

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

COMMONWEALTH	:	No's. CR-1663-2012
	:	
vs.	:	
	:	
MICHAEL T. WILLS,	:	Motion to Sever
Defendant	:	
* * * *	:	
COMMONWEALTH	:	
	:	
vs.	:	No. CR-1662-2012; 1990-2013
	:	
KENNETH MARTIN,	:	
Defendant	:	Motion to Sever
* * * *	:	
COMMONWEALTH	:	No. CR-1715-2012
	:	
vs.	:	
	:	
TERENCE FORSYTHE,	:	
Defendant	:	Motion to Sever

OPINION AND ORDER

Before the Court are the motions to sever filed on July 18, 2014 by Terence Forsythe and by Michael Wills.

A hearing and argument on the motions was held on August 25, 2014. At the hearing, Forsythe and Wills argued in favor of severance. Kenneth Martin was somewhat unclear and appeared to oppose consolidation.

The parties stipulated that in considering the motions to sever, the Court consider the transcripts of the hearings held on September 13, 2012 and September 18, 2012 before President Judge Nancy Butts.

Each of the parties is charged with criminal offenses relating to an alleged assault of an individual by the name of Noor Ford on June 19, 2012 in room 214 of the Econo

Lodge in Loyalsock Township, Lycoming County.

Martin and Forshyte are alleged to have entered the room. Martin threatened Ford with a gun, then both physically assaulted him and took money and property. Wills is alleged to have stood outside the room and acted as lookout, keeping another individual from returning to the room and threatening him by showing him a weapon in his waistband if he did not.

Martin is charged with burglary, two counts of robbery, two counts of conspiracy to commit robbery, aggravated assault, criminal trespass, terroristic threats, theft by unlawful taking, receiving stolen property, simple assault, and recklessly endangering another person.

Forsythe and Wills are each charged with one count of theft, one count of simple assault and six counts of criminal conspiracy with the objects of the conspiracies being burglary, robbery (felony 1), robbery (felony 2), aggravated assault, criminal trespass and receiving stolen property.

On May 2, 2014, the Commonwealth filed a notice pursuant to Pa.R.E. 609 (b), indicating that it intended on introducing at trial Martin's prior conviction for false identification to law enforcement authorities and 2001 prior conviction for receiving stolen property.

On July 14, 2014, the Commonwealth filed a notice pursuant to Pa.R.E. 404(b)(4) indicating that it intended to introduce in evidence prior drug transactions between Martin and Ford. Specifically, the Commonwealth indicated that it intended to produce evidence that prior to the alleged assault, Ford sold heroin and that Martin was his supplier.

Immediately prior to the alleged assault, Martin provided Ford with heroin. Allegedly, Mr. Ford failed to pay for the heroin and as a result, Martin and the others committed the criminal conduct against Ford. The Commonwealth specifically alleges that the motive for the criminal acts was Ford's failure to pay Martin.

Forsythe and Wills argue that their charges should be severed from Martin. They contend that the prior convictions and prior bad acts evidence would be unduly prejudicial. They argue that their clients will be found guilty "by association." They also assert that they will have "antagonistic defenses." They claim that any alleged prejudice could not be rectified by any limiting or cautionary instruction.

Pennsylvania Rule of Criminal Procedure (Pa.R.Crim.P.) 583 governs severance and states that the court may order separate trials of defendants if it appears that any party may be prejudiced by the defendants being tried together. Pa. R. Crim. P. 583.

The Court will address each of the claims of prejudice separately. First, Forsythe and Wills argue that they will be found guilty by association. They assert that because the jury may hear the damaging evidence against Martin, the jury will conclude that they, too, are guilty of the charges.

The Court cannot agree. First, to the extent the evidence relates only to Martin, the jury will be instructed, when the evidence is introduced, to consider the evidence only in connection with the charges filed against Martin and not the other defendants. The jury is presumed to follow the instructions of the Court. Furthermore, in its closing instructions, the Court will instruct the jury that it must consider the charges against each defendant separately and consider only that evidence which has been properly introduced in connection with the

particular defendant. The Court will explain to the jury that it may not consider the evidence introduced only against one defendant as evidence against another defendant. Again, the jury is presumed to follow the instructions of the Court. Indeed, at jury selection, the Court will specifically address with the jurors their ability to follow the instructions of the Court with respect to the law including evidentiary instructions.

