three expert opinions and the appellant's answers to the judge's extensive and detailed questioning with the court rejecting the conclusions of one expert that was believed to have relied on contradictory factual conclusions); *Knight*, 419 A.2d at 498 (competency determination could stand where two expert opinions were presented and the court found one more persuasive than the other).

Because the court rejected the unrefuted and credible conclusions of an expert and did not rely on "proper or sufficient evidence" for its competency determination, it must be reversed. *See Commonwealth v. Davis*, 330 A.2d 847, 850 (Pa. 1975) (it was error for the court to make a competency determination when only an uncontradicted expert opinion was presented finding the individual to be incompetent).

2. It is an Abuse of Discretion for the Trial Court to Rely on the Testimony of Lay Witness when a Contrary Expert Opinion has been Presented

Appellant acknowledges the discretion which the trial court has in making a competency determination, which does include the consideration of lay witnesses.

However, in this case, the court relies solely on the opinion of a child care worker who has no clinical credentials to find Timmy B. competent, thereby rejecting the credible opinion of an expert clinician who has completed hundreds of competency evaluations. Not only does the court rely on the opinion of a lay witness to the exclusion of the recommendations of an expert clinician, it also relies upon descriptions of Timmy B.'s behavior and responses that have nothing to do with his ability to understand the nature of the proceedings and to assist counsel in his defense, resulting in reversible error. .

The court largely relies on the testimony of Rodney Missel, a child care worker for the Tioga County Department of Human Services detention unit and described his job as "basically watch[ing] over the youth" and ensuring they "get up and do specific things." (N.T. Comp H'rg p. 63.)[6] While Missel's observations and opinions may be factored into the competency determination if deemed credible and relevant, there is no authority for accepting the opinion of an individual not trained in competency evaluations over the opinion of clinician with expertise in competency evaluations. If Missel's testimony corroborated or supported the conclusions of an expert, for example, there may be reason to give it more weight. That, however, was not the situation here.

The testimony of lay witnesses or witnesses such as Missel who are not clinicians may shed some light on the competency determination *if* their testimony speaks to whether the individual can understand the nature of the legal proceedings and whether he or she can assist his attorney. The testimony that the court relies upon to find Timmy B.

[6] Courts accept both psychiatrists and psychologists to testify in competency hearings based on their professional and clinical expertise. *See Commonwealth v. Scott*, 578 A.2d 933, 934 (Pa. Super. Ct. 1990) (directing competency evaluation by neuropsychologist under 50 Pa. Stat. § 7402); *Commonwealth v. McClucas*, 3 Pa. D. & C. 5th 214 (Dauphin County Ct. Common Pleas 2006) (accepting incompetency evaluation by psychologist under 50 Pa. Stat. § 7402).

competent was improper because it did not relate to those two crucial inquiries.[7] The court relied upon Timmy B.'s "comments and descriptions to counselors and evaluators" to support the contention that he "demonstrated the ability to communicate with others, including counsel." (Trial Ct. Op. p 3.) However, the fact that Timmy B. can communicate with these individuals provides no information about his ability to understand the nature and object of the legal proceedings or his ability to participate and assist in his defense. Likewise, nor does Timmy B.'s ability to recite the events that led up to his arrest (*Id*. at p. 2, 3.) speak to these crucial inquiries of the competency determination. Timmy B. was "never out of sorts" and "listened" and "always answered willingly without prompting." (*Id*. at p. 4.) Significantly, Timmy B.'s "respectful" answers to the child care worker's questions that took place while sitting down together for an "all encompassing" conversation about family, school records, sexuality, and why he is being detained (N.T. Comp. Hr'g p. 63-68) simply do not predict whether or to what extent Timmy B. is able to understand the criminal proceedings in court or participate effectively with his defense attorney. In fact, Dr. Heilbrun, who did evaluate Timmy B. with respect to his understanding of the legal concepts at issue in the competency determination, put in context the irrelevance of Timmy B.'s respectfulness and agreeability to the determination of competency:

> He would be an enthusiastic or at least positive client. He probably wouldn't argue and if you told him to do something, he may very well do it, it is just that he wouldn't understand that very well and what you would be asking him in his role as a client and advising him in your role as defense attorney would be hard for him to understand even if you presented it at a very basic level.

[7] Moreover, Mr. Missel admitted that he had altered the information contained in the Behavioral Study introduced by the Commonwealth at trial.(N.T. Comp. Hr'g p. 71-74.) This further weakens the credibility of his opinion. The Behavioral Study was accepted into evidence with the limitation that what appears as quoted language was not actually quoted from Timmy B. (*Id*. at p. 74.) Significantly, this information was obtained during placement following an adjudication of delinquency that was ultimately vacated as based on an unlawful admission..

(*Id*. at p. 28.) Further, Timmy B.'s ability to write down that he was brought to a detention center for an evaluation following an altercation with a police officer (Trial Ct. Op. p. 4) does not satisfy the legal standard for competency, namely that the defendant must understand the nature of the judicial proceedings against him.

The information Missel gathered in the course of his duties at the detention center were largely related to his preparation of a Behavioral Observation Report and his interaction as an employee who supervises youth at the detention center. He was at no time explaining the legal process to Timmy B. or attempting to gauge his understanding of either the legal proceedings against him or his ability to assist his lawyer in his defense. Missel conceded that he did not question Timmy B. regarding his understanding of the judicial process, or the roles of a prosecutor, defense attorney, judge, or probation officer (i*d.* at p. 72) and that he did not question Timmy B. about his understanding of what a trial is, his ability to communicate with his attorney, or what "guilty" and "not guilty" mean. (*Id*. at p. 72, 73.) Both Commonwealth witnesses admitted that they did not question Timmy B. with regard to his understanding of the judicial process, the roles of those in the courtroom, his ability to communicate with his attorney, or his ability to understand and make rational decisions regarding plea bargaining. (N.T. Comp. Hr'g p. 70-74; 76-77.)

