

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

RASHEAN HICKMAN,

Defendant

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NO. 1314-2007

CRIMINAL ACTION - LAW

HABEAS CORPUS PETITION

DATE: January 28, 2008

OPINION and ORDER

Before the court for determination is the Petition for *Habeas Corpus* filed by Defendant Rashean Hickman on October 15, 2007. On November 20, 2007 counsel stipulated on the record that the court is to determine the petition based upon the testimony presented on August 17, 2007, a preliminary hearing held before Magisterial District Judge Allen P. Page. The Petition will be denied. The evidence presented by the Commonwealth sufficiently establishes a *prima facie* case for all ten charges.

I. BACKGROUND

During the August 17, 2007 preliminary hearing, testimony was taken from two of the Commonwealth's witnesses, Anthony Miller (hereafter "Miller") and Tammy Sheaffer (hereafter "Sheaffer"). Miller testified that on July 5, 2007, he and Sheaffer were inside Sheaffer's residence at 327 High Street, Williamsport, PA. Notes of Testimony, 08/17/2007, pg. 2-3. At approximately 5:20 a.m., Sheaffer stated she heard a knock at her front door. N.T., pg. 21. As the front door to Sheaffer's apartment has no peep hole from which to view the outside, Sheaffer peered out the window that was beside the front door to see who had knocked. N.T. 21-22. Sheaffer saw Miller's ex-girlfriend, "Missy", a.k.a. Ovette Foreman, (hereafter Miss Foreman) outside her front door. N.T. 20. Sheaffer then called to Miller, who was in the bedroom, that

Miss Foreman was outside the front door. *Id.* Sheaffer testified that she told Miller she did not want Miss Foreman visiting at her residence and for Miller to tell her to leave. N.T. 20. At the time, Miller was in the bedroom and had just exited the shower. N.T. 22. He testified that he yelled from the bedroom for Miss Foreman to get away from the door. N.T. 21. Neither Sheaffer nor Miller opened the door for Miss Foreman. *Id.*

Miller testified that after he dressed, which was five to ten minutes after he told Miss Foreman to go away, there was a loud banging at the front door. N.T. 23. Miller stated the banging was much louder than a normal knock and sounded as though someone was trying to get into the apartment. *Id.* Both Miller and Sheaffer testified that Miller looked out the door and saw Miss Foreman outside, but when he opened the door Miss Foreman had gone and the two defendants, Niheem Keys and Rashean Hickman were outside instead. N.T. 14, 53. Miller stated that as he began to open the front door it was “smashed open” by the two men. N.T. 24. Sheaffer stated that Miller did not open the door completely for the two men, but when it was partially opened, the two defendants “slid” in. N.T. 53.

When Miller first opened the door, he noticed that Miss Foreman had stepped out of the way to reveal both Hickman and Keys standing in the doorway. N.T. 14. Miller did not object to Hickman or Keys coming into the doorway to the apartment nor did he try to prevent them from doing so. N.T. 14-15. Keys asked Miller if the two men could speak with him. N.T. 34. Miller asked what the two defendants wanted to speak to him about. *Id.* Hickman replied that they wanted to talk to Miller about some money and whether he knew anything about Miss Foreman’s cell phone which had gone missing from Miss Brook’s apartment earlier that evening. N.T. 4, 34. Miller replied that he had not seen the phone. *Id.* After about five to ten minutes of

conversation, Keys' and Miller's voices become loud and the two stood face to face. N.T. 36. Miller testified that Hickman did not say much during this time. *Id.*

Keys allegedly started the fight by shoving Miller who then shoved Keys back. N.T. 37. This shoving back and forth continued for about ten to fifteen seconds. *Id.* Miller could not remember if Hickman struck him at any time, but recognized that he was between the two men during the struggle and Keys was doing most of the tugging. N.T. 12-13. Miller landed one or two punches on Keys' upper body and Keys landed one or two closed fist punches in against Miller. N.T. 38. During the fight, Miller's body was slanted to the right and Keys was positioned off to the right of Miller. N.T. 41. Both men were within arms reach of each other and grabbing at each other. *Id.* Miller had Keys' shirt in his right hand and Keys was pushing back against Miller. N.T. 41-43.

