IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1014-2013**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
DONTE JONES,	:	**Pretrial Motion**
Defendant	:	

OPINION AND ORDER

Defendant is charged with several offenses related to an incident that allegedly occurred on March 28, 2013 involving a Chad Stutzman.

The charges include Attempted Murder, Conspiracy to Commit Murder of the First Degree, Conspiracy to Commit Burglary, Conspiracy to Commit Aggravated Assault, Discharge of a Firearm into an Occupied Structure, Conspiracy to Commit Possession with Intent to Deliver, Conspiracy to Commit Possession of a Controlled Substance, Conspiracy to Commit Simple Assault, and two counts of Conspiracy to Commit Recklessly Endangering Another Person.

On October 1, 2013, Defendant filed an extensive Pretrial Motion. The Omnibus Motion includes a Motion to Strike Count 11 of the Criminal Information, a Petition for Writ of Habeas Corpus and a Motion in Limine to Preclude Propensity Evidence.

A hearing and argument on Defendant's Motion was held before the Court on December 11, 2013. The Court addressed some of the issues raised by Defendant at the hearing. Count 11, Criminal Attempt to Commit Simple Assault, was dismissed with prejudice. With respect to Defendant's Motion in Limine to Preclude Propensity Evidence, the Commonwealth was directed to provide a Rule 404 (b) Notice to the Defendant within 30

days. Following receipt of that Notice, Defendant could request a hearing, if deemed appropriate. With respect to the Petition for Writ of Habeas Corpus, the parties stipulated that the Court would consider the Petition based on the evidence presented at the preliminary hearing. A transcript of the preliminary hearing was introduced as Commonwealth's Exhibit 1.

Defendant's Petition for a Writ of Habeas Corpus encompasses all ten of the remaining charges filed against Defendant. For various reasons, Defendant claims that the Commonwealth has not established a prima facie case with respect to the varied charges. Defendant attacks the Commonwealth's proof not only with respect to specific elements of the crimes but also with respect to the identification of Defendant as the actor.

The proper means to attack the sufficiency of the evidence presented at a preliminary hearing is through the filing of a petition for writ of habeas corpus. Commonwealth v. Landis, 48 A.2d 432, 444 (Pa. Super. 2013). At a habeas corpus proceeding, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the Defendant. See Commonwealth v. Williams, 911 A.2d 548 (Pa. Super. 2006); Commonwealth v. Carbo, 822 A.2d 60, 75-76 (Pa. Super. 2003).

"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). "Stated another way, a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of the case to the jury." Packard, supra. at 1071.

The first issue to be determined is whether the evidence presented by the Commonwealth sufficiently establishes that Defendant was probably the perpetrator of the crimes.

Defendant argues that no one identified him as being present at the time of the incident. Defendant argues as well that no one could identify who committed any of the alleged criminal activity. Defendant further argues that the only testimony linking him to the crimes is that of one witness who believed Defendant would have been one of the two actors due to size and weight.

Contrary to the Defendant's argument, the Court concludes that Defendant's identity as the perpetrator of the crimes has been established for prima facie purposes through both direct and circumstantial evidence.

Chad Stutzman knew the Defendant through purchasing heroin from him. On at least two occasions, they, along with an associate of the Defendant known as "Neech," traveled to Philadelphia to obtain heroin.

On May 22, 2013, the three individuals drove to Philadelphia for the purpose of obtaining heroin. While in Philadelphia, Defendant and Neech went into an unknown residence and returned with a bag. Mr. Stutzman took the bag and placed it in the trunk.

Later, without the knowledge of Defendant and Neech, Mr. Stutzman left Philadelphia in the car alone. He eventually opened the trunk, looked in the bag, and found 25 to 30 bundles of heroin. He also noticed that there were two handguns in the trunk.

After May 22 but before May 28, Mr. Stutzman was driving his vehicle on Little League Boulevard in Williamsport. He was stopped in traffic when Defendant abruptly

entered the passenger side of the vehicle. Defendant confronted Mr. Stutzman stating, "Where's my shit." Defendant tried assaulting Mr. Stutzman by doing "something around [his] neck." Mr. Stutzman put his thumb in Defendant's eye in order to get Defendant out of the vehicle.

On May 28, Mr. Stutzman was at his apartment on Jordan Avenue in Montoursville. He first heard a knock which then became loud banging on his back door. He looked through the peephole and "recognized them based on the size differential between Neech and [Defendant]." (Transcript, p. 9).

Mr. Stutzman heard the assailants "come through the door" at which point he "just bolted to the front door." The assailants kicked in the back door and the molding fell down "almost on them." At that point, after the assailants broke through the door and Mr. Stutzman was running to the front door, he heard shots. The shots were fired from where "Neech and [Defendant] were." (Transcript, p. 11). Mr. Stutzman ran out the front door and took an immediate right.