Assuming *arguendo* that Missel's testimony is true, it does not provide the court with relevant and proper evidence to rely upon to determine whether Timmy B. had "sufficient ability at the pertinent time to consult with a reasonable degree of rational understanding, and have a rational as well as a factual understanding or the proceedings against him." *Hughes*, 555 A.2d at 1270. In contrast, Dr. Heilbrun's evaluation and

testimony speaks directly to Timmy B.'s lack of understanding of the legal proceedings as well as his inability to assist his attorney.[8]

Because the trial court relies so heavily on the opinions and testimony of Missel, it is important to note that Missel admitted that he had altered the information contained in the Behavioral Study introduced by the Commonwealth at trial. (N.T. Comp. Hr'g p. 71-74.) This further weakens the credibility of his opinion. The Behavioral Study was accepted into evidence with the limitation that what appears as quoted language was not actually quoted from Timmy B. (*Id*. at p. 74.) Significantly, this information was obtained during placement following an adjudication of delinquency that was ultimately vacated as based on an unlawful admission.

Finally, the court did not engage in any colloquy with Timmy B. at the competency hearing to determine his understanding or provide any further information upon which to base the competency determination.[9] Accordingly, the trial court finding

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[8] In this case, Timmy B.'s admission was withdrawn. The hearing where the admission was taken clearly demonstrated Timmy B.'s inability to understand the legal process and communicate with his attorney and the court. (N.T. Admission Hr'g June 15, 2009.) When Timmy B.'s former attorney asked if he understood the charges against him and why he was in court, he responded "No." (*Id*. at 6.) When he was asked what part he did not understand he responded "about the legal stuff." (*Id*.) When asked if he observed Trooper Ives bleeding on the day of his arrest, he responded "I think I sees boo-boo's." (*Id*. at 7.)

[9] In fact, Timmy B.'s inability to understand the nature of the judicial proceedings and his impaired ability to communicate with his attorney is tragically evident in the record of the October 19, 2009 disposition hearing. Timmy B.'s defense attorney asked the court to advise Timmy B. of his post disposition rights because she was unable to ascertain whether Timmy B. understood the proceedings. (N.T. Dispo. Hr'g p. 91, Oct. 19, 2009.) The record shows a colloquy longer than a page recited by the court, concluded with the court's question to Timmy B., "do you understand that you have rights to file Motions with the Court after today's Hearing?" (*Id*. at p. 91-92.) Timmy B.'s telling response to the extensive page-long colloquy explaining this stage of the proceedings was "Um, I don't know what you are trying to say to me." (*Id*. at p. 93)

The record shows a subsequent page and a half-long attempt by the court to explain Timmy B.'s right to communicate with his lawyer who could file papers with the court to decide whether the right decision was made. (*Id*. at pP. 93, 94) Timmy B.'s failure to comprehend is clear in his repeated inquiries of "So what is my choice again?" and "Is that my final choice?" (*Id*. at p. 93) When the court attempted to inquire whether Timmy B. was under the influence of medication that would "make [him] unable to understand what is happening," Timmy B. again responded tellingly, "Um, I don't know what is going to happen, but I do take meds." (*Id*. at p. 94:17-24.) This record makes clear that Timmy B. did not know what the court was trying to say, was confused about his choices, and couldn't tell what was going to happen - he was obviously without a "rational and factual understanding of the proceedings" and has

of competency should be reversed.

II. THE TRIAL COURT ERRED IN ADJUDICATING TIMMY B. DELINQUENT FOR RESISTING ARREST, SIMPLE ASSAULT, AND AGGRAVATED ASSAULT

A. The Trial Court Erred in Adjudicating Timmy B. Delinquent for Resisting Arrest When Insufficient Evidence was Presented that Trooper Ives was attempting to Effectuate a Lawful Arrest

The juvenile challenges his adjudication of delinquency for resisting arrest because the Commonwealth's evidence was insufficient to prove that the officer was attempting to effectuate a lawful arrest or other duty. In order to prevail on a challenge to the sufficiency of the evidence, the juvenile must prove that the Commonwealth's evidence was insufficient to prove each and every element of the offense beyond a reasonable doubt. The reviewing court is required to accept as true all of the evidence of the Commonwealth and all reasonable inferences arising therefrom upon which the trial court could have properly rendered its decision. *Commonwealth v. Biagini*, 644 A.2d. 492, 497 (Pa. 1995).

The criminal code states that:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a *lawful arrest* or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. Cons. Stat. § 5104 (2010) (emphasis added). In order to adjudicate the juvenile delinquent on the charge of resisting arrest, the court must first find that the underlying arrest was lawful. *See also Biagini*, 655 A.2d at 497 ("The determination of the

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insufficient "ability to consult with his lawyer with a reasonable degree of rational understanding." *See Hughes*, 555 A.2d at 1270.

lawfulness of the underlying arrest necessitates a legal conclusion that the arresting officer acted with authority and probable cause.")

In the case presently before the court Timmy B. was not charged with any underlying offense. All of the charges stem from Timmy B.'s reaction to the physical force levied against him by Trooper Ives. Prior to the officer grabbing Timmy B.'s arm and wrestling him to the ground, he had done nothing to warrant his arrest. (N.T. Adj. Hr'g p. 17, Oct. 1, 2009.) He was merely crying on the stairs and telling the officer to leave. (*Id*. at p. 28.)

Trooper Ives was called to the home of Timmy B. and his mother not because any crime was alleged to have been committed, but rather in response to a call for assistance by Susan B. (*Id.* at p. 7.) Trooper Ives arrived at the home with no lawful grounds for an arrest, without an arrest warrant and without reasons to investigate a complaint that might lead to criminal charges. Trooper Ives testified that when he arrived at the home, he was informed that Timmy B. "was pretty agitated" because he had had a difficult day at school and that the therapist was on her way to the home. (*Id*.) He further stated that when he entered the Berger home, Timmy B. was sitting down on one of the stairs. (*Id.*) Trooper Ives continued:

> I initiated conversation with him and immediately Mr. Berger informed me to get out of his house and basically that he hated fucking cops is what he had told me, several times. He continued to yell. I tried to initiate conversation as to why he hated us or why he hated me. He indicated that a relative of his was arrested, I believe on drug charges. I informed him that it wasn't me that had arrested him and so on and so forth. At that time he still became hostile…As I continued to try to talk [to] him and he continued to escalate his voice and yell and he told me to get out of his house.

