IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 97-12,027**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
HILTON MINCY,	**:**	
Defendant	**:**	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is written in support of this Court's Judgment of Sentence dated September 28, 1998 and docketed October 6, 1998. The relevant facts are as follows: On September 19, 1997 at approximately 8:45 p.m., the defendant and the victim, Albert Johnson, engaged in a verbal confrontation outside the Shamrock bar. The defendant wanted to fight and began to take off his watch. The victim took a swing at the defendant, but he missed. The victim's cousin, Salina Johnson, then intervened and pushed the victim into the passenger seat of her vehicle. As they were leaving, the defendant yelled to the victim, "This ain't over." N.T., May 13, 1998, at pp. 40-42.

Around 9:00 or 9:30 p.m., the defendant and another individual (hereinafter referred to as "the defendant's cousin")[1] arrived at Kariemma Morrison's mother's residence located at 622 Second Street. Kariemma Morrison and her friend Howey were at the residence. The defendant and his cousin entered the kitchen and the defendant's cousin began speaking to Howey, asking him if he was Albert Johnson. The defendant's cousin pulled a gun, and the defendant said, "Don't shoot him, he ain't Albert." The defendant and his cousin then looked around the house for Albert Johnson, asked Ms. Morrison some questions regarding his whereabouts and left approximately

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[1]During the testimony at trial, this individual was referred to as the defendant's friend and his cousin, for clarity, the individual will on ly be referred to as the defendant's cousin in this Opinion.

ten to fifteen minutes after they arrived. N.T., May 12, 1998, at pp. 20-26.

At approximately 9:30 p.m., the victim was at 750 Second Street watching television and drinking beer when the defendant and his cousin kicked in the front door and, with a gun drawn, told the victim not to move. The defendant asked the victim where the guns, coke and money were. The victim replied that he did not know what the defendant was talking about. The defendant told the victim to stop lying and then began searching the house. The defendant's cousin had the victim lie on the ground and pointed a gun at his head. When the victim tried to look at the defendant's cousin's face, he smacked him in the head with the barrel of the gun and told the victim not to try to look at him. The defendant then told his cousin to take the victim upstairs. The cousin took the victim upstairs with the gun pointed at his head. Once upstairs, all three went into a bedroom, where the defendant began opening drawers and asking where the 'hammers' (guns) were. The victim again replied that he did not know and the defendant accused him of lying. After all the drawers were pulled out, the defendant said "go ahead and bust him", which the victim believed meant that they were going to shoot him. The victim then pushed the defendant's cousin and fled down the stairs. The defendant's cousin began shooting and both he and the defendant ran after the victim. N.T., May 12, 1998, at pp. 34-40.

The victim suffered three (3) gunshot wounds to the chest, back, and abdomen. Someone called 911 and/or the police, and the victim was taken to the emergency room. The victim sustained serious injuries which required surgery and resulted in a colonostomy and the removal of a portion of his bowel. N.T., May 12, 1998, at pp. 6-12.

On September 20, 1997, the defendant was arrested. He was charged with attempted homicide, possession of a firearm, possession of an instrument of crime, aggravated assault (cause serious bodily injury), aggravated assault (attempt or cause bodily injury with a deadly

weapon), recklessly endangering another person, simple assault (attempt or cause bodily injury), and simple assault (negligently cause bodily injury with a deadly weapon). On February 19, 1998, the Court granted the Commonwealth's motion to amend the information to include a conspiracy count with the intended crimes being all counts except the attempted homicide.

A jury trial was held May 11-14, 1998. The jury found the defendant guilty of attempted homicide, aggravated assault (causing serious bodily injury), aggravated assault (bodily injury with a deadly weapon), conspiracy, and recklessly endangering another person. The jury acquitted the defendant of possessing a firearm and possessing an instrument of crime.[2]

The defendant came before the Court for sentencing on September 28, 1998. The Court sentenced the defendant to a period of state incarceration with a minimum term of 17 years and a maximum term of 40 years on the attempted homicide. The other counts merged or did not justify an additional sentence. The Court also made this sentence concurrent to the sentence imposed by Carbon County. The defendant filed a notice of appeal on October 30, 1998.