At this point Miller heard a loud bang, smelled gun powder and looked around. N.T. 43. Both Hickman and Keys fled out the door together two to three seconds after the bang was heard by Miller. N.T. 45-46. As the two men were running out the door Miller testified that he saw the "taller one" of the two defendants holding a silver and black automatic hand gun in his hand. N.T. 8, 10-11, 45-46. During the preliminary hearing it was established that the "taller one" was defendant Niheem Keys and Miller identified Keys at the hearing as the man he saw holding the gun as he fled. N.T. 8-9. Miller began to follow Keys and Hickman out the front door to the parking lot until he felt his arm go numb and realized that the shot had pierced his left shoulder. N.T. 11, 16. He then collapsed. N.T. 17.

Miller also testified that he was acquainted with both Hickman and Keys and had a friendship with them prior to seeing them standing at his door. N.T. 31. Miller testified that he had been socializing with both Hickman and Keys earlier that evening as well as four other

individuals. *Id.* Between 4:00 a.m. and when the two defendants knocked on the door after 5:00 a.m., Miller had been socializing in a group of people consisting of defendants Hickman and Keys, as well as a Miss Berks, Miss Foreman, Miss Lewis and Miss Brooks. *Id.* All six had been socializing at Miss Brooks apartment. N.T. 32. At some point before 5:00 a.m., perhaps 4:30 a.m. or 4:45 a.m. per Sheaffer's estimation, Miller arrived at Sheaffer's residence alone after leaving Miss Brooks' apartment. *Id.* Then at around 5:00 a.m., the incident described above ensued. N.T. 21.

As a result of the gun shot, Miller suffered a fractured shoulder and an abrasion on his head from when he fell. N.T. 9, 17. He required emergency medical care at the hospital for the gun shot wound. N.T. 9. Miller stayed in the hospital ten days during which time it was determined that he suffered internal bleeding and a collapsed lung as a result of the gun shot wound. N.T. 10. To treat him, a tube had to be inserted into Miller's lung to drain the blood and the bullet had to be surgically removed. *Id.*

Sheaffer testified that during the fight, she was standing against the wall of her apartment approximately four to five feet away from all three men. N.T. 59. Miller had testified to the same, estimating that Sheaffer stood about six feet away. N.T. 19. Sheaffer stated that she saw Keys enter the apartment with a gun in his hand. N.T. 54, 56. In her opinion, Miller allowed the two men to "slide" in through the front door because Keys was holding a gun. N.T. 57. She then heard Keys say repeatedly "let go of the gun, I'm not going to shoot you." N.T. 70. Sheaffer stated that after these statements she saw the fight start between Keys and Miller at which point Hickman stepped up and became involved by hitting Miller in the side. N.T. 57.

Sheaffer testified that all three men had their hands on the gun and that the gun very well could have transferred hands between Keys and Hickman. N.T. 69-70, 74. Sheaffer then stated

that Miller let go of the gun and Keys hit Miller over the top of the head with the gun causing blood to flow down the side of his face. *Id.*, 56, 70, 71, 74, 80. She then said the men moved back in front of Sheaffer's living room door and Keys had his hand on Miller's left shoulder. N.T. 75. It was then that Sheaffer heard a shot and smelled the gun go off. *Id.* Sheaffer testified that she saw Keys shoot Miller. N.T. 76.