(*Id*. at p. 8.) Accepting the testimony of Trooper Ives as true, Trooper Ives entered the home of a youth, known to be agitated and awaiting his therapist, and continued to

verbally press him despite his recognition that his presence was making Timmy B. more agitated and that he was showing his agitation by "escalat[ing] his voice" and "yell[ing]," not by making any physical acts of aggression. Rather than exiting the home and waiting outside for the therapist to arrive, Trooper Ives continued to walk towards the stairwell and question the youth. (*See id*. at p. 9)("I was standing maybe on the second step. I believe there was some type of landing. . . . I was standing maybe four or five steps down from Mr. Berger.") When Timmy B. took a few steps toward the officer, rather than telling him to back up, ordering him to stop, and rather than moving backwards himself, Trooper Ives made the decision to wrestle Timmy B. to the ground. Timmy B. had made no threat towards the Trooper Ives at that time and there is no evidence to suggest that the juvenile was attempting to harm the officer by coming towards him. Indeed, while Timmy B. may have used vulgar language toward the officer, in the absence of any threat the use of vulgar language in refusing to co-operate with an officer in one's own home is not grounds for an arrest. *See Commonwealth v. Wertelet*, 696 A.2d 206, 209 (Pa. Super. Ct. 1997) (displaying a "significant lack of respect for police authority" on his/her own land is not probable cause for an arrest).[10] Pennsylvania courts have consistently held

[10] In *Wertelet,* the Superior Court reversed a conviction for resisting arrest where a woman flailed and kicked a police officer who was attempting to arrest her on her own property. The police had been called to the property by a utility company after the Defendant had allegedly threatened to shoot anyone on her property, because of a dispute over a right of way. The troopers had blocked the woman's access to the property. She then walked on to the property, told the utility workers and the troopers they were trespassing, and ordered them off of her property. When the workers refused to leave, she grabbed a garden rake and pushed dirt into the ditch they had dug. The troopers then tried to take her rake but she refused to give it up. They attempted to place her under arrest and a struggle ensued. She was then charged with resisting arrest, simple assault, aggravated assault, and disorderly conduct. *Wertelet,* 696 A.2d at 208. In reversing the defendant's conviction for resisting arrest, the Court stated:

> Interestingly, almost all of the charges leveled against the appellant emanate from her physical resistance to arrest. It is not as if she had committed a felony or even a misdemeanor and then when apprehended she resisted being placed in custody. Rather . . . the situation here would be more similar to one where the police approached someone at a corner who had done nothing wrong and told him he was under arrest and then charged him with resisting arrest, and only

that a "confrontational attitude" is an "insufficient basis for executing a lawful arrest." *Id. See also Biagini*, 655 A.2d at 497 (refusing to cooperate and using loud and vulgar language did not justify arrest for public drunkenness or disorderly conduct).

Like the defendants in *Wertelet* and *Biagini*, Timmy B. had committed no action justifying his arrest prior to Trooper Ives attempting to arrest him. It is also noteworthy that unlike the defendants in *Wertelet* and *Biagini* , Timmy B. was not even charged with any underlying offense for which he was arrested. The charges of simple assault and resisting arrest stem from alleged actions that occurred after the officer made the decision to make physical contact with Timmy B. As the underlying arrest was not lawful, the adjudication on the charge of resisting arrest cannot stand.

B. The Trial Court Erred in Adjudicating Timmy B. Delinquent for Resisting Arrest Because the Adjudication was Against the Weight of the Evidence

Next, the juvenile similarly argues that the Court's decision adjudicating the Timmy B. on the charge of resisting arrest was against the weight of the evidence as the Commonwealth failed to prove that the officer was attempting to effectuate a lawful arrest or other duty beyond a reasonable doubt. An appellate court "may only reverse the lower court's verdict if it is contrary to the evidence as to shock one's sense of justice. Where the lower court ruled on the weight claim below . . . appellate review is limited to whether the trial court palpably abused its discretion." *Commonwealth v. Champney*, 832 A.2d 403 (Pa. 2003).

The trial court committed a manifest abuse of discretion. For the reasons set forth

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> resisting arrest, when he offered physical resistance. Here . . . appellant did nothing to justify her arrest until the troopers attempted to arrest her.

Id. at 209.

above, the Commonwealth's evidence was insufficient to adjudicate the juvenile delinquent on the charge of resisting arrest. As the evidence was insufficient to sustain the adjudication, it also follows that the decision adjudicating the juvenile delinquent on the charge of resisting arrest is also against the weight of the evidence.

Furthermore, Timmy B.'s mother's testimony was largely uncontradicted. Specifically, the juvenile's mother testified that she repeatedly requested that the officer wait for her son's therapist before speaking with her son. (N.T. Adj. Hr'g p. 28.) She also testified that the therapist instructed her to tell the officer to wait for her before speaking with Timmy B. (*Id.* at p. 29.) Trooper Ives never denied that Mrs. Berger asked him to wait for the therapist on cross examination. He merely stated that he could not remember his exact conversation with Mrs. Berger. (*Id*. at p. 15.) However, on direct examination, he admitted that he knew that the therapist had been notified and was on her way. (*Id.* at 7.) Both witnesses testified that the juvenile repeatedly told the officer to leave his house. (*Id*. at p. 18.)

As Timmy B.'s mother had repeatedly requested that the officer wait for the therapist before speaking with her son, and Timmy B. himself had ordered the officer out of his house (*id*. at p. 18) the officer had no lawful right to enter or remain in Mrs. Berger's house to question and confront the juvenile. Thus, any resistance on the part of the juvenile to the officer's attempts to restrain him, were not done in an attempt to thwart the officer in effectuating a lawful arrest or other lawful duty because the officer's actions were not lawful.

Wherefore, the juvenile respectfully requests that the Court reverse the juvenile's adjudication of delinquency based upon the charge of resisting arrest.

C. The Trial Court Erred in Adjudicating Timmy B. Delinquent for Simple Assault where the Commonwealth Presented Insufficient Evidence to Establish the Trooper Ives Suffered Substantial Pain or an Impairment to his Physical Condition

Timmy B. was charged with simple assault pursuant to 18 Pa. Cons. Stat. § 2701(a)(1) (2010) which states that "a person is guilty of assault if he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." The juvenile petition sets forth a factual basis for the charge alleging that the juvenile did, in fact, cause injury to the officer. It was not alleged that the juvenile attempted to cause injury.

