

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

**COMMONWEALTH OF PA** :  
**vs.** : **Docket No's. CR-382-2013**  
: **CR-383-2013**  
**JESS DAVID KECK,** : **Petition for Habeas Corpus**  
**Defendant** : **Motion to Sever**

**OPINION AND ORDER**

Under the above-captioned Criminal Informations, Defendant is charged with robbing four separate convenience markets between October 7, 2012 and October 14, 2012. By Notice of Joinder filed by the Commonwealth on March 21, 2013, the Commonwealth served notice that the Informations would be tried together. On April 3, 2013, Defendant filed a Motion to Sever the charges. On May 1, 2013, Defendant filed a Petition for Habeas Corpus regarding the incidents that allegedly occurred on October 7, 10 and 12 of 2012. Information No. 382-2013 includes the crimes associated with the alleged incidents on October 7, 10 and October 14, while Information No. 383-2013 includes the crimes associated with the alleged incident of October 12, 2012.

Hearings on Defendant's Motions were held on July 3, 2013 and August 6, 2013. On July 3, 2013, the Commonwealth submitted into evidence Commonwealth Exhibit 1, which is a transcript of the preliminary hearing held in these matters on March 5, 2013 before Magisterial District Judge Gary Whiteman. On August 6, 2013, the Commonwealth presented the testimony of Rupalten Patel, an employee at the convenience market that was allegedly robbed on October 10, 2012 as well as Commonwealth Exhibit 2, which is a copy of a photographic array presented to Ms. Patel.

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 are based on the same act or transaction.” Pa. R. Cr. P. 582. Conversely, the Court may order separate trials for the offenses if it appears that any party may be prejudiced by the offenses being tried together. Pa. R. Cr. P. 583.

The Supreme Court has established a three-part test that the lower courts must apply in addressing a severance motion similar to the one raised in these cases. First, the Court must determine whether the evidence of each of the offenses would be admissible in a separate trial for the other. Second, the Court must determine whether such evidence is capable of separation by the jury so as to avoid the danger of confusion. Third, if the answers to the previous two questions are in the affirmative, the Court must determine if the defendant will be unduly prejudiced by the consolidation of offenses. Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418, 422 (1997), cert. denied, 525 U.S. 1015, 119 S. Ct. 538 (1998), citing Commonwealth v. Lark, 518 Pa. 290, 302, 543 A.2d 491, 496-97 (1988).

In determining whether the evidence of each offense would be admissible in a separate trial for the other, the Court is guided by the Pennsylvania Rules of Evidence. “Other crimes” evidence is admissible, among other things, to show motive, intent, absence of mistake or accident, common scheme or plan, or identity. Pa. R. E. 404 (b) (2); Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010).

While “[i]t is a principle of longstanding in this Commonwealth that evidence of a distinct crime, except under special circumstances, is inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of another, and the effect of such evidence is to create prejudice against the

defendant in the jury's mind," evidence of other crimes is admissible to prove a common scheme, plan or design or "to establish the identity of the person charged with the commission of the crime, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." Commonwealth v. Armstrong, 2013 PA Super 220 (July 31, 2013), citing Commonwealth v. Morris, 493 Pa. 164, 25 A.2d 715, 720-21 (1981).

"The Commonwealth must show more than the other crimes are of the same class as the one for which the defendant is being tried. Rather, there must be such a high correlation in the details of the crime that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others." Id. Moreover, other crimes are admissible when they tend to prove a common scheme or plan involving two or more crimes so related to each other that proof of one tends to prove the other. Commonwealth v. Judd, 897 A.2d 1224, 1231-32 (Pa. Super. 2006). Factors to be considered are: (1) the elapsed time between the crimes; (2) the geographical proximity of the crime scenes; and (3) the manner in which the crimes were committed. Id. at 1232, citing Commonwealth v. Clayton, 506 Pa. 24, 33, 483 A.2d 1345, 1345-1350 (1984).

Upon reviewing all of the evidence, which includes the testimony of twelve (12) different witnesses, the Court concludes that not only are the offenses so similar that they tend to show a common scheme or a plan, but that they also demonstrate that it is very unlikely that anyone else but Defendant committed the other crimes. The crimes were not only of the same class (robberies and thefts); they also took place in close temporal and geographic proximity. The crimes occurred on October 7, October 10, October 12, and October 14. The

establishments robbed were on East Third Street, the 1300 block of West Third Street, the 1900 block of West Fourth Street and Lycoming Creek Road, all of which are in the Williamsport area within a few miles of each other. All of these crimes were committed against lone cashiers in convenience markets. In each of the incidents, the offender walked into the store concealing his appearance by wearing glasses, head gear and/or a fake mustache or beard, and he demanded that the cashier put monies in a black drawstring, cloth-type bag. Furthermore, on each occasion, the offender pointed a small black handgun at the cashier. Each of the incidents took just a few minutes and the offender was described as Caucasian (white), approximately 6 feet tall and “bigger,” “heavy build,” or “stocky.”

Moreover, there is abundant circumstantial evidence linking Defendant as the perpetrator.

Prior to the October 14, 2012 robbery of the cigarette outlet, an individual matching Defendant’s description was seen sitting in the driver’s seat of a white truck and talking on a cell phone. The truck was parked behind a Pizza Hut at approximately 2:30 p.m. The Pizza Hut is located next to the cigarette outlet. The cigarette outlet was robbed at 4:00 p.m. that same day.

