in the case at bar because that charge had been dismissed and was not a matter for the proper consideration of the jury. An examination of the officer's affidavit of probable cause discloses nothing which would indicate that the defendant caused or attempted to cause any bodily injury to the officer, which might well have led the jury, as it did the court, to wonder whether the alleged aggravated assault occurred outside the time frame of the alleged hindering apprehension incidents. To include the criminal complaint or that portion of it containing the aggravated assault count without background evidence would have been more likely to confuse than to clarify the issues for the trier of fact. Further, in the light of the prohibitation of Pa. R. Crim. P. 1114 against permitting the jury to have "a copy of the information or indictment," we have serious doubts whether under any circumstances it would be appropriate to admit a criminal complaint in evidence.

We, therefore, conclude the third post trial motion must be dismissed.

ORDER OF COURT

NOW, this 11th day of March, 1982, the three post trial motions in arrest of judgment and for new trial, briefed and argued by the defendant are dismissed.

The Probation Department of Franklin County shall prepare a PreSentence Investigation Report and file the same. Upon the filing of the PreSentence Investigation Report the defendant shall appear on the call of the District Attorney for sentencing.

Exceptions are granted the defendant.

COMMONWEALTH V. SCHWARTZ, C. P. Franklin County Branch - No. 425 of 1980 and No. 426 of 1980

Criminal Law - Assault - Resisting Arrest - Hypothetical Questions

1. Generally, hypothetical questions must be based on matters which appear in the record and on facts warranted by the evidence.

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2. In the court's discretion, hypothetical questions may be allowed on anticipated proof.

3. The use of force to resist an unlawful arrest by a known police officer is unjustifiable.

4. An arrest is any act that indicates an intention to take an individual into custody and that subjects him to actual control and will of the person making the arrest.

5. Where a state trooper observed the defendant attacking another person, attempted to restrain the defendant and directed another trooper to put handcuffs on defendant, an arrest was made.

John F. Nelson, Assistant District Attorney, Attorney for the Commonwealth

John McCrea, III, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P. J., March 22, 1982:

Gary Eugene Schwartz was convicted by a jury of aggravated assault on James Osterman, simple assault on Trooper Edward Miller and resisting arrest. Post trial motions were filed saying the court erred in (1) consolidating the trials, (2) denying the defendant the opportunity to show the victim Miller was seen at the YMCA changing into street clothes shortly after the incident, (3) preventing the Commonwealth's physician from answering a hypothetical question presented by the defendant's attorney, (4) accepting the testimony of a chiropractor based in part on statements he received from Miller, (5) not limiting the testimony to the occurrence between Trooper Miller and the defendant in the middle of a highway, (6) in submitting the matter without on the record finding that a lawful arrest was made, and (7) in charging on aggravated assault, contending that there was no evidence to establish it. Other reasons were stated but were not pursued at argument and are abandoned.

This case arose out of an episode on the Lincoln Highway east of Chambersburg when Osterman ran into a car operated by the defendant's girlfriend. Neither was injured in the accident but upon ariving at the scene the defendant became incensed and when he determined Osterman operated the other car, he assaulted him and knocked him to the ground. While on the ground, defendant kicked Osterman. As a result, the victim was injured.

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The State Police arrived and Osterman was directed to get into a cruiser. Defendant later removed Osterman from the car and was seen punching him repeatedly. Trooper Miller, wanting to stop the episode, grabbed the defendant from the back, ultimately subdued him, though it was a struggle, and asked another trooper to put the cuffs on defendant. The other trooper had one cuff on the defendant, but was talked out of putting the other one on by defendant's brother who said he could handle the defendant.

At the time it was the intention of the trooper who intervened to place the defendant under arrest. The assaulted trooper made no further effort to take defendant into custody as he was trying to buy time, waiting for help to arrive. Then the trooper was again assaulted by the defendant, knocked backwards, in the center of Route 30. Again the trooper tried to subdue the defendant to place him under arrest and during this effort, the trooper was repeatedly punched by the defendant. Defendant grabbed the trooper's testicles, subjecting him to excruciating pain, and then threw him onto the road. The trooper had difficulty getting up and for a time it seemed he was all alone, without assistance. Then help arrived. The trooper looked at the defendant and stated to him that he was under arrest. The officers who had arrived put the defendant to the ground, put the handcuffs on him and for all purposes pertinent to this case, the episode was over.