For the purposes of simple assault, bodily injury is defined as an impairment of physical condition or substantial pain. Courts have aptly stated that this definition provides little guidance. Instead, Pennsylvania courts have largely relied upon a common sense comparison of the injury to other injuries one might receive during the course of every day living. As the court stated in *Wertelet*:

> The term "bodily injury" is defined at 18 Pa.C.S.A. § 2301 as "impairment of physical condition or substantial pain." Although not necessarily controlling, the connotation of bodily injury, a sort of common person understanding of the term, suggests a physical event unlike those commonly occurring in normal life which, although unpleasant and somewhat painful, do not seriously interrupt one's daily life. Thus, if one cuts oneself shaving the average person does not think that he has suffered an injury even though such an event could be accompanied by some pain and bloodshed. Similarly, if one stubbed a toe or dropped something on it, even though it could elicit a fair amount of pain and might even result in some limping and the ultimate loss of a toenail, one would not think of himself as "injured." The same could be said if one bumped an elbow against the wall or one's head on a low ceiling beam.

Wertelet, 696 A.2d at 210-211. Thus in *Wertele*t, an injury that was likened to causing the pain one feels when bumping one's shin into a coffee table in the middle of the night

did not cause "bodily injury" pursuant to the simple assault statute. *See id.* at 210. The Court held that this was not the type of injury contemplated by the statute for simple assault and reversed the Defendant's conviction for aggravated assault, where the aggravated assault was based upon a conviction for simple assault of the protected status of the victim. *Id.*

Applying this common sense approach, the injuries allegedly sustained by Trooper Ives do not constitute bodily injury. The trooper sustained two scratches to the side of his face. He also stated that he had a swollen lip; however, this swelling is hardly, if at all, visible in the pictures introduced by the Commonwealth. (N.T. Adj. Hr'g p. 12.) The trooper never testified that he was in any pain. Rather, he stated he did not even know the scratches were there until Susan B. pointed them out. (*Id.* at p. 13) He never sought medical treatment, did not testify that he had any trouble talking or eating, and did not miss any time from work.

The scratches and puffy lip sustained by the officer are not the type of injuries that, if they had been suffered in every day life, would lead one to conclude that they had an injury that would "seriously interrupt one's daily life." *Wertelet*, 696 A.2d at 210-211; s*ee also Commonwealth v. Kirkwood*, 520 A.2d 451, 452-53 (Pa. Super. Ct. 1987) (burden to prove bodily injury under the simple assault statute was not made when individual suffered pain in her arms and right knee for short time and had bruises and cut marks on her arms). The scratches that Trooper Ives suffered could have been sustained while walking in the woods, working in one's yard, or playing with one's cat or dog, and are not the type of painful experience one would normally associate with an "injury." Similarly, the puffiness of the officer's lip, (N.T. Adj. Hr'g p. 13) was comparable to

what would likely be suffered if one bit one's lip while eating or chewing gum. Again, using common sense, this is not the type of substantial pain or impairment of physical condition that would lead one to conclude that he or she had been injured.

The court in both *Kirkwood* and *Wertelet* relied upon a comparison of the injuries alleged to injuries sustained in. In summarizing these comparisons, the court stated:

> The court found support for its conclusion in cases like *In re Philip A.*, 49 NY.2d 198, 424 NY.S.2d 418, 400 N.E. 2d 358 (1980) which found that "petty slaps, kicks and shoves delivered out of hostility, meanness and similar motives" do not constitute an assault of the third degree, an offense which also requires the infliction of a "bodily injury." The New York court concluded that a red mark on a face accompanied with swelling, which was caused by being stricken in the face twice and which made the juvenile victim cry, was not a bodily injury, id. Also, in an earlier decision a New York court made a similar conclusion regarding a blackened eye that lacked more serious complications. *People v. McDowell*, 28 N.Y. 2d 373, 321 N.Y.S.2d 894, 270 N.E. 2d 716 (1971).

Wertelet, 696 A.2d at 212 (citing *Kirkwood*, 420 A.2d. at 451).[11] Using the comparative approach employed by the court in *Kirkwood* and *Wertelet*, the affront suffered by Trooper Ives is on par with the above examples. *See id.* A couple of scratches on the face and a slightly puffy lip are no more serious, and perhaps less serious, than a red mark and swelling on the face, or a black eye. *Id.* Thus, consistent with *Wertelet* and *Kirkwood*, Trooper Ives did not suffer a "bodily injury" as defined under Pennsylvania law.

Moreover, to determine whether an individual has suffered bodily injury under the simple assault statute, the court has also looked to the circumstances in which the injury

[11] The court references various New York decisions in discussing the term bodily injury because Pennsylvania law regarding this offense was modeled on the offense as defined in the New York Crimes Code.

occurred. In *Kirkwood*, the court stated, "the assault section of the Crimes Code was intended to protect and preserve one's physical well-being and was not intended to prevent temporary hurts resulting from trivial contacts which are a customary part of modern day living." 520 A.2d at 454. The court also rejected arguments seeking "to attach criminality to the pushing, shoving, slapping, elbowing, hair-pulling, perhaps even punching and kicking, that not infrequently occur between siblings and other members of the same family." *In re J.L.*, 475 A.2d 156, 157 (Pa. Super. Ct. 1984). Even where the contact is criminal, the court is reluctant to find that minor injuries rise to the level of "bodily injury" and warrant a conviction for simple assault or aggravated assault where the incident is more properly addressed by lesser offenses. In *Wertele*t, the court did not find "bodily injury" where the injury occurred during a struggle with a police officer and could have been more appropriately addressed by the charges of harassment or resisting arrest. 696 A.2d at 211-212.

When looking at this incident in context, it is clear that Timmy B.'s actions were not the actions of a violent, aggressive individual. Rather, they were the actions of a frightened, confused, mentally disabled, autistic child in response to the actions of an overly aggressive, untrained police officer. As Susan B. succinctly stated, "[Timmy B.] felt safe on his stairs. It was his own little world, feeling safe on his stairs." (N.T. Adj. Hr'g p. 30.) When confronted verbally and physically by the officer, he reacted based upon his disability. (*Id*. at p. 29.) The contact with the officer was not based upon a criminal intent.

In light of the trivial nature of the officer's injuries when conducting a common sense and comparative inquiry, and when taking into consideration the circumstances

surrounding the physical contact with the officer, the Commonwealth has failed to meet its burden in proving "bodily injury." This matter could have been appropriately addressed through a dependency referral for the implementation of services, or, at most, a summary citation.

Wherefore, the juvenile respectfully requests that the trial court reverse the juvenile's adjudication of delinquency based upon the charge of simple assault.