Following the robbery at the cigarette outlet, the same white truck was seen pulling in front of the Pizza Hut. The driver stopped the vehicle and exited. He was the same individual who had been at the Pizza Hut previously. He walked over to the Pizza Hut dumpster and threw out numerous items including a McDonalds’ bag and the contents of a black cloth bag.

The police eventually searched the dumpster and found among other things, DUO adhesive used to apply a fake beard or mustache, a bank deposit slip with Defendant's name on it, a money drop receipt from the Uni-Mart which was robbed on October 12, drug paraphernalia, and lottery tickets that were later determined to be tickets taken from the Uni-Mart on October 12.

Further investigation uncovered a video from a different convenience store of an individual, fitting Defendant's description, redeeming a lottery ticket which was found to be one of the lottery tickets stolen from the Uni-Mart on October 12. Defendant's truck and residence were searched as well. Among other things in Defendant's truck, law enforcement officials found clothing that generally matched the clothing worn by the offender during at least some of the incidents, as well as a black, canvas, drawstring bag. In Defendant's residence, the police found a DUO adhesive box, heroin packets similar to those found in the dumpster, and a receipt showing that the DUO adhesive was purchased in September (prior to the robberies).

Even more investigation uncovered a video from a Rite Aid store in Wellsboro showing a white individual, fitting the Defendant's description, purchasing DUO adhesive.

Moreover, during the October 7, 2012 robbery at the Nittany Mini-Mart, the offender stole a \$10.00 roll of quarters, among other things. Evidence was produced that Defendant subsequently paid for items at another store on October 8, 2012 with a \$10.00 roll of quarters.

Finally, on October 14, 2012, following the robbery at the cigarette outlet, a cell phone was left behind. The evidence established that the cell phone was not present prior to the

robbery. Defendant actually returned to the store to retrieve the cell phone. Defendant admitted that it was his cell phone. When Defendant was apprehended soon thereafter, police noticed a flaky material on his face matching the adhesive.

With respect to the October 10, 2012 robbery at the Smokes to Go, Ms. Patel, the cashier working behind the counter, testified that she was close enough to the offender to view him. She was subsequently presented with a photograph lineup and identified the Defendant as looking “similar if one added the black beard and mustache.”

All of this evidence when taken together not only tends to show a common scheme and plan, rather than merely a propensity to commit the crimes, as well as the identity of the Defendant as the perpetrator. Accordingly, the Court finds that the first prong of Collins is met in that the evidence of each burglary would be admissible in a separate trial for the others.

The second issue that the Court must address concerns whether the evidence is capable of separation by the jury so as to avoid confusion. These cases involve four separate locations, a limited number of actors, and essentially the same conduct, making them relatively uncomplicated. Commonwealth v. Boyle, 733 A.2d 633, 637 (Pa. Super. 1999). Each burglary occurred in a different store and can be labeled as such. Because the robberies took place in different locations on different dates, a jury should be able to distinguish the incidents without confusion. Commonwealth v. Janda, 14 A.3d 147, 157 (Pa. Super. 2011). Therefore, the Court finds that the second prong of Collins is met.

Third, the Court must determine if the consolidation of the offenses will unduly prejudice Defendant. Collins, 703 A.2d at 422. The Court must “weigh the possibility of

prejudice and injustice caused by the consolidation against the considerations of judicial economy.” Janda, at 155-156, quoting Commonwealth v. Morris, 493 Pa. 164, 171, 425 A.2d 715, 718 (1981). This prejudice exists “if the evidence [tends] to convict [the defendant] only by showing his propensity to commit crimes, or because the jury wasn’t capable of separating the evidence or could not avoid cumulating the evidence.” Boyle, 733 A.2d at 637. The Court finds that the possibility of prejudice does not outweigh the judicial economy of consolidating the cases. Further, the jury will be instructed to consider each charge separately and not to use any other crimes evidence as proof of Defendant’s character or propensity. Accordingly, Defendant will not be unduly prejudiced and the third prong of Collins is met.

In light of the aforesaid discussion, the Court will deny Defendant’s Motion to Sever.

The Court will next address Defendant’s Petition for Habeas Corpus. Defendant’s sole argument on this Petition relates to the identification of Defendant. More specifically, Defendant argues that, for prima facie purposes, the Commonwealth has not established that Defendant was the individual who committed the robberies which allegedly occurred on October 7, 10 and 12.

“If a defendant wishes to challenge the sufficiency of the evidence that was adduced during a preliminary hearing, the defendant may file a pretrial petition for a writ of habeas corpus.” Commonwealth v. Claffey, 2013 PA Super 155 (June 25, 2013), citing Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012). The Commonwealth’s duty at the habeas corpus stage is to present a prima facie case. Id. “A prima facie case consists of evidence showing the existence of each material element of the charged offense(s) and

probable cause to believe that the Defendant committed the crime(s) such that if the evidence was presented at trial, the court would be warranted in submitting the case to the factfinder.”

Id.

“A prima facie case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.” Commonwealth v. Packard, 767 A.2d 1068, 1070 (Pa. Super. 2001)(citations omitted). A prima facie case merely requires evidence of each element of the offense charged, not evidence beyond a reasonable doubt. Commonwealth v. Santos, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005).

As set forth above, the Commonwealth presented sufficient evidence for prima facie purposes to identify Defendant as the perpetrator of the crimes. Accordingly, Defendant’s Petition for Habeas Corpus will be denied.

**ORDER**

AND NOW, this \_\_\_\_ day of August 2013 following a hearing, Defendant’s Motion for Severance and Petition for Habeas Corpus are **DENIED**.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: DA (MK)  
PD (WM)  
Gary Weber, Esquire (Lycoming Reporter)  
Work File