Felicia Weinhardt was also purchasing drugs from Defendant in May. Prior to the May 28 entry into Mr. Stutzman's home, she had a few conversations with Defendant regarding Mr. Stutzman. Defendant was aware that Mr. Stutzman had taken drugs and guns from him and specifically told Ms. Weinhardt that "the cops better get to him before he did." (Transcript, p. 21). On another occasion, they were talking about the guns that were apparently stolen. Defendant told her he was not worried about the old gun, because "he got a new gun now and it had Chad's name all over it." (Transcript, p. 21).

On May 28, at approximately 11:41 a.m., Defendant went to at Ms. Weinhardt's residence on Memorial Avenue in Williamsport to obtain Mr. Stutzman's address, and Ms. Weinhardt gave "Chad's address" to Defendant in exchange for "some dope." (Transcript, p. 22).

Trooper Tyson Havens is employed by the Pennsylvania State Police in their Investigations Unit. He was investigating the incident that lead to the charges against Defendant.

When Defendant was arrested, the police confiscated two cell phones and a blue bandana. A search of one of the cell phone's records indicated that at approximately 11:45 a.m. on May 28, 2013, a call was placed with the use of a tower in the city of Williamsport. At approximately noon, a call was received via a cell phone tower in Montoursville. Moreover, the next call, approximately 34 minutes after the noon incident, was through the cell tower in Williamsport. (Transcript, p. 32).

Trooper Havens also testified and presented documentary evidence depicting the damage that was done at Mr. Stutzman's residence. The backdoor had been kicked in and several shots had been fired causing damage to the backdoor and the front door. The line of fire of the bullets depicts a direction from the backdoor to the front door and actually through the front door at a straight line.

With respect to Defendant's identity as a perpetrator of the crimes, Mr. Stutzman, being familiar with Defendant and Neech, clearly identified them. While a portion of the perpetrators' faces were covered by a blue or black handkerchief, he knew it was Defendant and Neech from their stature and size differential. Moreover, when Defendant was

apprehended, he was in possession of a blue handkerchief/bandana.

Additionally, Defendant had a motive to be present. Mr. Stutzman had taken his drugs and handguns. Defendant was not only aware of this but, in addition to accosting Mr. Stutzman in his vehicle and demanding "Where's my shit," he made statements to Ms. Weinhardt indicating his intent to retaliate against Mr. Stutzman using a gun, as actually happened.

Circumstantially, one of cell phones in Defendant's possession was utilized in the Williamsport area around the time he was obtaining Mr. Stutzman's address from Ms. Weinhardt and then it was used in the Montoursville area near the exact same time that the break-in took place. Following the break-in, the cell phone was again used in the Williamsport area.

In conjunction with Defendant's identity argument, Defendant argues that there is insufficient proof as to who actually kicked in the door and fired the shots. For prima facie purposes, however, the Court concludes that Defendant was in fact the actor who kicked in the door and fired the shots. Alternatively, Defendant is liable under prima facie standards on the theory of accomplice liability. For prima facie purposes and based upon the above testimony, the Commonwealth has proven that with the intent of promoting or facilitating the commission of several offenses, Defendant aided or agreed or attempted to aid another in planning or committing of those offenses. 18 Pa. C.S.A. § 306.

The Court will now address each of the specified crimes in light of Defendant's respective arguments that the required elements have not been proven by the requisite prima facie standard.

With respect to Count 1, Attempted Murder, Defendant argues that he did not attempt the premeditated or unlawful killing of a human being.

When reviewing a petition for habeas corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. Commonwealth v. Santos, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005). A prima facie case "merely" requires evidence of each element of the offense charged; not evidence beyond a reasonable doubt. See Commonwealth v. Patrick, 933 A.2d 1043, 1045 (Pa. Super. 2007) (en banc).

For a defendant to be found guilty of Attempted Homicide, the Commonwealth must establish that the defendant took a substantial step toward committing homicide with specific intent to kill. Commonwealth v. Packard, 767 A.2d 1068, 1071 (Pa. Super. 2001). Specific intent to kill can be inferred from the circumstances surrounding the incident. "Because a person generally intends the consequences of his act, specific intent to kill may be inferred from the fact that the accused used a deadly weapon to inflict injury to a vital part of the victim's body." Commonwealth v. Sattazahn, 631 A.2d 597, 602 (Pa. Super. 1993).

In this case, there was clearly prima facie evidence to support Count 1, Attempted Homicide. Prior to the incident, and in retaliation for Mr. Stutzman allegedly taking Defendant's drugs and handguns, Defendant told Ms. Weinhardt that the cops better get to Mr. Stutzman before he did and that his new gun had Mr. Stutzman's name all over it. Additionally, when Defendant saw Mr. Stutzman in his vehicle, he assaulted him. Moreover,

on the date of the incident, Defendant went to Ms. Weinhardt's residence and obtained the address for Mr. Stutzman. Shortly thereafter, he and his accomplice went to Mr. Stutzman's residence.