D. The Trial Court Adjudicated the Youth Delinquent Against the Weight of the Evidence Where the Commonwealth was unable to Establish that Trooper Ives Suffered Substantial Pain or an Impairment to his Physical Condition

Next Timmy B. asserts that his adjudication of delinquency must be reversed as to the charge of simple assault because it is "contrary to the evidence as to shock one's sense of justice. Where the lower court ruled on the weight claim below . . . appellate review is limited to whether the trial court palpably abused its discretion." *Commonwealth v. Champney*, 832 A.2d 403 (Pa. 2003).

The trial court committed a manifest abuse of discretion. For the reasons set forth above in Section C., the Commonwealth's evidence was insufficient to adjudicate Timmy B. delinquent on the charge of simple assault. As the evidence was insufficient to sustain the adjudication, it also follows that the decision adjudicating the juvenile delinquent on the charge of simple assault is also against the weight of the evidence.

Wherefore, the juvenile respectfully requests that the Court reverse his adjudication of delinquency with respect to the charge of simple assault.

E. Because the Commonwealth Failed to Meet its Burden to Prove the Substantial Pain or Impairment of Physical Condition for Simple Assault, the Adjudication Based on Aggravated Assault is also in Error

The juvenile was charged with aggravated assault pursuant to 18 Pa. Cons. Stat. §

2702(a)(3). This section raises a simple assault to an aggravated assault where the alleged victim falls into the protected class enumerated in § 2702(c). It is undisputed the Trooper Ives falls within the category of protected persons under this section. 18 Pa. Cons. Stat. § 2702(c)(1). Thus, in order to adjudicate a juvenile delinquent on the charge of aggravated assault, the Commonwealth must prove, beyond a reasonable doubt, that the juvenile attempted to cause or intentionally or knowingly caused bodily injury to a police officer in the performance of a duty.

Like the allegation for simple assault, the juvenile written allegation does not allege that the juvenile attempted to cause bodily injury. It states that the juvenile did cause bodily injury, specifically, that the juvenile caused a bleeding/swollen lip and lacerations on the side of the face.

The juvenile hereby incorporates the arguments raised above with regard to the charge of simple assault into this argument pertaining to the sufficiency of the evidence on the charge of aggravated assault. As the evidence was insufficient to prove that the officer suffered bodily injury pursuant to the statute for simple assault, it is also insufficient to prove bodily injury pursuant to the statute for aggravated assault.

Pennsylvania courts have also been reluctant to find bodily injury pursuant to the statute for aggravated assault when, based upon an examination of the "injury" and the circumstances in which it occurred, charging with a lesser offense or handling in an alternative fashion would be more appropriate. In addition, the court in *Wertelet* has also emphasized that the special protection that the law provides to police officers by making the simple assault of a police officer an aggravated assault does not transform minor or harmless conduct into an extremely serious offense:

> ….as the name of the offense implies, aggravated assaults are assaults of a rather serious nature….An aggravated assault of someone not provided greater protection under the statute, i.e., under Section 2702(a)(1), requires an attempt to cause, or the actual causation of, serious bodily injury. Serious bodily injury is one which creates a substantial risk of death or serious permanent disfigurement or physical impairment. Although there was undoubtedly an intent on the part of the legislature to provide police officers who are performing their duties greater protection under the statute than a layperson, it does not follow that the elimination of the qualifier "serious" from the serious bodily injury element was meant to depreciate the severity of the offense to the point where it encompasses relatively harmless physical contact with a police officer.

Wertelet, 696 A.2d at 211-212.[12] Wherefore, the juvenile respectfully requests that the Court reverse the juvenile's adjudication of delinquency based upon the charge of aggravated assault.

F. The Trial Court Erred in Adjudicating Timmy B. Delinquent of Aggravated Assault Because it was against the Weight of the Evidence

Next the juvenile asserts that his adjudication of delinquency must be reversed as to the charge of aggravated assault as the trial court's decision was against the weight of the evidence. An appellate court "may only reverse the lower court's verdict if it is contrary to the evidence as to shock one's sense of justice. Where the lower court ruled on the weight claim below . . . appellate review is limited to whether the trial court palpably abused its discretion." *Commonwealth v. Champney*, 832 A.2d 403 (Pa. 2003).

The trial court committed a manifest abuse of discretion. For the reasons set forth above, the Commonwealth's evidence was insufficient to adjudicate the juvenile delinquent on the charge of aggravated assault. As the evidence was insufficient to sustain the adjudication, it also follows that the decision adjudicating the juvenile

[12] As is argued in Section D, given the trivial nature of the officer's alleged "injuries," this matter would have more appropriately been addressed by a dependency petition, or, at most, a summary citation. These options would have allowed the juvenile to receive the services and allowed the court to oversee his progress without an adjudication of delinquency.

delinquent on the charge of simple assault is also against the weight of the evidence. As elaborated upon above, the adjudication of a juvenile for aggravated assault, a felony of the second degree, under these factual circumstances shock's one's sense of justice.

Wherefore, Timmy B. respectfully requests that the Court reverse his adjudication of delinquency with respect to the charge of aggravated assault.

III. THE COURT ABUSED ITS DISCRETION IN ORDERING A PLACEMENT AT A YOUTH DEVELOPMENT CENTER AS A DISPOSITION WITHOUT ANY CONSIDERATION OF LESS RESTRICTIVE SETTINGS

"Fashioning delinquency dispositions is among the most important Responsibilities entrusted to juvenile court judges." Pennsylvania Juvenile Court Judges' Comm'n, *Pennsylvania Juvenile Delinquency Benchbook* 120 (Jan. 2008). The Juvenile Act authorizes the court to select among the following dispositions:

> (1) Any order authorized by section 6351 (relating to disposition of dependent child).
>
> (2) Placing the child on probation under supervision of the probation officer of the court or the court of another state as provided in section 6363 (relating to ordering foreign supervision), under conditions and limitations the court prescribes.
>
> (3) Committing the child to an institution, youth development center, camp, or other facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Department of Public Welfare.
>
> (4) If the child is 12 years of age or older, committing the child to an institution operated by the Department of Public Welfare.
>
> (5) Ordering payment by the child of reasonable amounts of money as fines, costs, fees or restitution as deemed appropriate as part of the plan of

rehabilitation. . . .