The defendant's first issue on appeal is that the evidence is insufficient to support the verdict. This Court cannot agree. In reviewing the sufficiency of the evidence, the Court must view the evidence presented in the light most favorable to the verdict winner. The test is whether the evidence, thus viewed, is sufficient to prove guilt beyond a reasonable doubt. Commonwealth v. Whiteman, 336 Pa.Super. 120, 124-125, 485 A.2d 459, 461-462 (1984). A conviction for criminal attempt murder requires (1) a specific intent to kill and (2) any act which constitutes a substantial step towards killing. Commonwealth v. Fuller, 396 Pa.Super. 605, 579 A.2d 879, 884 (1990).

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[2]The Court set forth the facts of this Opinion in the light most favorable to the verdict winner. Since the defendant was acquitted of the weapons charges, the recitation of facts does not include witnesses' statements that the defendant was the shooter or was also shooting at the victim.

Given the jury's not guilty verdict on the possession of a weapon and possession of an instrument of crime, it seems clear that the defendant's convictions were a result of co-conspirator and/or accomplice liability. Whether an accomplice possessed the same intent to kill as a co-conspirator may be inferred from words, conduct, the attendant circumstances and all reasonable inferences that follow from them. Commonwealth v. Rios, 721 A.2d 1049, 1053 (Pa. 1998). Here, there is more than sufficient evidence from which to infer that the defendant had the requisite intent. The defendant told his cousin to "bust" the victim. The cousin then asked if the defendant wanted him to 'take the victim out' and the defendant replied in the affirmative. N.T., May 11, 1998, at p. 74. From these statements the jury could find beyond a reasonable doubt that the defendant directed his cousin to kill the victim. An individual is responsible for acts of his co-conspirators that are committed in furtherance of the conspiracy. Commonwealth v. Jackson, 506 Pa. 469, 475, 485 A.2d 1102, 1104 (1984); Commonwealth v. Roux, 465 Pa. 482, 350 A.2d 867(1976); Commonwealth v. Bryant, 461 Pa. 309, 336 A.2d 300 (1975). Based on all the facts and circumstances set forth in this Opinion, the jury could infer beyond a reasonable doubt that the defendant and his cousin agreed to seek out Albert Johnson and shoot him with the intent to kill.

In his statement of matters complained of on appeal, the defendant lists nine (9) reasons why he believes the evidence was insufficient. The majority of these reasons relate to alleged statements made by the victim to the effect that he did not know who shot him. However, none of these statements are contained in the record. Moreover, even if the victim did not know or was not sure whether the defendant or his cousin was the shooter, the defendant could still be held accountable based on theories of accomplice or co-conspirator liability.

The defendant also asserts that the evidence was insufficient because his co-conspirator was never identified. Again, this Court cannot agree. A defendant can be charged with

conspiring with an unnamed individual.

As part of his challenge to the sufficiency of the evidence the defendant claims that the victim charged another individual, Kareem Blagman, with a shooting offense the same week the defendant was charged. The defense failed to show how this evidence was relevant to the charges in this case. Although the Court permitted some limited questioning regarding this incident on the defense theory that there were other people who had a motive to be angry with the victim, this fact does not vitiate the jury's verdict in this case since credibility is within the sole province of the jury who is free to believe all, some, or none of the evidence presented. Commonwealth v. Jackson, 506 Pa. 469, 475, 485 A.2d 1102, 1104 (1984).

The defendant contends that the victim's testimony should not have been believed because he was charged with robbery and assault charges and/or he had a motive to falsely accuse the defendant because the defendant slept with his girlfriend. These allegations simply are not supported by the record. While this information, if true, may have been admissible to show the victim's potential bias to the Commonwealth or a motive for the victim to lie, it was not introduced into evidence. Furthermore, as previously stated, credibility is within the sole province of the finder of fact. Jackson, supra.

The defendant's second allegation of error is that trial counsel was ineffective in numerous respects. In order to prevail on a claim of ineffective assistance of counsel the defendant must plead and prove the following: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced the defendant, i.e., but for counsel's act or omission the outcome of the proceedings would have been different. Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 475-76 (1998); Commonwealth v. Henry, 550 Pa. 346, 706 A.2d 313, 323 (1997); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973

(1987). In addition, if the claim is of ineffectiveness for failing to call a witness, the defendant must also show: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Henry, 550 Pa. at ___, 706 A.2d at 329.