At the preliminary hearing, Sheaffer acknowledged that after Miller was shot and taken to the hospital, Agent Leonard Dincher interviewed her about the incident. N.T. 62. During the interview, she stated that a black man in his early twenties with braids in his hair going by the street name of "Twin" had shot Miller. *Id.* Sheaffer knew the street names for both men, Hickman went by "Twin" and Keys went by "Ny". Sheaffer then testified that during later interviews with Agent Dincher that occurred between July 5th and July 29th, she told Agent Dincher that the taller skinny man with the blue shirt and black hat, later identified by Sheaffer as Keys, had been the one to shoot Miller. N.T. 69, 77. At the preliminary hearing Sheaffer acknowledged that she had made inconsistent statements to Agent Dincher in her interviews, but again insisted that it was Keys who shot Miller. N.T. 65-66.

Defendant Hickman was charged on July 29, 2007, with the following crimes: Count 1, Criminal Conspiracy 18 Pa. C.S. § 903(a)(1); Count 2, Aggravated Assault 18 Pa.C.S.A. § 2702(a); Count 3, Aggravated Assault with a Deadly Weapon 18 Pa.C.S.A. § 2702(a)(4); Count 4, Burglary 18 Pa.C.S. § 3502(a); Count 5, Criminal Trespass 18 Pa.C.S. § 3503(a)(1)(i); Count 6, Possessing Instruments of Crime 18 Pa.C.S.A. § 907(b); Count 7, Recklessly Endangering Another Person 18 C.S. § 2705, victim Miller; Count 8, Recklessly Endangering Another Person 18 C.S. § 2705, victim Sheaffer; Count 9, Person Not to Possess, Use, Manufacture, Control, Sell

or Transfer Firearms 18 Pa. C.S.A. 6105(c)(7); Count 10, Firearms Not to be Carried Without a License 18 Pa.C.S. § 6106(a)(1).

II. ISSUES

Hickman's Petition for *Habeas Corpus* raises 6 issues. They are as follows:

- (1) Whether the testimony presented at the preliminary hearing is sufficient to uphold a *prima facie* case for criminal conspiracy;
- (2) Whether there is sufficient evidence to support a *prima facie* case for aggravated assault and aggravated assault with a deadly weapon given the testimony Keys and not Hickman possessed and fired the gun;
- (3) Whether there is sufficient evidence to support a *prima facie* case for burglary given the testimony that Miller knew both Keys and Hickman and allowed them to enter the apartment;
- (4) Whether there is sufficient evidence to uphold a *prima facie* case for criminal trespass when there is evidence Miller allowed Keys and Hickman to enter the apartment and did not ask them to leave;
- (5) Whether there is sufficient evidence to uphold a *prima facie* case for possession of instruments of a crime, persons not to possess a firearm, and possession of a firearm without a license when there is testimony Keys and not Hickman possessed the handgun;
- (6) Whether there is sufficient evidence to uphold a *prima facie* case for reckless endangerment of both Miller and Sheaffer given that there is testimony Keys possessed and fired the gun while Hickman merely stood by.

III. DISCUSSION

“The writ of *habeas corpus* exists to vindicate the right of personal liberty in the face of unlawful government deprivation.” *Commonwealth v. Jackson*, 809 A.2d 411, 416 (Pa. Super. 2002) (quoting *Commonwealth v. Morman*, 541 A.2d 356, 358 (Pa. Super. 1988)). “It is settled that a petition for writ of *habeas corpus* is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case.” *Commonwealth v. Keller*, 822 A.2d 1004, 1010 (Pa. Super. 2003), *app. denied*, 832 A.2d 435 (Pa. 2003). “[T]he

finding of a *prima facie* case is the prerequisite for requiring the accused to stand trial for the charges leveled against him.’” *Commonwealth v. Cordoba*, 902 A.2d 1280, 1284 (Pa. Super. 2006). “A trial court may grant a defendant’s petition for *habeas corpus* when the Commonwealth has failed to present a *prima facie* case against the defendant.” *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005).

The evidentiary sufficiency of the Commonwealth’s *prima facie* case is a question of law. *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa. Super. 2005), *app. denied*, 891 A.2d 731 (Pa. 2005).