42 Pa. Cons. Stat. § 6352(a). The disposition must meet the needs of the individual child – in this case a youth with pervasive developmental disorder, Mixed-Receptive Expressive Language Disorder, Obsessive Compulsive Disorder, Mild Mental Retardation (N.T. Dispo. Hr'g p. 15) and autism (N.T. Comp. Hr'g p. 13-14). The disposition also must "provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable the child to become a responsible and productive member of the community." 42 Pa. Cons. Stat. § 6301(b)(2) . The disposition must also be consistent with the purposes of the Juvenile Act: "[t]o preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained and [t]o provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter." *Id*. at § 6301 (b)(1)-(1.1). Finally, "when confinement is necessary, the court shall impose the minimum amount of confinement that is consistent with the protection of the public and the rehabilitation needs of the child." *Id*. at § 6352(a)(6).

The standard of review of a juvenile disposition is abuse of discretion. *Commonwealth v. Przybla*, 722 A. 2d 183, 184 (Pa. Super. Ct. 1998). This strict standard reflects the discretion given to the juvenile court judge, who has both expertise as well as the opportunity to observe the youth in order to craft an appropriate disposition. At the same time, this standard should not preclude the review and reversal of a disposition that is beyond the juvenile court's authority or that fails to properly balance the juvenile's need for supervision, care, and rehabilitation with protection of the

community, accountability, and competency development. Where, as here, a youth with no prior involvement in the juvenile justice system and with significant cognitive and mental health issues was placed in the most restrictive placement option available – with no consideration of less restrictive, community-based alternatives – the lower court abused its discretion and failed to order a disposition consistent with the goals of the juvenile justice system. "It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily....Even with the most superior personnel, these tribunals call for legal checks." Roscoe Pound, *Foreword* to Pauline V. Young, *Social Treatment in Probation and Delinquency* xxvii (1937).

A. The Lower Court Erred in Placing Timmy B. in One of the Most Restrictive Placements when no Efforts were Made to Provide Services or Maintain Him in the Community

Loysville is a secure Youth Development Center ("YDC") that has on its grounds facilities or programs that are considered "open." Out of the range of dispositional placement options, secure and "open" YDCs are the most restrictive placements that can be ordered in the juvenile system in Pennsylvania. Probation Officer Yolango, who recommended Loysville, acknowledged it was highly restrictive. (N.T. Dispo. Hr'g p. 35-36.) However, it remains a touchstone of dispositional practice that the choice of a disposition "must be made based on the child's individualized needs and only the minimum amount of confinement necessary should be employed." 18 West's Pa. Prac. Juvenile Delinquency 13:7 (2008 ed.). Additionally:

> In choosing among statutorily permissible dispositions, the court should employ the least coercive category and duration of disposition that are appropriate to the seriousness of the delinquent act, as modified by the degree of culpability indicated by the circumstances of the particular case, age and prior record of the

juvenile.

National Advisory Committee on Criminal Justice Standards and Goals: Juvenile Justice and Delinquency Prevention, Standard 14.4 (1976). Timmy B. has no prior contact with the juvenile justice system and no prior history of misconduct. While the charge of aggravated assault is a serious, the record raises doubts about the degree of culpability[13] that should be assigned to Timmy B. in the crafting of a disposition. A child cannot be placed in state custody until the court has considered and rejected other options that would allow him or her to stay in the home. *In re Ryan*, 440 A.2d 535 (Pa. Super. Ct.1982). "It has long been the policy of juvenile courts in Pennsylvania to make *every effort* to keep youthful offenders in their communities and some form of probation supervision is by far the most common system response to offending youth." Juvenile Court Judges Comm'n, *Juvenile Justice in Pennsylvania, Mission-Driven, Performance-Based, Outcome-Focused* 8, available at http://www.jcjc.state.pa.us/portal/server.pt/community/balanced_and_restorative_justice/5032 (emphasis added) [hereinafter *Juvenile Justice in Pennsylvania*]. Further, commitment is meant to be a disposition of "last resort;" so rare that only 1 in 10 delinquency dispositions result in out of home placements. Pennsylvania Juvenile Court

[13] While the argument in this section of the brief must assume that the delinquency adjudication was valid, it is still proper for the court to take into account the youth's mental state and degree of culpability in determining a proper disposition. *See also* 42 Pa. Cons. Stat. § 6352 (Court may order disposition determined to be consistent with the protection of the public interest and best suited to the child's treatment, supervision, rehabilitation, and welfare, which disposition shall, *as appropriate to the individual circumstances of the child's case*, provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable the child to become a responsible and productive member of the community) (emphasis added). All the evidence before the court shows that Timmy B. has significant and pervasive developmental delays, including difficulties in interpreting social cues and processing information, which would certainly impact how he perceived the police officer in his home and responded to his actions, among which was the reaching for a taser which Timmy B. and his mom believed to be a gun.

Judges' Comm'n, *Pennsylvania Juvenile Delinquency Benchbook* 120 (Jan. 2008).

The preference for the least restrictive placement serves multiple goals. By serving the youth in the community, he learns to master the skills he needs to be a law abiding and productive citizen in a real world setting. Removing youth from their natural support systems and community can be disruptive and costly and is counter to the goals of the Juvenile Act "[t]o preserve the unity of the family whenever possible" and achieve the goals of the Act To achieve the foregoing purposes "in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa. Cons. Stat. § 6301(b)(1) & (b)(3). In addition, research has shown that "community based treatment and programs are generally more effective than incarceration or residential placement in reducing recidivism, even for serious and violent juvenile offenders." Kathleen R. Scowyra & Joseph J. Cocozza, Nat'l Ctr. for Mental Health & Juvenile Justice, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System* 33 (2007) (summarizing the research). In addition, the preference for the least restrictive setting:

> recognizes that, for the most part, young people who commit crimes are not serious, violent or chronic offenders. It furthers a long-standing policy of making *every effort* to keep young offenders in their communities—or apply the least restrictive alternative to incarceration—so long as the risk they pose to the public's safety can be managed.

Patricia Torbet, Nat'l Ctr. for Juvenile Justice, *Advancing Community Protection: A White Paper for Pennsylvania* 1 (2008) [hereinafter Torbet] (emphasis added).

At the time of the disposition, *no efforts* had been made by the court to keep Timmy B. in the community. Nevertheless, after the dispositional hearing, the trial court

found that:

> to allow the juvenile to remain in the home with his Mother, Susan Berger, would be contrary to the welfare of the juvenile and the community and that reasonable efforts to prevent out of home placement were made in that the juvenile received a diagnostic evaluation which recommended residential placement for treatment, supervision, and rehabilitation and the juvenile has received community based services but has failed to benefit from the same.