The doctor who treated Osterman reported that he complained of head and neck injuries, that the left side of his face was swollen, that he couldn't open his mouth, apparently because his cheek bones were fractured and that he had a bloody nose. The victim was referred to an oral surgeon.

Miller reported that he was scratched under the eye, had sore testicles for two weeks, suffered from a fractured rib for two or three weeks and has a continuing problem with his upper and lower back. These injuries required him to lay off work for three weeks. Upon returning to work the pain returned so he laid off again and hadn't gone back to work at the time of the trial.

During the direct examination of the physician who treated Osterman, the court asked him whether the injuries Osterman received were consistent with being struck and he replied they were. Defendant then sought to question him as to whether they were consistent with injuries Osterman might have received in an automobile accident. Objection was made and sustained. A chiropractor who treated Trooper Miller con-

cluded his testimony with a statement that it was his recommendation that Miller should not work.

On the day before the trial, the District Attorney moved to consolidate the cases for trial. The court made an order in the presence of the defendant and his counsel granting the motion and noted that there was no objection from either the defendant or his counsel. Beyond that, the charges arose out of a single transaction and could be joined under Pa. R. Crim. P. 228.

Defendant contends that he offered to prove that the injured state trooper was seen at the YMCA changing into street clothes and that the testimony should have been allowed. The record does not reflect such an offer and at this time the court has no independent recollection of its having been made.

In his brief counsel for the defendant states the evidence was to be offered to impeach the trooper's credibility when he said he suffered severe injuries, arguing that an inference was possible that with such injuries he couldn't be engaged in an exercise program at the YMCA. Mere presence in the YMCA locker room without showing the trooper was engaged in some form of active exercise would establish nothing. The facilities at the YMCA are manifold, including swimming pools, and just showing that he was there would not infer he was engaged in strenuous exercise.

If the offer was made, to refuse it was not error.

The court asked Dr. Chicklo whether the injuries suffered by Osterman were consistent with his being struck as the assault by the defendant was described. He said the injuries were caused by a blow of some force and that the injuries could be caused by being kicked in the face. On cross examination defendant's counsel asked the following question:

BY MR. McCREA:

Q Assuming that there is testimony that Mr. Osterman was in an automobile accident which he collided with another vehicle, could the injury have been sustained as a result of the automobile accident?

BY MR. NELSON (Assistant District Attorney):

Your Honor, we object. We don't have sufficient information at this point in time that he bumped--no evidence presented to

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this time.

The Court sustained the objection.

At sidebar, defendant's counsel asked that he be permitted to ask Dr. Chicklo "to assume that there will be evidence that following the accident Mr. Osterman was observed with blood in this facial area and holding a blood-stained handkerchief to his face prior to any contact with Gary Schwartz. Could the injury that he diagnosed, could it be sustained as a result of an automobile accident."

The District Attorney objected because the question was based on facts not in evidence, saying that there was no way of telling what caused the blood, and that it could have been from a simple scratch. The court sustained the objection.

The first complaint is that by asking Dr. Chicklo the question, the court may have appeared to be taking sides. Nothing like that can be assumed. The Commonwealth failed to ask the question and it could have been for a reason--that the answer would not be favorable. But the court felt that knowing the doctor's opinion would be helpful to the jury. So no suggestion of favoritism can be adduced from the court's question.

Generally, hypothetical questions must be based on matters which appear in the record and on facts warranted by the evidence, *Borough of Morrisville v. Workmen's Compensation Appeal Board*, 54 Pa. Cmwlth. 41, 419 A.2d 813 (1980): *Frontage, Inc. v. Allegheny County*, 400 Pa. 249, 162 A.2d 1 (1960). In the Court's discretion, hypothetical questions may be allowed on anticipated proof, *Keilbach v. Metropolitan Life Ins. Co.*, 157 Pa. Super. 590, 43 A.2d 652 (1945).