Determinatively, they kicked in the backdoor and fired several shots in the same direction that Mr. Stutzman was running. Fortunately, none of the bullets struck Mr. Stutzman. Indeed, and as asserted by the Assistant District Attorney during the preliminary hearing in this matter, had Mr. Stutzman not turned to the right upon exiting his front door, he in all likelihood would have been hit by one of the bullets.

With respect to Count 2, Conspiracy to Commit Murder, a person commits the offense of criminal conspiracy when "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." 18 Pa. C.S.A. § 903(a)(1). "Although the existence of an agreement is an essential element of conspiracy, it is generally difficult to prove an explicit or formal agreement. Therefore, such an agreement may be established inferentially by circumstantial evidence, i.e. the relations, conduct or circumstances of the parties or overt acts on the part of co-conspirators." Commonwealth v. Spotz, 716 A.2d 580, 592 (Pa. 1998)(citation omitted).

The Court finds more than sufficient evidence to support a prima facie case for the offense of Criminal Conspiracy to Commit Murder in the first degree. Both Neech and Defendant traveled together with Mr. Stutzman to Philadelphia for the drug transactions. They both appeared at Mr. Stutzman's residence on May 28 and broke in. It can be inferred from all of the circumstances that they were together when Defendant obtained Mr.

Stutzman's address from Ms. Weinhardt, traveled to Montoursville together and subsequently broke into Mr. Stutzman's residence and at which point one or both of them fired shots at Mr. Stutzman.

With respect to Count 3, Defendant argues that it should be dismissed because the Commonwealth did not meet the element of criminal conspiracy, the element of entering a building or occupied structure, or the element of intent to commit a crime therein.

Based upon the aforesaid reasoning, Defendant's argument fails. The prima facie evidence establishes that Defendant and Neech, in retaliation for what Mr. Stutzman apparently did in taking their drugs and handguns, broke into Mr. Stutzman's apartment with the intent to either kill him or seriously injure him by shooting him with a handgun or handguns.

With respect to Count 4, Conspiracy to Commit Aggravated Assault, Defendant argues again that the Commonwealth did not meet the element of criminal conspiracy. Furthermore, Defendant argues that the Commonwealth did not meet the element of attempting to cause bodily injury to another. Defendant contends as well that the Commonwealth did not meet the element of a deadly weapon.

"Attempt, in the context of an assault, is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another." Commonwealth v. Lopez, 654 A.2d 1150, 1154 (Pa. Super. 1995)(citations omitted). Clearly, and for prima facie purposes, Defendant conspired with another to attempt to cause bodily injury to Mr. Stutzman with a deadly weapon.

With respect to Count 5, Defendant argues that the Commonwealth did not prove for prima facie purposes that he knowingly, intentionally or recklessly discharged a firearm into an occupied structure. 18 Pa. C.S. §2707.1 (a). As referenced previously, the evidence is more than sufficient for prima facie purposes to establish that Defendant either individually or as an accomplice fired a weapon into the residence of Mr. Stutzman and/or while in the residence of Mr. Stutzman.

With respect to Count 6, Conspiracy to Commit Possession with Intent to Deliver, the Court easily concludes that there was sufficient evidence for prima facie purposes to show that Defendant, Neech and Mr. Stutzman agreed that they would possess controlled substances with the intent to distribute them to third parties. They traveled together to Philadelphia for the sole purpose of obtaining the drugs, they in fact obtained the drugs, stored them in the trunk and then intended to return to Williamsport.

Defendant contends, however, there was no evidence, circumstantial or otherwise, to prove that the substances were in fact controlled substances. Defendant argues that labeling the substances as "heroin" and/or "cocaine" or the fact that Mr. Stutzman indicated he used a portion of them is insufficient. There was no testimony from any expert, no testimony from any lab analyst, no lab report, and no testimony from any lay person as to how the drugs were packaged, what they looked like and most importantly whether their effect when used was similar to controlled substances used in the past.

Defendant's argument misses the mark. He is not charged with possession of controlled substances with the intent to deliver them; he is charged with conspiracy. To be

guilty of a conspiracy, the underlying crime need not actually be completed. Pa.SSJI (Crim) 12.903A. Instead, the Commonwealth only needs to prove: an agreement with another person to commit a crime; and an overt act in furtherance of the agreement. 18 Pa.C.S.A. §903; Pa.SSJI (Crim) 12.903A; see also Commonwealth v. Ripley, 833 A.2d 155, 160 (Pa. Super. 2003). The overt act can be criminal or noncriminal, as long as it is designed to put the agreement into effect.