A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. [(citation omitted)]. The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. [(citation omitted)]. Moreover, ‘inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth’s case.’ [(citation omitted)].

Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003). The Commonwealth is not required to prove the defendant’s guilt beyond a reasonable doubt in order to establish a *prima facie* case. *Santos*, 876 A.2d at 363. Rather, the “more-likely-than-not” test is the minimum standard to be used in assessing the reasonableness of the inferences relied upon to establish a *prima facie* case. *Commonwealth v. Wodjak*, 466 A.2d 991, 996 (Pa. 1983); *Commonwealth v. Lacey*, 496 A.2d 1256, 1261 (Pa. Super. 1985).

A. Conspiracy Charge

Hickman claims the testimony elicited from the preliminary hearing is insufficient to support a *prima facie* showing of criminal conspiracy to unlawfully enter Sheaffer’s residence for the purpose of committing aggravated assault. Specifically, Hickman argues that the

Commonwealth has failed to show he conspired with his co-defendant, Keys, to commit the crime of aggravated assault. The court disagrees with Hickman's claim and finds the testimony sufficient to support a *prima facie* showing of criminal conspiracy to commit aggravated assault upon Miller.

The Pennsylvania Crimes Code defines the offense as follows:

(a) DEFINITION OF CONSPIRACY.-- A person is guilty of conspiracy with another person or persons to commit a crime if, with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

“A conspiracy conviction requires proof of (1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator and (3) an overt act in furtherance of the conspiracy.”

Commonwealth v. Spatz, 562 Pa. 498, 756 A.2d 1139, 1162 (Pa. 2000). “Because it is difficult to prove an explicit or formal agreement to commit an unlawful act, such an act may be proved inferentially by circumstantial evidence, i.e., the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.” *Id.* In *Commonwealth v. Swerdlow*, 431 Pa. Super. 453, 636 A.2d 1173 (Pa. Super. 1994), the court established criteria to follow when determining the existence of a criminal conspiracy:

Among the circumstances that are relevant, but not sufficient by themselves, to prove a corrupt confederation are: (1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy. The presence of such circumstances may furnish a web of evidence linking an accused to an alleged conspiracy beyond a reasonable doubt when viewed in conjunction with each other and in the context in which they occurred.

636 A.2d at 1177.

In the instant case, the testimony supports a finding that there was a conspiracy between Hickman and Keys based upon the relationship between Hickman and Keys, Hickman's inferred knowledge of Keys' intent to commit a crime, Hickman's acting together with Keys to gain entry to the apartment, Hickman and Keys' shared conversation with Miller, Hickman's participation in Keys' actions toward Miller, and Hickman and Keys common manner of flight from the scene of the crime.

The evidence shows both Hickman and Keys were associated before the crime occurred. Both Miller and Sheaffer testified that Hickman and Keys had been socializing together on the evening of the incident shortly before the crime occurred. N.T. 31-32.

The circumstances surrounding the shooting also supports a reasonable inference that Hickman had knowledge of the commission of the crime. Both Hickman and Keys were present during the commission of the crime. N.T. 4. Sheaffer testified that when Keys and Hickman entered her residence, Keys was holding a gun in his hand. N.T. 54, 56. As Hickman and Keys had approached the residence together and Hickman was standing directly beside Keys, it is more likely than not that a gun in Keys' hand would not have gone unnoticed by Hickman. It is reasonable to infer that Hickman knew Keys had a gun and had knowledge of Keys' intention to use the gun against Miller.

Furthermore, the evidence suggests that both men used Miss Foreman in a planned ruse to induce Miller to open the door. When the second knock on the door occurred, both Miller and Sheaffer testified that they expected to see Miss Foreman standing outside. N.T. 14, 53. Instead of Miss Foreman, however, the two defendants were at the doorstep and "smashed" the door open to gain entrance. *Id.* This testimony supports a finding that the two men entered the

apartment pursuant to a previously discussed plan to deceive the occupants as to the true identity of the person at the door.