Clearly then it is discretionary with a judge whether to allow a hypothetical question based on anticipated facts. The defendant was not prohibited from introducing evidence. He was only unable to elicit that testimony from a Commonwealth witness before his proof was in.

It is hard for us to understand the objection to Dr. Curfman's testimony. He is a chiropractor who treated Trooper Miller and spoke about the degree of Trooper Miller's pain. The testimony was very brief. In testifying he relied on facts given him by Trooper Miller, some of the same facts contained in Trooper Miller's testimony. There is nothing in Dr. Curfman's testimony that forms the basis for a new trial.

Defendant next argues we should not have submitted the matter to a jury because there was no showing that the defendant was placed under arrest. The resisting arrest information in this case alleges that the defendant intended to prevent a public servant from making a lawful arrest, and created a substantial risk of bodily injury to a public servant or employed means justifying or requiring substantial force to overcome the resistance and spoke of his hitting, biting and kicking Trooper Miller.

Section 5104 of the Crimes Code, the Act of 1972, Dec. 6, P.L. , No. 334, which seems to suggest that a person may resist an unlawful arrest is inconsistent with Section 505(b) which declares that the use of force is not justifiable in resisting an arrest even though it is unlawful. And our Superior Corut has indicated by a footnote in *Commonwealth v. Supertzi*, 235 Pa. Super. 95, 98, 340 A.2d 574 (1975), that the use of force to resist an unlawful arrest by a known police officer is unjustifiable. Crimes Code, Sec. 505(b) supra.

A police officer may make a lawful arrest without a warrant when he has reasonable or probable cause to believe that a misdeameanor is being committed in his presence. *Commonwealth v. Kloch*, 230 Pa. Super. 563, 327 A.2d 375 (1974).

When Trooper Miller observed the defendant attacking Mr. Osterman, attempted to restrain defendant and directed the other trooper to put the handcuffs on him, that was an arrest. An arrest is any act that indicates an intention to take an individual into custody and that subjects him to actual control and will of the person making the arrest. *Commonwealth v. Richards*, 458 Pa. 455, 327 A.2d 63 (1974). The fact that the other trooper removed the handcuffs and that Trooper Miller felt himself without sufficient force to keep the defendant in custody would not change the nature of the arrest.

Later, the defendant struck Trooper Miller across the chest while the two were in the middle of the road and again the trooper attempted to take the defendant into his custody. That was supported by the authority gained from witnessing the attack on Mr. Osterman and was justified by the assault upon the officer himself. He was not able to subdue the defendant until help arrived.

We concluded therefore that Trooper Miller arrested the defendant, that defendant resisted on several occasions and that the evidence relating to defendant finally being subdued is

relevant because it showed the force that was necessary to complete the arrest.

Defendant's final argument is that the court erred in submitting the charges of aggravated assault to the jury, saying at the close of the case that all of the evidence negates any intent to cause any serious bodily injury.

Under the Crimes Code, supra, Sec. 2702(a) a person is guilty of aggravated assault if he intentionally, knowingly or recklessly attempts to cause or causes serious bodily injury (1) to another under the circumstances manifesting extreme indifference to the value of human life, or (2) to a police officer making or attempting to make a lawful arrest, or (3) attempts to cause or causes bodily injury to a police officer making or attempting to make a lawful arrest.

The defendant's argument is that if the court had not charged on aggravated assault, but had limited the charge to simple assault, then instead of compromising on simple assault, the jury might have found the defendant not guilty. Whether the defendant intentionally, knowingly or recklessly attempted to cause or caused serious bodily injury as required by the act was a matter for the jury. *Commonwealth v. Holgate*, 75 Pa. Super. 471 (1921); *Commonwealth v. Tattersall*, 61 Luz. L. Reg. 73 (1971). It was not error to submit aggravated assault to the jury.

The post trial motions are denied.

ORDER OF COURT

March 22, 1982, the defendant's post trial motions are denied. It is ordered that a presentence investigation report be prepared. For that purpose the defendant is directed to appear at the Probation Office at the call of the Probation Office and sentence is deferred until April 21, 1982, at 9:00 a.m.

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