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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. 2014SUCR10417
NO. 2015SUCR10384

COMMONWEALTH

v.

AARON HERNANDEZ

COMMONWEALTH'S MOTION FOR JOINDER OF RELATED OFFENSES

Now comes the Commonwealth in the above-captioned matters and respectfully moves this Honorable Court, pursuant to Mass. R. Crim. P. 9(a)(3), to join the indictments pending against the defendant, Aaron Hernandez, arising out of the July 16, 2012 homicides with the witness intimidation indictment arising out of the February 13, 2013 shooting of an eyewitness to those homicides who was with the defendant at the time of the murders.

Joinder is proper because the murder indictments directly relate to the witness intimidation indictment in a manner consistent with Mass. R. Crim. P. 9(a)(3). Moreover, the defendant will not suffer compelling prejudice by joining these cases. Finally, joinder of these indictments will expedite the administration of justice, lessen the burden upon the Court, and reduce the potential for error and inequity as a result of inconsistent verdicts. Accordingly, joinder is appropriate and warranted.

6/4/15 after hearing allowed in part: Court joins the two indictments for purposes of pre-trial proceedings but defers ruling on joinder for trial, Locke RAJ Attest: [signature] ACM

FILED MAY 21 2015

FACTUAL BACKGROUND

A. The July 16, 2012 Homicides in Boston

On July 16, 2012, at approximately 2:30 a.m., the defendant shot and killed two men and injured a third as the victims were stopped at the intersection of Shawmut Avenue and Herald Street in Boston. The driver of the victim's vehicle, 29-year-old Daniel de Abreu, suffered fatal gunshot wounds to the chest. The front seat passenger, 28-year-old Safiro Furtado, suffered fatal gunshot wounds to the head. Two backseat passengers escaped without injury, and a third backseat passenger suffered a non-life threatening gunshot wound to his arm.

Earlier that evening, at approximately 12:00 a.m., the defendant and Alexander Bradley arrived in Boston and parked in a garage at 274 Tremont Street, a short distance from Cure Lounge ("Cure"). By coincidence, Abreu, Furtado, and three of their friends parked their car (a 2003 BMW) at the same garage within five minutes of the defendant.

Around 12:30 a.m., the victims entered the foyer area of Cure. The defendant and Bradley also went to Cure, proceeded downstairs, purchased drinks, and stood at the edge of the dance floor. Shortly thereafter, Abreu, while dancing nearby, accidentally bumped into the defendant and caused the defendant's drink to spill. The defendant became angered and increasingly agitated, particularly after Abreu smiled and did not apologize.

The defendant told Bradley that Abreu deliberately bumped him and was "trying him." Bradley quickly convinced the defendant to leave the nightclub and walked him outside just ten minutes after their arrival. For the next five minutes, Bradley attempted to calm the defendant as they paced back and forth on the sidewalk leading towards the parking garage. Video surveillance from outside of the nightclub captured this interaction.

The defendant and Bradley then walked across the street and entered another nearby nightclub. Within fifteen minutes of their arrival at the second nightclub, the defendant pointed out a small group of men entering the same nightclub. The defendant

told Bradley that this small group included the man who had bumped him and spilled his drink. The defendant reiterated that he was being targeted and disrespected by this individual and his friends and that he believed the group had followed him from Cure.

Shortly after these observations, the defendant and Bradley left the second nightclub and walked back to the parking garage. They drove around the immediate area, and at some point, pulled over on a street nearby. There, the defendant opened the hood of the SUV and retrieved a loaded .38 caliber revolver that he had placed there earlier that night.

Around 2:10 a.m., the victims left Cure, and Abreu, Furtado, and one of the surviving victims walked down Tremont Street. The defendant's SUV drove by and slowed down as these three victims entered the parking garage. The SUV looped around the block and, three minutes later, slowly drove by as the other two victims waited in front of the parking garage for their friends to exit in the BMW. Following the second pass, the SUV pulled over a short distance away, and the defendant and Bradley walked towards the parking garage and stood near the exit.

Around 2:26 a.m., Abreu, Furtado, and another victim exited the garage in the BMW and picked up his two friends. As the BMW pulled out of the garage, the defendant and Bradley got back into the SUV. The BMW passed by, and the defendant stated to Bradley, "There they go!" The defendant and Bradley followed the BMW down Tremont Street.