Moreover, the manner in which Keys and Hickman conversed with Miller upon their entrance into Sheaffer's apartment serves as circumstantial evidence from which a prior agreement to commit the crime can be inferred. When Hickman and Keys entered Sheaffer's apartment, both men spoke to Miller in turn. N.T. 34. Keys announced that the two wanted to speak to Miller, and when Miller asked why the two men needed to speak to him, it was Hickman who answered him. N.T. 34. This shared conversation supports a *prima facie* finding that the two men were in a concert and acted according to a previously made agreement to assault Miller.

The testimony supports a reasonable inference that Hickman was present at Sheaffer's apartment to assist Keys and "cover him" in his planned assault against Miller. Both Miller and Sheaffer testified that the two defendants arrived and remained at the apartment together. N.T. 12-14, 24, 53. Although Keys primarily did the talking when the men entered the apartment, and Hickman "stood back" behind Keys, it can be inferred from Hickman's actions throughout the fight that he was providing backup for Keys. N.T. 15. Sheaffer testified that as the fight between Keys and Miller escalated, Hickman stepped up and became involved in the fight by hitting Miller in the side as well as struggling to gain control of the gun. N.T. 57, 69-70, 74. Miller stated that he found himself standing "in the middle" between the two men as the fight ensued. N.T. 13. Such actions support a *prima facie* finding that the two men were acting in concert with one another in the assault upon Miller.

The manner in which Hickman and Keys fled the scene after the shooting also supports a *prima facie* finding for conspiracy. The fact finder can consider flight indicative of a defendant's

consciousness of guilt. *Commonwealth v. Ford*, 715 A.2d 1141, 1144 (Pa. Super. 1998). Two to three seconds after the shot was fired at Miller, both men fled the scene together. N.T. 46. The fact that both Hickman and Keys fled together after the shot was fired and Hickman did not stay behind to determine if Miller was injured, supports an inference that the two had an agreement to commit the crime and that the planned result had occurred.

Viewing the evidence in a light most favorable to the Commonwealth, it can reasonably be inferred that Hickman not only agreed to, but did, aid the shooter in the commission of his act thereby establishing it more likely than not the presence of conspiracy.

2. Aggravated Assault and Aggravated Assault with a Deadly Weapon

Hickman next claims that no testimony was presented by either of the Commonwealth's witnesses that would support the aggravated assault charges under Counts 2 and 3. Hickman asserts the evidence is insufficient to sustain the charges because the victim, Miller, testified that he saw Keys and not Hickman holding the gun and believed it was Keys and not Hickman who shot him. The court finds the evidence sufficient to sustain a *prima facie* showing for aggravated assault and aggravated assault with a deadly weapon as Hickman is criminally responsible for the acts of his co-conspirator Keys.

Aggravated Assault under 18 Pa. C.S.A. § 2702(a)(1) is defined as follows:

- (a) OFFENSE DEFINED.-- A person is guilty of aggravated assault if he:
- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

A person is guilty of Aggravated Assault with a Deadly Weapon under 18 Pa. C.S.A. § 2701(a)(4) if he: "(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon..." In this case, Miller was shot allegedly by Keys, Hickman's co-conspirator, with a .45 millimeter handgun. N.T. 87. Firing a gun constitutes the type of

conduct that is likely to result in serious bodily injury for purposes of satisfying a charge of aggravated assault. See *Commonwealth v. Wanamaker*, 298 Pa. Super. 283, 444 A.2d 1176, 1178 (Pa. Super. 1982). The gun shot resulted in a serious bodily injury as Miller sustained a bullet in his shoulder, an abrasion on his head from falling, and required emergency medical treatment. N.T. 9-10.