In paragraphs 2(a), (b) and (c) of his statement of matters complained of on appeal, the defendant asserts that his trial attorney was ineffective for failing to interview and/or call as witnesses the following individuals: Kim Rhodes, Chris Johnson, Alicia and Erica of 333 Campbell Street, Keena Dandridge of 1202 Park Avenue, Juay Brokenbaugh, Hakeem Grady, and Jesus Flores. However, the defendant cannot meet the above elements. For example, it is clear from the defendant's own allegations that Kim Rhodes was not willing to testify for the defense. See Concise Statement of Issues to be Determined on Appeal, para. 2(a). Also, Chris Johnson testified for the Commonwealth. In his testimony he admitted that he was interviewed by defense counsel. Therefore, the defendant's allegations that Chris Johnson was not interviewed and would have been an alibi witness for the defense are belied by the record. N.T., May 13, 1998, at pp. 18-25. The record also reflects that trial counsel had difficulty locating Keena Dandridge. Moreover, although she was located and subpoenaed on the weekend before trial, she failed to appear to testify. See, N.T., May 11, 1998, at p. 2; N.T., May 13, 1998, at p. 125.

The defendant next asserts that trial counsel was ineffective for failing to cross-examine the victim regarding (1) his motive to lie because the defendant slept with the victim's girlfriend; (2) his admission to several people that he lied about Mincy shooting him; (3) his offer not to testify if the defendant paid him $5,000; and (4) whether he confused the defendant with Kareem Blagman. It is questionable, though, whether the victim would have made such statements or

admissions on cross-examination. For example, when cross-examined with a taped statement he gave to the police to the effect that the defendant's cousin shot first, the victim still maintained that the defendant was the one who shot him and the taped statement was wrong. N.T., May 11, 1998, at pp. 61-62, 66-68. If the victim did not admit these assertions, the only way to attack his credibility would be to present witnesses who would testify otherwise. The defendant claims witnesses existed who would so testify; however, none of these witnesses were produced at trial and the defendant has not met the elements for an ineffectiveness claim for failing to call such witnesses.

The defendant also contends that trial counsel was ineffective for failing to point out several prior inconsistent statements made by the victim at the preliminary hearing. Without knowing the substance of such statements, it is difficult to address this issue. If the statements were simply that the victim was not sure or did not know whether the defendant or his cousin was the shooter, the defendant could still be held accountable based on theories of accomplice or co-conspirator liability.

The defendant next asserts that counsel was ineffective for failing to request dismissal of a juror "who informed the Court that it recalled a newspaper article describing Mincey as being arrested for a $27,000 drug bust in a bus, all of which was untrue, but not to that juror's understanding." Again, the defendant's allegations are not what the record reflects. It is true that there was a newspaper article printed during the defendant's trial which mentioned other charges and contained numerous inaccuracies, but the juror simply saw the headline. He did not know any of the details of the article because he did not read it. N.T., May 13, 1998, at pp. 2-3. Since the juror did not read the article, its contents could not have affected his ability to be a fair and impartial juror.

The defendant also claims trial counsel was ineffective for failing to challenge the

conspiracy charge given by the Court when there was no co-conspirator and no evidence of any gun ever handled by the defendant. This claim is without merit. Although the co-conspirator was unnamed, the evidence presented established beyond a reasonable doubt that the defendant and another individual went out seeking Albert Johnson with the intent to shoot him, and, in fact, accomplished that goal. Even if the defendant never handled a gun during this incident, he can be held responsible as an accomplice or a co-conspirator. The accomplice and conspiracy charges given by the Court can be found in the transcript dated May 11, 1998, at pages 141-142 and 151-156, respectively.[3] These charges were taken substantially, if not verbatim, from the Pennsylvania Suggested Standard Criminal Jury Instructions 8.306, 12.903A and 12.903B and they accurately set forth the law on accomplice and co-conspirator liability.