The defendant's SUV briefly stopped at a red traffic light and then quickly accelerated through that red light to catch up to the victims. The BMW was stopped at the next traffic light at the intersection of Herald Street and Shawmut Avenue. The defendant's SUV pulled up close alongside the passenger door of the BMW. The defendant leaned out of the driver's side window of the SUV and stated, "Yo! What's up now?" and used a racial slur. The defendant immediately fired five rounds from the .38 caliber revolver into the victims' car. Witnesses reported hearing a "clicking noise" as

the defendant continued to pull the trigger of the gun after all of the loaded bullets had been fired. Immediately after the shooting, the defendant and Bradley fled the scene in the SUV. While travelling westbound on the Massachusetts Turnpike towards Connecticut, the defendant stated to Bradley, "I think I got one in the head and one in the chest." The pair arrived at an address in Hartford, Connecticut, at approximately 5:00 a.m.

In the aftermath of these homicides, Bradley's relationship with the defendant changed, but then eventually normalized. Also during that time, Bradley noticed that the defendant exhibited increasing fear and paranoia that law enforcement was watching him or investigating him.

B. The February 2013 Shooting of Alexander Bradley in Florida

In February 2013, the defendant and Bradley travelled to Florida to attend a Super Bowl victory party. The defendant and Bradley were staying together at a hotel, along with some friends of the defendant. One of the defendant's friends had a gun in the room. Bradley believed it to be a black .40 or .45 caliber Glock. The defendant handled this weapon.

During this trip, while at a nightclub, the defendant saw two men standing across from him who he thought were undercover police. After pointing them out to Bradley, the defendant conveyed his belief that the two men were police and that they were watching him. In response, Bradley stated to the defendant, "It's probably because of the stupid shit you did up there in Boston." After this comment, the defendant gave Bradley "a look" and became visibly angry with him.

The next night, on February 13, 2013, the defendant, Bradley, and the defendant's friends went to another club in Miami. The group arrived at the club sometime after midnight. At the end of the night, Bradley and the defendant had an argument over the bill. The group left the club together: the defendant was sitting in the front passenger seat, and Bradley was seated on the rear passenger side, directly behind the defendant.

Soon after, Bradley realized that he had left his cell phone at the club, and asked the driver, a friend of the defendant, to go back to the club. The defendant did not want to do so, and they argued. Eventually, Bradley fell asleep. When Bradley woke up, they had stopped in an alley, and the defendant had a black gun pointed at Bradley's face. The defendant shot Bradley, and pushed him from the car. Bradley sustained a near-fatal gunshot wound to his head, resulting in the loss of his right eye and a defensive gunshot wound to his hand.

C. The Civil Lawsuit

In the months that followed, Bradley and the defendant communicated back and forth via text message and phone. Specifically, Bradley threatened to kill and to sue the defendant. In June 2013, Bradley filed a civil lawsuit against the defendant relative to the February 13, 2013 shooting.

D. The Indictments

On May 15, 2014, a Suffolk County grand jury returned seven indictments charging the defendant with: two counts of murder, in violation of G.L. c. 265, § 1; three counts of armed assault intent to murder, in violation of G.L. c. 265, § 18(b); assault and battery with a dangerous weapon, in violation of G.L. c. 265, § 15A; and unlawful possession of a firearm, in violation of G.L. c. 269, § 10(a).

Thereafter, this same grand jury remained open to investigate additional charges and, on May 8, 2015, the grand jury returned an additional indictment charging the defendant with witness intimidation, in violation of G.L. c. 268, § 13B.

LEGAL ARGUMENT

I. THE DEFENDANT'S MURDER INDICTMENTS SHOULD BE JOINED WITH THE WITNESS INTIMIDATION INDICTMENT THAT ARISES OUT OF THE DEFENDANT'S SHOOTING AN EYEWITNESS TO THE HOMICIDES.