Although testimony from both Sheaffer and Miller indicates that Keys fired the shot at Miller, this fact does not negate Hickman's culpability under the aggravated assault charge nor the aggravated assault charge with a deadly weapon due to the *prima facie* showing of criminal conspiracy.

The general rule of law pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The co-conspirator rule assigns legal culpability equally to all members of the conspiracy. All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action.

Commonwealth v. Hannibal, 562 Pa. 132, 753 A.2d 1265, 1274 (Pa. 2000). Therefore "once conspiracy is established and upheld, a member of the conspiracy is also guilty of the criminal acts of his co-conspirators." *Commonwealth v. Roux*, 465 Pa. 482, 350 A.2d 867, 871-872 (Pa. Super. 1976).

In this case, evidence supports a *prima facie* finding that Hickman engaged in a conspiracy with Keys to commit aggravated assault upon Miller. A firearm was used in furtherance of the conspiracy. N.T. 87. Because Hickman and Keys engaged in a conspiracy to commit an aggravated assault, the fact that one of them shot at Miller using a deadly weapon renders the other equally criminally responsible. *Roux*, 350 A.2d at 871-872. Each conspirator is criminally responsible for the action of his co-conspirator, provided it is accomplished in

furtherance of the common design, “even though one does not perform the immediate act [complained of].” (Citation omitted) *Commonwealth v. Bachert*, 271 Pa.Super. 72, 77, 412 A.2d 580, 583 (1980). It is not necessary to prove who actually fired the weapon, so long as it is shown it was fired. *See Commonwealth v. Simpson*, 562 Pa. 255, 754 A.2d 1264 (Pa. Super. 2000) (each member of a conspiracy to commit murder can be convicted of capital murder regardless of which of the conspirators inflicted the fatal wound). Thus, Hickman’s claim as to aggravated assault fails regardless of whether Keys was the individual who possessed or fired the gun.

3. Burglary

Hickman claims the Commonwealth failed to provide any testimony to support the charge of burglary because the victim, Miller, testified he previously knew the defendants and did not attempt to prevent their entrance to the apartment. The court disagrees and finds the testimony sufficient to make a *prima facie* showing for the charge of burglary because the offense transpired during the commission of the conspiracy to commit aggravated assault upon Miller.

“A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.” 18 Pa. C.S.A. § 3502(a). An “Occupied Structure” is defined as any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. 18 Pa.C.S. §3501. “Intent may be proved by indirect evidence or inferred from circumstantial evidence.” *Commonwealth v. Canon*, 297 Pa. Super. 106, 443 A.2d 322, 324 (Pa. Super. 1982).

A person who is licensed or privileged to enter a building cannot be convicted of burglary even if he intends to commit a crime once in the building. *Commonwealth v. Majeed*, 548 Pa. 48, 52, 694 A.2d 336, 338 (1997). The element of “license” or “privilege” is similar to that of consent. *Commonwealth v. Starkes*, 268 Pa. Super. 108, 407 A.2d 853, 856 (Pa.Super. 1979). “License means ‘1: permission to act . . . 3b: authority or permission of one having no possessory rights in land to do something on the land which would otherwise be unlawful or a trespass . . .’; privilege means ‘1a: a right or immunity as a peculiar benefit, advantage or favor; special enjoyment of a good or exemption from an evil or burden; a peculiar or personal advantage or right especially when enjoyed in derogation of common right’: PREROGATIVE.” *Commonwealth v. Hopkins*, 2000 PA Super 47, P15 (Pa. Super. Ct. 2000).

The elements of license and privilege, however, like that of consent, can be vitiated if they are induced by force, duress, deception or from one who is intoxicated and unable to make a reasonable judgment as to the nature or harmfulness of the situation at hand. *Commonwealth v. Edwards*, 588 Pa. 151, 903 A.2d 1139, 1148 (Pa. 2006); 18 Pa. Cons. Stat. § 311(c)(2) and (4).