Evidence regarding Martin's prior convictions could only be introduced in rebuttal if Martin takes the stand and testifies in his own defense. Given the reluctance of some of the Commonwealth's witnesses (including Ford) to testify and their claims in their preliminary hearing testimony that they do not remember the incident, their prior statements to Trooper Havens or both, the Court questions whether Martin will actually testify in this case. Martin has a Fifth Amendment right not to testify in this case and, if he chooses to exercise that right, he can ask the Court to instruct the jury that they cannot draw any inference of guilt or adverse inference from the fact that he did not testify. However, even if Martin testifies and his prior *crimen falsi* convictions are admitted to impeach his credibility, it should not be difficult for the jury to follow instructions that they cannot consider this evidence against Forshyte or Wills; they can **only** consider this evidence to determine the credibility and weight of Martin's testimony.

Moreover, the proffered 404 (b) evidence clearly goes to motive and, depending upon the testimony induced at trial, may be relevant to motive not only with respect to Martin but to Forshyte and Wills as well. While the evidence may be detrimental to the defendants in that it links the defendants to the crimes, it is probative.

Rule 404(b)(2) provides that this type of evidence is admissible in a criminal case “only if the probative value of the evidence outweighs its potential for unfair prejudice.” Pa.R.E. 404(b)(2). Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury’s attention from its duty of weighing the evidence impartially. Pa.R.Crim.P. 403, comment. The Court does not see how any prejudicial impact would outweigh its probative value.

The Court fails to see how consolidation of the cases would cause Forshyte and Wills to suffer a specific prejudice greater than the general prejudice any defendant suffers when the Commonwealth links them to a crime. Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010), citing Commonwealth v. Lauro, 819 A.2d 100, 107 (Pa. Super. 2003), appeal denied, 574 Pa. 752, 830 A.2d 973 (2003).

Forshyte and Wills further argue that they have conflicting or antagonistic defenses. They have not, however, expounded on this argument. “While the possibility of conflicting or antagonistic defenses is a factor to be considered in determining whether to grant a motion for severance, [the defendants] must show a real potential for prejudice and not just mere speculation.” Commonwealth v. Jones, 542 Pa. 464, 486, 668 A.2d 491, 501 (1995).

As the Court in Jones further noted, “[t]he fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance. Moreover, the mere fact that one defendant might have a better chance of acquittal if tried separately is an insufficient ground to require severance.” Id. (citations omitted).

Forshyte’s and Wills’ argument with respect to antagonistic defenses fails.

They have not established a factual basis from which the Court can conclude that the defenses are antagonistic. As well, they have not demonstrated a real potential for prejudice.

Finally, and with respect to both assertions of prejudice, the Court finds that, without more, the general policies governing consolidation outweigh any boilerplate claim of prejudice.

“As a general policy, joint trials are encouraged when judicial economy will be promoted by avoiding the expense and time-consuming duplication of evidence.”

Commonwealth v. Jones, 542, Pa. 462, 668 A.2d 491, 501 (1998). When defendants have been charged with a conspiracy, a joint trial is preferable. Id., citing Commonwealth v. Jackson, 451 Pa. 462, 464, 303 A.2d 924, 925 (1973). Even if the defendants have conflicting versions of what took place, or the extent to which they participated in it, such is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together. Commonwealth v. Martinelli, 690 A.2d 203, 213 (Pa. 1997), citing Commonwealth v. Chester, 526 Pa. 578, 590, 587 A.2d 137, 1373 (1991). Moreover, the fact that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance. Martinelli, supra.

Forshyte and Wills are charged with having committed many of the same crimes as Martin. Wills was allegedly the lookout while Forshyte and Martin supposedly entered Ford’s second floor hotel room without his consent, assaulted him, and took his money and possessions. All three are alleged to have conspired with one or more of the others and were observed on video surveillance going to and leaving the second floor together. Although they arrived empty-handed, they left carrying a backpack and duffle bag that

allegedly belonged to Ford. Under the facts and circumstances of this case, joint trials are preferable.

Accordingly, the following order is entered.

ORDER

AND NOW, this ____ day of September 2014, following a hearing and argument, the motions to sever filed by Forsythe and Wills are **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Eileen Dgien, Deputy Court Administrator
Martin Wade, Esquire
Don Martino, Esquire
E.J. Rymysza, Esquire
Jerry Lynch, Esquire
Gary Weber (Lycoming Reporter)
Work file