"'The determination of whether joinder is proper is committed to the sound discretion of the trial judge.'" *Commonwealth v. Magri*, 462 Mass. 360, 363-64 (2012),

quoting *Commonwealth v. Montanez*, 410 Mass. 290, 303 (1991); *accord Commonwealth v. Wilson*, 427 Mass. 336, 345 (1998); *Commonwealth v. Delaney*, 425 Mass. 587, 593 (1997). Rule 9(a)(3) of the Massachusetts Rules of Criminal Procedure provides that the court shall join "related" offenses for trial unless joinder is not in the best interests of justice. "Two or more offenses are related offenses if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan." Mass. R. Crim. P. 9(a)(1). Thus, joinder is permissible if the offenses grow out of essentially one transaction, constitute a single line of conduct, and would be proved by substantially the same evidence. *Montanez*, 410 Mass. at 303; *Commonwealth v. Helfant*, 398 Mass. 214, 230 (1986).

The decision whether to join two offenses for trial is a matter left to the sound discretion of the judge. *Commonwealth v. Sullivan*, 436 Mass. 799, 803 (2002). Decisions to join offenses for trial will not be reversed unless there has been "a clear abuse of discretion." *Commonwealth v. Allison*, 434 Mass. 670, 679 (2001). Here, the murder indictments and the witness intimidation indictment are related offenses, and the defendant will not suffer unfair prejudice if these indictments are joined for trial.

A. Joinder is Proper Because the Crimes Arose Out of a Related Course of Conduct and Evidence of Each Offense Is Cross-Admissible.

It is well-settled that evidence of one crime may not be used to demonstrate a defendant's propensity to commit the indicted offense. *Commonwealth v. Mamay*, 407 Mass. 412, 417 (1990). Such evidence may be admissible, however, to "show a common scheme, pattern of operation, absence of accident or mistake, identity, intent or motive." *Helfant*, 398 Mass. at 224. It is also well-settled law that evidence of threats made to a witness is admissible as evidence of consciousness of guilt. *Commonwealth v. Fernandes*, 427 Mass. 90, 94 (1998); *Commonwealth v. Scanlon*, 412 Mass. 664, 676 (1992). Where conflicting inferences can be drawn from a defendant's words and

conduct, it is for the jury to determine where the truth lies. *Scanlon*, 412 Mass. at 677; *Commonwealth v. Porter*, 384 Mass. 647, 654 (1981); *Commonwealth v. Fuentes*, 45 Mass. App. Ct. 934, 936 (1998), *rev. denied*, 429 Mass. 1101 (1999).

While not dispositive, the propriety of joinder is often resolved by determining whether evidence of both crimes would be admissible at two severed trials. *Wilson*, 427 Mass. at 346, citing *Commonwealth v. Gallison*, 383 Mass. 659, 672 (2005), and *Mamay*, 407 Mass. at 417. *Accord Commonwealth v. Gaynor*, 443 Mass. 245, 260 (2005). ("The appropriateness of joinder often turns on whether evidence of the other crimes would be admissible in a separate trial on each indictment"). "[W]hen evidence of other crimes is admissible because the evidence demonstrates a state of mind, common scheme, plan, or method of action bearing on the crime charged, related offenses may be properly joined." *Commonwealth v. Todd,* 394 Mass. 791, 794 (1985), citing *Commonwealth v. Hoppin*, 387 Mass. 25, 32 (1982).

Here, the July 2012 murders of Abreu and Furtado and the February 2013 shooting of Bradley constitute related offenses for purposes of joinder. Bradley witnessed the July 2012 murders. In fact, as far as the defendant was aware, Bradley was the only eyewitness who could identify him as the perpetrator of the July 2012 homicides. In February 2013, the defendant shot Bradley after he had remarked about the homicides while he and the defendant were at a club in Florida. Concerned that Bradley would implicate him in the 2012 murders, he shot him in the face and left him in an alley. These offenses constitute a "series of criminal episodes connected together," and joinder is proper. Mass. R. Crim. P. 9(a)(1). *See Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 617-18 (2007) (joinder of assault and battery and intimidation of a witness offenses proper where offenses represented a series of events involving same individuals and stemming from a singular incident and where evidence of each offense would have been admissible at separate trials to show motive, intent, and consciousness of guilt).

Moreover, evidence of each offense will be admissible at severed trials. *See Wilson*, 427 Mass. at 345. Evidence of the 2013 shooting of Bradley will be admissible at a trial on the 2012 murder charges as evidence of the defendant's consciousness of guilt. *See Pagels*, 69 Mass. App. Ct. at 618 (consciousness of guilt evidence properly admitted in joined trial). *See also Commonwealth v. McQuade*, 46 Mass. App. Ct. 827, 835 (1999) (consciousness of guilt evidence was properly admitted), citing *Commonwealth v. Toney*, 385 Mass. 575, 584 n.4 (1982). Additionally, where Bradley will provide critical eyewitness testimony, undoubtedly the defendant will seek to challenge his credibility and exploit his bias on cross-examination by highlighting the fact that Bradley has filed a civil lawsuit against the defendant arising out of the February 2013 shooting.