Hickman and Keys entered Sheaffer’s apartment, an “occupied structure” adapted for overnight accommodations under §3501, at around 5:20 a.m. N.T. 21, 24. As discussed above in the criminal conspiracy section of this opinion, the circumstantial evidence is sufficient to support an inference that Hickman and Keys entered Sheaffer’s apartment with the intent to commit an unlawful act, i.e. aggravated assault. At the time of their entry to the apartment, the premises was not open to the public but was a private residence rented by Sheaffer.

When the testimony is viewed in a light most favorable to the Commonwealth, there is sufficient evidence that the defendants did not gain entrance to the apartment by a valid privilege. Although Miller was acquainted with both Keys and Hickman, the testimony supports

a finding that the two defendants gained entrance through deception, thereby negating any purported license or privilege to enter. After the second knocking at the door, Miller looked out the window to see Miss Foreman standing at the doorstep. N.T. 14, 53. Yet when Miller opened the door, he was surprised to find the two defendants standing before him instead. *Id.* From this testimony it appears that the defendants gained access through deception by instructing Miss Foreman to knock on the door for them in order to mislead Miller into thinking he was opening the door for her.

Evidence of privilege to enter is also negated by testimony of force used by the men to gain entrance to the apartment. Sheaffer testified that Keys was holding a gun in his hand when he entered the apartment. N.T. 54, 56. Moreover, Miller stated that the door was “smashed” open when he began to open it, and Sheaffer testified that the two men “slid” into her apartment through the half opened door, with Keys holding a gun in his hand to gain entrance. N.T. 53, 56. Finally, the affirmative defense of privilege to enter the apartment based on an acquaintance with Miller is weakened by the fact that the two men sought entrance into an apartment that was not Miller’s, but Sheaffer’s, whom they did not share such a relationship.

The evidence of deception in using Miss Foreman to induce Miller to open the door, the gun in Keys’ hand as he opened the door, as well as the evidence of forced entry, negates the privilege asserted by Hickman to enter the apartment. Accordingly, there is sufficient evidence to support a *prima facie* finding for the charge of burglary.

4. Criminal Trespass

Hickman asserts there is insufficient evidence to support a *prima facie* finding that he committed criminal trespass because Miller allowed him into the residence and at no time did he ask Hickman or Keys to leave. The court does not agree with Hickman’s claim.

A person commits criminal trespass under 18 Pa.C.S. § 3503(a)(1)(i) when “knowing that he is not licensed or privileged to do so, he enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof.”

The testimony at the preliminary hearing as to the deception used by Hickman and co-defendant Keys in entering the apartment supports a finding of entry by subterfuge. The use of subterfuge is evidenced by the use of Miss Foreman to knock on the door in place of the defendants to trick Miller into opening it under the belief that Miss Foreman would be at the door. N.T. 14, 53. The use of force and subterfuge, evidenced by testimony that the door was “smashed” open and Keys was holding a gun when he entered the apartment, negates Hickman’s claim of privilege and license to enter the apartment through his prior acquaintance of Miller. N.T. 53, 56.

5. Possessing Instruments of Crime and Weapons Charges

Hickman claims that insufficient evidence exists to uphold a *prima facie* finding that he possessed an instrument of a crime, possessed a firearm unlawfully as an adjudicated felon, or possessed a firearm without a license. Hickman argues that no testimony was given to substantiate a finding he at any time physically had the firearm on his person. The court disagrees with Hickman’s argument and finds sufficient *prima facie* evidence that Hickman possessed the gun.

Under 18 Pa. C.S.A. § 907(b), a person is guilty of Possessing an Instrument of a Crime if he “possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.” Under 18 Pa. C.S.A. 6105(c)(7), Person Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms, a person is guilty of violating this section if he possesses a firearm having been adjudicated delinquent under the charges enumerated in subsection (7). It is

undisputed in this case that Hickman was adjudicated delinquent on felony drug charges and satisfies the category of persons prohibited from possessing a firearm. A person violates 18 Pa.C.S. § 6106(a)(1), Firearms Not to be Carried Without a License, if he “carries a firearm concealed on or about his person... without a valid and lawfully issued license under this chapter...” It is undisputed that Hickman lacked a valid license to carry a .45 caliber handgun.

