

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-403-2013
:
vs. :
:
JASON WELSHANS, :
Defendant : Motion to Sever

OPINION AND ORDER

Before the Court is Defendant’s Motion to Sever filed on November 6, 2013. Defendant is charged by Information filed on April 12, 2013 with two counts of Burglary and related charges, two counts of Theft by Deception and one count of Persons not to Possess Firearms. The charges arise out of alleged burglaries that occurred in the Newberry section of Williamsport in January of 2013.

The hearing and argument in this matter was held on December 17, 2013. The parties stipulated that the Court could consider the Affidavit of Probable Cause and the transcript of the March 12, 2013 Preliminary Hearing in deciding the Motion.

Defendant argues that Counts 1, 2, 3 7, and 10 which all relate to a burglary that allegedly occurred at the home of Tim and Robin Pardoe should be severed from the counts relating to a burglary that allegedly occurred at the home of Catherine Luke the same day. With respect to Count 11, Persons not to Possess, the Commonwealth has conceded that said count must be severed in that it is too prejudicial.

On January 24, 2013, Catherine Luke at approximately 2:20 p.m. returned to her home in the Newberry section of Williamsport to find out that it had been burglarized. The front door of her home had been “kicked in” and handguns, a TV and approximately \$2,000.00 worth of “good” gold and silver jewelry was stolen. The burglary occurred between 9:00 a.m.

to 9:30 a.m. and 2:30 p.m. on the 24th.

On January 24, 2013, the home of Tim and Robin Pardoe was also burglarized. They also reside in the Newberry section of Williamsport. Upon returning home a little before 3:00 p.m., Mr. Pardoe soon discovered that his front door had been kicked in and that his home had been burglarized. The actor stole a laptop and various gold and silver jewelry in excess of \$2,500.00.

On January 24, 2013 and January 28, 2013, the Defendant went to Cillo's Antiques in Williamsport and sold various gold and silver jewelry. On January 24, 2013, Cillo's paid \$350.00 for the pieces of jewelry while on January 28, Cillo's paid \$450.00 for the pieces of jewelry. Subsequently, it was determined that the jewelry which was sold to Cillo's was owned by Robin Pardoe and/or Catherine Luke.

Defendant argues that the respective charges should be severed because the evidence of one set of charges would not be admissible in a separate trial and that he would be prejudiced. The Commonwealth argues, to the contrary that severance is inappropriate under the circumstances.

Rule 583 of Pennsylvania Rules of Criminal Procedure, which governs severance, states: "The court may order separate trials of offenses...if it appears that any party may be prejudiced by offenses...being tried together." Pa.R.Cr.P. 583; Commonwealth v. Dozzo, 991 A.2d 898, 901-02 (Pa. Super. 2010).

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 this case. 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 deciding the first question of whether the evidence of each offense would be admissible in a separate trial for the other, the Court is guided by Rule 404 (b) of the Pennsylvania Rules of Evidence, which precludes using evidence of other crimes “to prove the character of a person in order to show action in conformity therewith” but permits such evidence for other purposes, such as proof of motive, intent, plan, identity or absence of mistake or accident. Pa. R. E. 404 (b) (1) and (2); see also Collins, 703 A.2d at 422-23. As the Pennsylvania Supreme Court aptly stated: “While evidence of distinct crimes is inadmissible solely to demonstrate a defendant’s tendencies, such evidence is admissible... to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the others.” Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 481 (2004) (citations omitted); see also Commonwealth v. Judd, 897 A.2d 1224, 1231-32 (Pa. Super. 2006). The Court must consider the similarity, if any, between the alleged crimes. The following factors should be considered in establishing similarity: the elapsed time between the crimes; the geographical proximity of the crime scenes; and the manner in which the crimes were committed. Robinson, supra; Judd, supra at 1232, citing Commonwealth v. Clayton, 506 Pa. 24, 33, 43 A.2d 1345, 1345-1350 (1984).

It 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. The general rule, however, allows evidence of other crimes to be introduced to prove... (4) a common scheme, plan or design...; or (5) to establish the identity of the person charged with the commission of the crime on trial, 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.

* * *

The Commonwealth must show more than the other crimes were 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

Commonwealth v. Armstrong, 74 A.3d 228, 233 (Pa. Super. 2013) quoting Commonwealth v. Morris, 493 Pa. 164, 425 A.2d 715, 720-21 (1981).

Upon 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 that they also demonstrate that it is very unlikely that anyone else but the Defendant committed the other crimes. The crimes are not only of the same class but they also took place in close temporal and geographic proximity. The crimes occurred on the same date, possibly within an hour of each other, the homes burglarized were both in the Newberry section of Williamsport and the method of committing the crimes was virtually identical. In each of the incidents, the offender broke into the residence by kicking a door open and stole primarily jewelry of significant value.

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 two separate

locations, one actor, and essentially the same conduct making them very uncomplicated. See Commonwealth v. Boyle, 733 A.2d 633, 637 (Pa. Super. 1999). Each burglary occurred at a different home and can be labeled as such. A jury should have no problem whatsoever distinguishing the incidents without confusion. Accordingly, 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 the Defendant. Collins, 703 A.2d at 422. The Court must “weigh the possibility of prejudice and injustice caused by consolidation against the considerations of judicial economy.” Morris, 425 A.2d at 718. This prejudice exists if the evidence tends 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 cumulating the evidence.” Boyle, 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.

ORDER

AND NOW, this 20th day of December 2013, Defendant’s Motion to Sever is **DENIED** except that Count 11, Persons to Possess shall not be tried with the remaining charges.

By The Court,

Marc F. Lovecchio, Judge

cc: CA
District Attorney's Office (TC)
Public Defender's Office (RC)
Gary Weber, Esquire (Lycoming Reporter)
Work File