Conversely, evidence of the 2012 murders will be admissible in a witness intimidation trial to demonstrate the defendant's identity, motive, intent, and state of mind for shooting Bradley. *See Commonwealth v. Cotto*, 52 Mass. App. Ct. 225, 231 (2001) (offenses were properly joined where evidence of one crime was admissible to prove the defendant's motive to commit the other crime); *Commonwealth v. Rushworth*, 60 Mass. App. Ct. 145, 147-48 (2003) (offenses were properly joined where evidence of sexual assault on a child was relevant to prove defendant's intent in threatening and assaulting the child's mother, who had confronted defendant about the sexual assault). *Commonwealth v. White*, 60 Mass. App. Ct. 193, 197 (2003) (joinder of armed assault and stalking indictments proper where defendant contested intent and identity, thereby enhancing the probative value of bad act evidence). *See also Gaynor*, 443 Mass. at 249 (evidence tending to prove motive is correctly considered when determining whether joinder is appropriate).

Accordingly, in this case "there [is] little chance of 'seepage . . . of evidence not otherwise admissible,'" as evidence of each set of crimes is admissible to prove that the

defendant committed the other. *See Gaynor*, 443 Mass. at 263, quoting *Gallison*, 383 Mass. at 672. Thus, joinder is proper and warranted.

B. Joinder of The Indictments Will Not Unfairly Prejudice the Defendant.

Where joinder is sought, a defendant bears the burden to show that prejudice would result. *See Commonwealth v. Ferraro*, 424 Mass. 87, 90 (1997); *Gallison*, 383 Mass. at 671. A defendant "must point to definite prejudice that presently exists" and not merely to "potential dangers," *Ferraro*, 424 Mass. at 90, quoting Reporter's Notes to Mass. R. Crim. P. 9, and that prejudice from joinder would be so compelling that it would prevent the defendants from obtaining a fair trial. *See Gaynor*, 443 Mass. at 260. "It is not enough for the defendant[s] to show merely that [their] chances for acquittal would have been better had the indictments been tried separately." *Wilson*, 427 Mass. at 346-47. Here, where the evidence of each crime would be admissible at separate trials, there is no prejudice to joining the indictments. *See Allison*, 434 Mass. at 680 , citing *Wilson*, 427 Mass. at 346 (defendant's claim of prejudice belied by the fact that evidence of other offenses would have been admissible at separate trials on each indictment).

Moreover, the trial judge can provide a jury instruction that each indictment must be evaluated separately as to properly inform the jury how to consider each offense, further diminishing any potential prejudice. "The defendant must also show that 'such prejudice is beyond the curative powers of the court's instructions.'" *Commonwealth v. Shelton*, 37 Mass. App. Ct. 964, 964 (1994), *rev. denied*, 419 Mass. 1106 (1995), quoting *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 706, *rev. denied*, 406 Mass. 1101 (1989). *Accord Magri*, 462 Mass. at 365 n.5 (judge's instructions to jury "offset" potential prejudice arising from joinder).

Accordingly, the defendant cannot meet his burden to demonstrate compelling prejudice that would result if these indictments were joined.

C. Joinder Is In The Interests Of Judicial Economy.

Finally, joinder in this cases serves the interests of judicial economy. While the goal of judicial economy is not paramount to protecting a defendant from prejudice, where offenses are related, there is little danger of prejudice from joinder. Joinder is permitted where the separate offenses would be proved by evidence connected with a single line of conduct. *Sullivan*, 436 Mass. at 803, citing *Hoppin*, 387 Mass. at 33. As discussed above, evidence of each of the crimes will be admissible at trials for the other crimes. In addition, many of the same witnesses and investigators would be called to testify at both trials. Joinder is therefore in the interest of judicial economy and appropriate here.

CONCLUSION

Accordingly, and for the reasons stated herein, this Court should allow the Commonwealth's motion and join the indictments for trial.

Respectfully Submitted
For the Commonwealth,

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