(Trial Ct. Order p.1-2, Oct. 19, 2009.) Since Timmy B. had no prior contact with the court or juvenile justice system until his arrest on June 10, 2009, the lower court's representation that Timmy B. has previously received community based services is simply untrue. To the extent that the court considered efforts by Mrs. Berger to obtain services or treatment for Timmy B. – as any concerned parent would – these services can hardly be considered efforts undertaken *by the court* to keep Timmy B. in the community. To consider any services or treatment that a parent would seek out for their child prior to any contact with the juvenile justice system as "efforts made to keep the child in the least restrictive setting within in the community" is to render that inquiry meaningless. Otherwise, any first time offender who received community-based treatment would through the efforts of his family and prior to any court involvement would forfeit his right to any consideration of less restrictive alternatives at disposition – an untenable as well as unlawful result. The fact that Timmy B. had wraparound services in October of 2008 (N.T. Dispo. Hr'g p. 56), or even a previous mental health hospitalization is no substitute for the court's obligation, now that Timmy B. has been adjudicated delinquent for the first time, to consider the availability of community-based alternatives before ordering Timmy B. committed to Loysville.,

Moreover, when Timmy B. was arrested, in-home services had only been in place

for about three weeks and had been initiated by his mother, not by the court.[14] Once Timmy B. was adjudicated, the court made no attempt to supplement or expand these services. The record reflects no discussion or consideration of the many tools and strategies available to probation and the courts to keep youth in the least restrictive setting while also maintaining community safety, including, community and school based probation, afternoon or evening reporting program, day treatment, electronic monitoring, house arrest, a community group home or specialized foster care. *See* Torbet, at p. 14 (describing some of the various supervision tools available). In fact, as explained by CASSP Coordinator Longendorfer, funding for placement at a residential treatment center was not approved because it was determined that Timmy B. did not require such a high level of restrictions, and that interventions such as Behavioral Health Rehabilitation Services, Therapeutic Foster Care and other community based services had not been made available. (N.T. Dispo. Hr'g p. 48.) See *In re L.A.*, 853 A.2d 388, 394 (Pa. Super. Ct. 2004) (a delinquent youth was not placed until she was given multiple chances to manage in the community with services, which included placement with her grandmother, placement in a community shelter, curfew, and drug screens. Only after the youth was unable to benefit from the community-based supports provided to her by the court was placement deemed an appropriate option.)

B. Because no Showing was Made that Timmy B. Posed a Risk to the Community, A Commitment to a Youth Development Center was an Abuse of Discretion

Before committing a child to a secure setting such as Loysville, an assessment of

[14] In addition, while Timmy B. and his mother were working on ways to best handle the behavior relating to his Obsessive Compulsive Disorder, it is also important to note that Timmy B. was doing relatively well in school, with only a few minor school incidents, and was generally compliant with his mother's rules. (*Id*. at p. 31-32.)

the youth's risk to himself and community must be done. An assessment of risk should include a "review of the youth's offense history, if any, and an assessment of other factors that may point to continued delinquent behavior. Maintaining the youth in the community also depends on the availability of a wide range of treatment, supervision and control options and the support of informal systems of control—including families, schools, faith communities and youth-serving organizations." *Juvenile Justice in Pennsylvania*, at 8. The Juvenile Act makes clear that the supervision, care, and rehabilitation of a delinquent youth should occur "in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa. Cons. Stat. § 6301(b)(3). The record clearly demonstrates that Timmy B. does not pose any risk to public safety and, by all accounts could have his treatment and supervision needs met within in the community. Even the probation officer acknowledged that Timmy B. "wasn't a physical threat" in the home or anywhere else. And that most of behavioral issues were related to his OCD. (N.T. Dispo. Hr'g p. 9, 39.) Yolango testified that "Mrs. Berger reported, she stated that it was a struggle dealing with his OCD issues," but "no anger management or violent behaviors" were at issue. (*Id.* at p. 32.) In fact, Mrs. Berger testified that she called the police on the day of Timmy B.'s arrest not because she was afraid that her son would hurt her, but because Timmy B.'s therapist told her to make the call, believing that the police would help calm Timmy B. down until the therapist arrived.[15] (*Id*. at p. 65.)

[15] Mrs. Berger testimony reveals a situation that many parents of youth with mental health issues face—that when you are desperate for treatment for your child that you either need the police or juvenile justice system to access these services. For example, a study completed by the General Accounting Office in 2001, found that parents placed over 12,700 children in the juvenile justice or child welfare system to access mental health services. U.S. General Accounting Office, *Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services* (2003). In this context, it was not odd for Mrs. Berger to think that

Additionally, his disciplinary history in school was unremarkable and never included physical altercations (*id*. at p. 31) (a few detentions only) and his mother was providing supervision at home. In addition, his mother had assembled a support network of services for Timothy and was making all efforts to connect with any resources that could be helpful.

Testimony supporting the appropriateness of a community placement as well as the absence of any risk posed by Timmy B. to the community was provided by mental health and child welfare professionals. Erin Longendorfer, the Child and Adolescent Services Program (CASSP) Coordinator for Pike County, testified that her recommendation for a disposition was for family-based services in the community. (*Id*. at p. 42.) She did not believe that a more restrictive environment was appropriate, and believed that an opportunity should be given for in-home services to benefit the family. (*Id*. at pp. 44, 47.) She further explained that the "intensive services" provided in-home would be based on the family's needs, up to six hours per week, and would include a clinician and a case manager. (*Id.* at p. 46.) Jeffrey Elston, the children and youth worker assigned to the case, testified that Timmy B. should remain in the community either in the home of his mother, or as a second choice, placed in specialized or therapeutic foster home. (*Id.* at pp. 58, 64.) His recommendation was based on a review of all the records, his interactions with Timothy and his mother as well as his knowledge of the incident that led to Timothy's arrest. (*Id.* at pp. 58, 60.) At the time of the disposition hearing, Timothy had already been detained for almost five months and had reports of complaint behavior. (*Id.* at p. at 10.) Mrs. Berger testified that she talked to many staff at the Tioga and Lehigh detention facilities and everyone reported how well Timothy was doing

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calling the police was a way to get help for her son.

and that they did not understand why he was in such a facility. (*Id.* at p. 71.) As Yolango reported, the only troubling behavior he exhibited was related to his OCD—picking at his skin, pulling at his hair, and brushing his teeth repeatedly. (*Id*. at p. 12-13.)

