

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

**DONDRE MCMILLAN,
Defendant**

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**CR-1309-2011; CR-1545-2011
CRIMINAL DIVISION**

OPINION AND ORDER

The Commonwealth filed a Motion to Consolidate on May 18, 2012. A hearing on the motion was held on June 25, 2012.

Background

The first incident included in the Commonwealth's Motion to Consolidate is found at docket number 1309-2011. On July 24, 2011, Frank Gair (Gair), a pizza delivery person for Old School Pizza, delivered four (4) large pizzas to 460 George Street in South Williamsport around 11:00 PM. The caller told Old School Pizza to deliver the pizza at the rear door because the front door did not work. Gair drove to the address and when he arrived at the rear of the building was jumped by at least three (3) males. Gair described two (2) of the males as black and one (1) as light skinned. Gair was tackled to the ground, punched in the face several times, and was choked. Gair told the men that they could have everything and one of them said to Gair to shut up or he would be killed. The men stole approximately \$140.00 from Gair along with the four (4) large pizzas. One of the men tried to steal a GPS unit, sunglasses, and the radio from Gair's vehicle but was unsuccessful. Two of the men ran eastbound down West Bluebird Alley. On July 28, 2011, Gair passed a South Williamsport playground and observed two of the individuals who had robbed him. Gair contacted South Williamsport Police and the individuals at the playground were identified by police as Quincy Drummond, Tahir Patterson, Dontay

Parks, and Dondre McMillan (Defendant). Gair specifically identified Quincy Drummond and Dontay Parks as the individuals who robbed him.

The second incident requested to be consolidated is found at docket number 1545-2011. On August 9, 2011, Rodney Ghalib (Ghalib), a pizza delivery person for Two Boys of Italy, delivered two (2) pizzas to 686 Mark Avenue in Williamsport around 12:30 AM. The caller used the phone number of (318) 505-8227. Ghalib drove to the address and when he was arriving attempted to make contact with the ordering party but there was no answer. Ghalib parked at front of the house and walked towards an enclosed front porch door. Prior to reaching the residence, he was immediately approached from behind by two black males. Both men were wearing dark hooded sweatshirts and bandanas over their faces. One had a red bandana (red male) and the other had a dark colored bandana (dark male). Red male held a knife to Ghalib's throat while the dark male searched his pockets and stole \$200.00. The red male referred to the dark male as "Slim" during the incident. Ghalib's hands were tied behind his back using a shoe lace and he was forced to get into the rear of his vehicle. The dark male took off on foot. While the red male got into Ghalib's vehicle, with the victim still inside, and started driving around, including back to the scene of the crime to collect the discarded pizzas. The vehicle eventually pulled over on Braine Street and the red male told Ghalib he would shoot up his car and kill him if he called the police. The red male then fled on foot from the vehicle. After the incident police discovered that the phone number used to call the pizza shop was known by Juvenile Probation as a contact number for the Defendant.

Discussion

The Pennsylvania Rules of Criminal Procedure state that "[o]ffenses charged in separate

indictments or informations may be tried together if . . . 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 or confusion; or . . . the offenses charged are based on the same act or transaction.” Pa.R.Crim.P. 582(A)(1). “The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tied together.” Pa.R.Crim.P. 583. The prejudice the defendant suffers due to the joinder must be greater than the general prejudice any defendant suffers when the Commonwealth’s evidence links him to a crime.¹ Commonwealth v. Lauro, 819 A.2d 100, 107 (Pa. Super. 2003).

Evidence of crimes other than the one in question is not admissible to show bad character or the propensity to commit a crime. Pa.R.E. 404(b). Exceptions, however, have been created:

[E]vidence of other crimes is admissible to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.

Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010) (citing Commonwealth v. Collins, 703 A.2d 418, 422-423 (Pa. 1997)); see also Pa.R.E. 404(b)(2). “Factors to be considered to establish similarity are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed.” Id. (citing Commonwealth v. Taylor, 671 A.2d 235 (Pa. Super. 1996)).

After an examination of the record, the Court fails to find sufficient similarities between

¹The Supreme Court of Pennsylvania has summarized all these rules into three determinations: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and (3) whether the defendant will be unduly

the two criminal episodes to grant consolidation. The Commonwealth cites multiple cases to support their position. Commonwealth v. Dozzo, 991 A.2d 898 (Pa. Super 2010); Commonwealth v. Taylor, 671 A.2d 235 (Pa. Super. 1996); Commonwealth v. Keaton, 729 A.2d 529 (Pa. 1999); Commonwealth v. Morris, 425 A.2d 715 (Pa. 1981). The strongest argument comes from Taylor, which consolidated a robbery that took place on the street; a forcible entry burglary, robbery, and attempted rape; and an entry by ruse and attempted robbery. See Taylor, 671 A.2d at 249. The similarities included the fact that all the victims identified the Defendant, gave physical descriptions very similar to one another, and described similar clothing and sunglasses. Moreover, a knife was possessed in each crime, the victims were white females, and the crimes occurred near each other. In these two incidents, the perpetrators committed the same type of crime; however, the victims did not identify the Defendant specifically or by any physical characteristics. These crimes did not employ the same weapons, use the same disguises, or occur in close proximity to each other.

In Morris two robberies were consolidated that occurred at the same exact location. See Morris, 435 A.2d at 721. The similarities, however, were much more striking than in the case at hand. The victims in Morris were women accompanied by small children and were identified as targets by the assailant while they waited for an elevator. The defendant would then enter the elevator with them, hit an emergency stop button, announced it was a hold up, checked the victims clothing and brassieres, and then escaped through the same breezeway into an adjoining housing project. See id. This Court finds the facts of the two cases presented for consolidation are too dissimilar; different parts of the county, distinctly different approaches to the delivery men as well as number of perpetrators. The most striking difference between these two crimes is

prejudiced by the consolidation of offenses. Commonwealth v. Collins, 703 A.2d 418, 422 (Pa. 1997).

that disguises were used in one crime by two (2) actors and none in the incident involving three (3).

While both the incidents involved Robbery and Criminal Conspiracy, more is required than the mere repeated commission of the same general class of crime. See Commonwealth v. Morris, 425 A.2d 715, 721 (Pa. 1981) (“there must be such a high correlation in the details of the crimes that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others”). Although, both crimes occurred in the middle of the night, involved pizza delivery men, and occurred within a few weeks of another, it is typical for this type of robbery to occur only at night. In fact, this Court believes that the only distinct similarity between the cases is that they involve pizza delivery men. Therefore, the evidence of each of the offenses would not be admissible in a separate trial for the other and consolidation of the cases would not be appropriate under Pa.R.Crim.P. 582(A)(1).

ORDER

AND NOW, this _____ day of July, 2012, based upon the foregoing Opinion, the Court finds that the evidence of each of the offenses would not be admissible in a separate trial for the other and as a result the two cases shall not be consolidated as directed by Pa.R.Crim.P. 582(A)(1). Therefore, the Commonwealth’s Motion to Consolidate is DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
PD (WM)
Eileen Dgien, Dep. CA
Gary Weber