Mr. Stutzman's testimony was sufficient to establish a prima facie case. Mr. Stutzman testified that he was familiar with Defendant because he purchased heroin from him in the past. Additionally, on two prior occasions, he drove Defendant and Neech to Philadelphia to pick up heroin. On May 22, 2013, Mr. Stutzman again agreed to drive Defendant and Neech to Philadelphia for the purpose of purchasing heroin. They drove to a residence in the Philadelphia area. Defendant and Neech went into the residence and when they exited Defendant was carrying a plastic bag, which he placed in the trunk of Mr. Stutzman's vehicle. Mr. Stutzman then drove Defendant and Neech to a shoe store. All three initially went inside, but Mr. Stutzman, stating the need to use a restroom as a ruse, left the store and drove back to Williamsport. When he opened the trunk of his vehicle, he noticed that Defendant had placed two firearms and several vials of suspected crack cocaine in the trunk in addition to the plastic bag which contained 25-30 bundles of what appeared to be heroin. Each bundle contained 13 or 14 individual bags.

Based on this testimony, a jury could reasonably conclude that Defendant intended to possess controlled substances with the intent to deliver them and that Defendant, Neech and Mr. Stutzman entered an agreement to travel to Philadelphia to purchase heroin

for the purpose of delivering it to people in Williamsport. A jury also could reasonably find that there were multiple overt acts, such as going to Philadelphia, entering the residence, returning with a bag that appeared to contain 25 to 30 bundles of heroin, and placing the bag in the trunk of the vehicle.

Accordingly, Defendant's Motion to Dismiss Count 6 will be denied.

For the same reasons as set forth above with respect to Count 6, the Court will deny Defendant's request to dismiss Count 7.

With respect to Count 8, Defendant argues that the Commonwealth has failed to prove a prima facie case of conspiracy to commit simple assault. Defendant argues that the Commonwealth did not present a prima facie case that Defendant attempted by physical menace to place Mr. Stutzman in fear of imminent bodily injury.

In light of the Court's aforementioned recitation of the facts and the reasonable inferences from said facts, the Court cannot agree. Defendant made threatening statements to others about the harm he would inflict on Mr. Stutzman, took action to find out where Mr. Stutzman lived, confronted Mr. Stutzman at his home by breaking into the backdoor and then firing a handgun toward him.

This same analysis applies with respect to Count 9, Conspiracy to Recklessly Endanger Mr. Stutzman.

Defendant contends that the evidence also was insufficient for Count 10, Conspiracy to Recklessly Endanger Joan Chandlee, because the Commonwealth did not meet the elements of conspiracy and no evidence was presented that Ms. Chandlee was in her residence and within the vicinity of the area of any gunshot. The Court is constrained to

agree.

Defendant is not charged with the crime of recklessly endangering Ms. Chandlee; he is charged with conspiracy. The elements for conspiracy are an agreement between two or more persons to commit a crime and an act in furtherance of the agreement. While there is sufficient evidence to establish a prima facie case that Defendant and Neech agreed (and intended) to place Mr. Stutzman in danger of death or serious bodily injury when they broke down his door and began firing shots at him, there is no evidence in the record to show that they agreed to place **Ms. Chandlee** in danger of death or serious bodily injury. The act of firing their weapons was not in furtherance of an agreement to endanger Ms. Chandlee, but rather an agreement to endanger Mr. Stutzman. Furthermore, there also is no competent evidence that she was at home when the shots were fired.[1]

O R D E R

AND NOW, this ___ day of January 2014, upon consideration of Defendant's Omnibus Pretrial Motion, the respective arguments of the parties and review of the transcript of the preliminary hearing held on June 24, 2013, it is ORDERED and DIRECTED as follows:

(1) Defendant's Motion to Strike Count 11, Simple Assault was previously disposed of by Order of Court dated December 11, 2013;

[1] During the course of describing a photograph, which was marked as Commonwealth Exhibit 8 and depicted damage from bullets that entered Ms. Chandlee's apartment, Trooper Havens stated, "This shows her living room where she was present at the time that the two rounds entered." Defense counsel objected on the basis of hearsay. The assistant district attorney indicated he was offering the evidence to show the damage to Ms. Chandlee's property, and the evidence was admitted on this limited basis.

(2) Defendant's Writ of Habeas Corpus with respect to Count 10, Criminal Conspiracy to Recklessly Endanger another Person is GRANTED. Count 10 is DISMISSED

(3) Defendant's Petition for Habeas Corpus with respect to Counts 1 through 9 is DENIED;

(4) Defendant's Motion in Limine to Preclude Propensity Evidence was disposed of via the Court's December 11, 2013 Order.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: DA (AB)
PD (RC)
Gary Weber, Esquire (Lycoming Reporter)
Work file