The remaining disputed element for these charges the Commonwealth must prove by a *prima facie* showing is possession. To show possession the Commonwealth is required to establish that the defendant had power over the weapon and the intention to exercise that control. *Commonwealth v. Armstead*, 542 Pa. 49, 51, 305 A.2d 1, 2 (1973). However, possession may be proven by circumstantial evidence. *Commonwealth v. Bentley*, 276 Pa. Super. 41, 46, 419 A.2d 85 (1980). “Individually, the circumstances may not be decisive; but, in combination, they may justify an inference that the accused had both the power to control and the intent to exercise that control, which is required to prove constructive possession.” *Commonwealth v. DeCampli*, 243 Pa. Super. 69, 74, 364 A.2d 454, 456 (1976). At the least, the evidence must show that the defendant knew of the existence of the item. *Commonwealth v. Wisor*, 466 Pa. 537, 353 A.2d 817 (1976).

As discussed earlier, *prima facie* evidence of a criminal conspiracy between Keys and Hickman to commit aggravated assault by use of a deadly weapon, the .45 caliber handgun, also exists in this case. Therefore under the same legal principal that all co-conspirators are responsible for the unlawful acts of other co-conspirators in the furtherance of the conspiracy, Hickman is responsible for the unlawful possession of a firearm in furtherance of his conspiracy to commit aggravated assault against Miller. The conspiracy shows that Hickman shared Keys’ intent and power to exercise control over the gun in furtherance of the crime.

Secondly, sufficient evidence exists to uphold a *prima facie* case for possession of the .45 caliber handgun through Sheaffer's testimony that Hickman had his hands on the gun. Sheaffer testified that at one point the gun could have transferred hands between Keys and Hickman, and that all three men had their hands on the gun, including Hickman. N.T. 69-70, 74. This evidence is sufficient to make a *prima facie* showing that Hickman did physically possess the gun.

6. Reckless Endangerment

Hickman argues there is no evidence to support the charges of reckless endangerment in regards to victims Miller and Sheaffer because there was testimony from Miller that Hickman was merely standing by and testimony from both victims that it was Keys who shot Miller. Pursuant to the reasoning set forth above for the conspiracy charge, Hickman is criminally responsible for all unlawful acts perpetrated by his co-conspirator in furtherance of the conspiracy. Accordingly, there is sufficient *prima facie* evidence to support a charge of reckless endangerment as to both Miller and Sheaffer.

Under 18 Pa. C.S. § 2705, a person is guilty of reckless endangerment of another if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Victim Miller was shot in the shoulder by Keys with a .45 caliber handgun, an act which placed him in danger of death and did cause him serious bodily injury. N.T. 9-10. As there is evidence of conspiracy between Hickman and Keys to commit aggravated assault against Miller through use of the handgun, Hickman is criminally responsible for Keys shooting Miller. In regards to victim Sheaffer, Keys conduct of getting into a fist fight and shooting a gun at Miller when Sheaffer was standing four to five feet away is conduct which may have placed her in danger of death or serious bodily injury. N.T. 59. Again, as the evidence

supports the conspiracy to assault Miller, Hickman is also criminally responsible for recklessly endangering Sheaffer.

IV. CONCLUSION

The Petition for *Habeas Corpus* of Defendant Rashean Hickman is denied as there is sufficient *prima facie* evidence to support all ten charges.

ORDER

It is hereby ORDERED that the Petition for *Habeas Corpus* by Defendant Rashean Hickman on January 28th, 2008 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Public Defender, William Miele, Esquire
District Attorney, Mary Kilgus, Esquire
Rebecca Penn, Esquire (Law Clerk)
Judges