In addition to the services that could be provided to Timmy B. and his family in the community by the behavioral health and child welfare agency, Mrs. Berger also testified that she had arranged her schedule so that she could be home from work by the time that Timothy returned from school so that he could be supervised at all times. (*Id*. at p. 33.)

"Most juvenile offenders do not need to be 'sent away' for risk to be managed." Torbet, at 13. The appropriate *scope* of considerations in the risk assessment is crucial to an equitable disposition.

> Pennsylvania's juvenile justice system operates under the principle of least restrictive setting required to protect the community, which is tied to a longstanding policy of keeping juvenile offenders in their communities. It is important to note here that *the level of restriction imposed should match the level of risk, not the level of need*. This means that the system must balance risk against needs and not impose custody measures in order to respond to need alone. The most challenging clients in terms of their needs (serious mental illness, for example) are not always the ones who pose the greatest risk to the community. These youth should not be incarcerated; neither should they be unjustifiably diverted.

Torbet, at 13-14 (emphasis added). If Timothy did not pose a risk to the community, a Youth Development Center would never be appropriate even if aspects of the program provided treatment. More importantly, Yolango testified that all the mental health services that Loysville could provide Timmy B. could be provided to him in the community. (*Id*. at p. 26.)

The court's explanation for its dispositional choice comprises barely a page of the Opinion. (Trial Ct. Op. p. 9-10.) The court notes that the recommendations from the

diagnostic, psychological and psychiatric evaluations were for residential treatment. (*Id*. at p. 9.) The court appears to heavily rely on Yolango's testimony and recommendations (*id*.) to determine that "Loysville was not any less appropriate than the residential facilities [such as Devereux Kanner] previously considered" because Loysville has many of the same services that a residential treatment center would. (*Id*. at p. 10.) The court's adoption of Yolango's recommendation is in error. The recommendation for a behavioral health residential treatment center, such as Devereaux Kanner, is categorically different than a placement at a YDC where treatment may be provided and cannot be an acceptable explanation for a why a less restrictive setting, like the one recommended by the professionals evaluating Timmy B., was not appropriate.[16] The court's rationale indicates that the level of restrictiveness is unimportant, which is inconsistent with the Juvenile Act.

The court's reliance on Yolango's recommendations is also flawed because it appears that Yolango relied on factors outside of the consideration of the youth's needs or the protection of the community to arrive at his recommendation. Yolango testified that the psychological, psychiatric, and diagnostic evaluations recommended that Timmy B. "be placed in a residential program that would enable the juvenile the opportunity to acquire a sense of independence and the skills necessary to facilitate the same. The Devereux Kanner Residential Treatment Program would be able to provide the juvenile with basic care skills and problem solving techniques and also provide community safety." (*Id*. at p. 15.) Based on these recommendations, Yolango made referrals to

[16] This "logic" is similar to the court's equating Timmy B.'s participation in treatment services in the community prior to his contact with the juvenile justice system as the court's efforts to keep him in the community. If it is permissible to reject a less restrictive setting because a more restrictive setting may have the same or similar services, the balanced inquiry into determining the type of setting that meets the individual youth's needs while also protecting the community is meaningless.

Southwood Hospital, the Bradley Center, Devereux Kanner MR-DD Program, and Cove Forge Residential Treatment Center, all residential treatment centers. (*Id*. at p. 16.) Timmy B. was accepted at Cove Forge and Southwood. (*Id*. at p. 17.) Yolango then testified that Devereaux and Cove Forge were not deemed appropriate because funding for the placements was not approved.[17] (*Id*. at pp. 25, 48.) Cost is not one of the considerations or principles that the Juvenile Act requires for the determination of the appropriate disposition for a youth coming before the court. *See* Introduction to Section II above.

Based on Timothy's disposition, he was classified as a higher risk youth who posed risks that cannot be managed in the community,[18] which make up less than 10% of all initial dispositions. Torbet, at p. 6. This is in no way supported by the record. The

[17] As discussed above, it was later explained that funding was not approved because Timmy B. did not require such a high level of restrictions, and that interventions such as Behavioral Health Rehabilitation Services, Therapeutic Foster Care and other community based services had not been made available. (*Id*. at p. 48.)

[18] While there is no uniform risk assessment for the State of Pennsylvania, most assessments take into account static risk factors (age at first offense; number of prior arrests, early pattern of conduct problems); dynamic risk factors (conditions that are highly correlated with delinquency that can potentially be changed such as competency development domains; peer associations; violent, aggressive or assaultive behavior; recent substance use, family functioning); and protective factors (clear, consistent parental supervision strong family ties; having a good relationship with a positive adult role model; strong community ties, engagement in school, realistic career goals, employment skills, opportunities for meaningful involvement in prosocial activities). Torbet, at 12 (summary of factors considered in a risk assessment).

Considering Timmy B.'s situation through the lens of all the elements of a comprehensive risk assessment, he does not evidence risk factors that would give one pause to keeping him in the community and shows significant protective factors that bode well to his continued success in the community. Timmy B. has no prior conduct with the juvenile justice system nor any significant conduct problems. While Timmy B. is working on his competency development skills, no evidence was presented showing that Timmy B. has a history of assaultive behavior, substance abuse or running away. Timmy B. has a caring parent who is willing to get her son whatever services that will benefit him and to structure her work schedule so she can provide him supervision when he is at home. Timmy B. also has a sister in college who serves as a good role model and source of support. Prior to his arrest Timmy B. was to begin karate classes to provide him a constructive activity with his peers. Finally, while Timmy B. has had some struggles in school, the school was working with the family and the therapist so that Timmy B. would thrive.

only riskier category is comprised of those youth who commit offenses that are tried in the criminal justice system. *Id.* The probation officer, in fact, seems to rest his recommendation for Loysville on the severity of the offense for which Timmy B. was adjudicated rather than due to any assessment of risk whatsoever. (N.T. Dispo. Hr'g pp. 19, 36.) While the severity of the offense is an important consideration in the type of disposition crafted, it is not a stand in for an assessment of risk, and cannot be considered to the exclusion of all other factors. Neither the Juvenile Act nor case law instruct that out of home placement and level of restrictiveness should be determined by the type of offense without more. Such logic would lead to a system with a goal of only punishment without any of the considerations required by the Juvenile Act and the principles upon which the juvenile court was established.

CONCLUSION

For the reasons presented above, Timmy B. respectfully requests that the Superior Court reverse the decision of the trial court.