

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH	:	No's. CR-970-2017; CR-1855-2017
v.	:	CR-2046-2017; CR-52-2018
	:	
NICHOALS DARWIN BROWN,	:	Motion to Consolidate
Defendant	:	

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Consolidate for trial the above-captioned Informations. An argument on the Commonwealth's Motion was heard by this Court on February 27, 2018.

The parties agreed that in considering the merits of the Motion, the Court could consider the separate Affidavits of Probable Cause.

Under Information 970-2017, the defendant is charged with one count of theft by deception and one count of home improvement fraud. The Commonwealth alleges that on February 28, 2017, the victim and the defendant entered into a contract in which the defendant would install 205 feet of fence at 1017 Hepburn Street in Williamsport. The victim paid the defendant \$3,654.00 for the fence and installation. As of March 31, 2017, however, no work had been started toward the installation or completion of the fence. The victim attempted, without success, on numerous times to contact the defendant. The listed address of defendant's business appeared to be abandoned. The charging police officer also made numerous attempts to speak with defendant but with no success.

At Information No. 1855-2017, the defendant is charged with two counts of home improvement fraud, two counts of theft by failure to make required disposition of funds and two counts of theft by deception. According to the Affidavit of Probable Cause, there are

two alleged victims.

On or about February 9, 2017, victim 1 and the defendant entered into an agreement for defendant to install a fence. Victim 1 paid the defendant the amount of \$1,848.00 in advance. No services, however, were ever rendered by the defendant. Attempts to contact the defendant were unsuccessful.

On February 28, 2017, the defendant allegedly entered into a contract with victim 2 to install a fence. Victim 2 paid the defendant \$850.00. Again, the project was never started. Attempts to contact the defendant were unsuccessful.

Under Information 2046-2017, the defendant is charged with one count of theft by deception and one count of home improvement fraud. The Commonwealth alleges that on May 22, 2017, the defendant entered into a contract with the victim to repair a fence that had been damaged from a fallen tree. The victim paid the defendant \$500.00. The defendant took the money but never performed any work to repair the fence. Numerous attempts to contact the defendant were unsuccessful.

Under Information 52-2018, the defendant is charged with one count of home improvement fraud, two counts of deceptive business practices and one count of theft by deception. The Commonwealth alleges that on June 5, 2017, the defendant entered into a contract with the victim to provide and install a vinyl fence at the victim's property. The victim wrote a down payment check to the defendant in the amount of \$2,258.55. As of July 27, 2017, however, no work had been done on the fence. The fence was never delivered nor was it installed. Numerous attempts to contact the defendant were unsuccessful.

Separate Informations may be tried together if “ (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the

jury so that there is no danger of confusion; or (b) the offenses charged are based on the same act or transaction.” Pa. R.Crim. P. 582. Conversely, the Court may order separate trials of offenses if it appears that any party may be prejudiced by offenses being tried together. Pa. R. Crim. P. 583.

The defendant concedes that the evidence of each of the other alleged offenses would be admissible in a separate trial for the other. The defendant concedes that the evidence would be admissible as tending to prove a common scheme or plan or to establish the identity of the person charged with the commission of the crime.

The Court agrees. After reviewing all of the evidence, the Court concludes that not only are the offenses so similar that they tend to show a common scheme or plan but they also demonstrate that it was very unlikely that anyone else but the defendant committed the other crimes. The crimes were not only of a similar class but they also took place in close temporal and geographic proximity.

The defendant argues, however, that consolidation of the cases would be prejudicial because the “jury would hear one and lump it in with the others and could not distinguish one versus the other.” The defendant’s argument as to prejudice encompasses the required element of the rule noting that the jury must be capable of separating the offenses and mandating that there be no danger of confusion. Pa. R. Crim. P. 582 (a).

Prejudice exists “if the evidence [tends] to convict [the defendant] only by showing a propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.” *Commonwealth v. Boyle*, 733 A.2d 633, 637 (Pa. Super. 1999). The Court must weigh “the possibility of prejudice and injustice caused by the consolidation against the consideration of judicial economy.” *Commonwealth v. Janda*,

14 A.3d 147 (Pa. Super. 2011), quoting *Commonwealth v. Morris*, 493 Pa. 164, 171, 425 A.2d 175, 178 (1981).

The Court disagrees with the defendant. The Court finds that the evidence would be capable of separation by the jury and that there would be no danger of confusion. The facts are relatively simple and straightforward. The victims are different although their versions of events are similar. It is expected that the different affiants and the other involved officers can clearly set forth the alleged details of each transaction. The testimony will certainly present to the jury facts which are not complex. There is no risk of confusing the jury.

Secondly, “prejudice...is not simply prejudice in the sense that [the defendant] will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of all Commonwealth evidence. The prejudice...is rather that which would occur if the evidence tended to convict [the defendant] only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid accumulating the evidence.” *Boyle*, supra. The Court sees no danger of this. Further, the jury will be instructed to consider each charge separately and not to use any other evidence as proof of the defendant’s bad character or propensity.

ORDER

AND NOW, this ____ day of March 2018 following a hearing and argument, the Court **GRANTS** the Commonwealth's Motion to Consolidate the four Informations. Information No's. 970-2017; 1855-2017; 2046-2017; and 52-2018 shall be consolidated for trial purposes.

By the Court,

Judge Marc F. Lovecchio

cc: CA
Nicole Ippolito, ADA
Matthew Welickovitch, APD
Gary Weber, Esquire (Lycoming Reporter)
Work file