In his third issue on appeal, the defendant asserts that the Commonwealth engaged in prosecutorial misconduct by persuading Kim Rhodes, Kariemma Morrison and Chris Johnson to refuse to testify on the defendant's behalf or to testify falsely against him. These allegations also are not supported by the record. Chris Johnson testified for the Commonwealth and stated on cross-examination that the Commonwealth never indicated that he would be charged if they thought he testified untruthfully nor did they offer him any benefit for testifying at the defendant's trial. N.T., May 13, 1998, at pp. 23-25. Although Ms. Morrison testified that a United States Marshall informed her that she would be shipped to a ladies' facility in Virginia if she withheld information regarding the defendant's whereabouts (N.T., May 13, 1998, at pp. 75-77), this testimony was contradicted by Daniel Ellis, the United States Marshall who had contact with Ms. Morrison (N.T., May 13, 1998, at p. 27). This credibility issue, like all credibility determinations, was within the sole province of the

[3]Although the cover sheet of the transcript only lists the date May 11, 1998, the transcript actually contains the record of May 11, 1998 and May 14, 1998.

jury. Jackson, supra. Therefore, these allegations are simply meritless.

Finally, the defendant contends that there was judicial misconduct in his case. First, the defendant asserts the Court erred in failing to grant a continuance to the defendant so he could locate various witnesses. The decision to grant or deny a request for a continuance is within the sound discretion of the trial judge and will not be overturned unless there is an abuse of discretion. Commonwealth v. Chambers, 546 Pa. 370, 387, 685 A.2d 96, 104 (1996). An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record, discretion is abused. Id., quoting Mielcuszny v. Rosol, 317 Pa. 91, 93-94, 176 A.2d 36 (1934). The Court held a conference on the record regarding the defense continuance request. N.T., May 11, 1998, at pp. 2-27. The reasons why the Court denied the defense request can be found in that transcript. To briefly summarize that portion of the record, the Court denied the motion because defense counsel had not interviewed the witness (Keena Dandridge) and did not know where she was located. The likelihood that this individual would be found and testify favorably for the defense was speculative at best. Furthermore, the Commonwealth had an expert witness who had already left the Harrisburg area to testify in this case. Since the benefit of the missing witness was sheer speculation and there would be some prejudice to the Commonwealth in that their expert was already on his way to the courthouse to testify, the Court had good reason to deny the defense request for a continuance.

The defendant also contends the Court erred in failing to rule that the jury was 'hung' when it could not arrive at a decision in a timely fashion. Like many of the defendant's other allegations of error, this assertion is simply not supported by the record. The jury began deliberations at 12:10 p.m. on May 14, 1998. At 1:27 p.m., they came back with two questions. The

first question was what constitutes attempted homicide and the second question was , with respect to charges 7 and 8 (the weapon offenses), did the jury have to be beyond a reasonable doubt that Hilton Mincy actually had a weapon on the night of the crime or that he was simply an accomplice. The jury was re-instructed on attempted homicide and accomplice liability and told that for charges 7 and 8 they must find that the defendant actually possessed the weapon. The jury began deliberating again at 2:37 p.m. and returned its verdict at 3:30 p.m. N.T., May 11, 1998, at pp. 164-172. The jury never indicated that it was 'hung' or could not reach a verdict; it simply wanted clarification and/or re-instruction regarding attempted homicide, accomplice liability, and whether the accomplice liability would also extend to the weapons offenses. Furthermore, the jury arrived at a decision in a timely fashion since deliberations took merely three (3) hours and twenty (20) minutes, including one (1) hour to answer the jurors' questions.

The defendant's final assertion of error is the "Court erred in telling the jury to find the defendant guilty of conspiracy to attempt murder since it did not believe Defendant had a gun in light of the fact that no co-conspirator was ever identified." This contention makes no sense. First, the Court did not tell the jury to find the defendant guilty of anything. The Court did, however, appropriately instruct the jury on accomplice liability. Second, the defendant was not charged with nor convicted of conspiracy to attempt murder. See this Court's Order dated February 19, 1998 and N.T., May 11, 1998, at pp. 151. Third, as has been stated several times throughout this Opinion, the defendant need not have possessed the gun to be subject to responsibility for these crimes on the basis of accomplice liability. Additionally, the co-conspirator need not be named for the defendant's conviction to be valid.

For the forgoing reasons, the Court finds that the evidence was sufficient to support the verdict, trial counsel was not ineffective and their was no misconduct during the defendant's trial - prosecutorial, judicial, or otherwise.

By The Court,

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Kenneth D. Brown