SUPERIOR COURT
OF THE
STATE OF DELAWARE

CHARLES E. BUTLER
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: ***State v. Dominique Benson*, ID: 1409003743**
***State v. Christopher Rivers*, ID: 1409001584**

Counsel:

The parties have presented the Court with two motions *in limine* in the week or so before this Murder First Degree case. The Court issued a somewhat perfunctory ruling in order to allow the trial to proceed with clear guidelines, but now takes this opportunity to flesh out the issues in just a bit more detail.

This is a "murder-for-hire" case in which it is alleged that defendant Christopher Rivers hired Joshua Bey, a "middle man" who then contracted with co-defendants, Dominique Benson and Aaron Thompson, to kill Joe and Olga Connell. The issue presented in the motion *in limine* dealt with whether the State could introduce evidence that, during the course of the murder plot, a different person was asked to commit the murders but backed out at the last minute, thus making it a "failed attempt." In addition, the State sought a ruling as to whether the conspiracy continued beyond the deaths of the Connells such that statements made by the co-conspirators after the death of the Connells were admissible pursuant to Delaware Rule of Evidence 801(d)(2)(E).

A. A murder-for-hire conspiracy lasts until payment therefore is made.

In this case, some of the evidence of the conspiracy among the various actors includes the demands for payment and the efforts to comply that followed the completion of the murder. Defendants urge that no statements made by any of the co-defendants should be admitted pursuant to the "co-conspirator's exception" to the hearsay rule because, in Defendants' view, the conspiracy ended upon the completion of the murders.

Out-of-court statements that are offered for the truth of the matter asserted are hearsay.[1] Such statements may not be admitted unless a recognized exception to the rule against hearsay applies.[2] Rule 801(d)(2) excludes statements by a party-opponent from the definition of hearsay,[3] the theory being that a party would not say things that were not true or, at a minimum, were indefensible. There are variations on the theme: statements by others that are "adopted" by the declarant

[1] D.R.E. 801(c).
[2] *See* D.R.E. 802.
[3] D.R.E. 801(d)(2)(A).

are admissible, regardless who made them,[4] statements specifically authorized by the declarant,[5] and statements made by agents of the declarant during the course of the agency relationship.[6]

The final "party-opponent" variety is the one that concerns us here: "statement[s] by a co-conspirator of a party during the course and in furtherance of the conspiracy; provided that the conspiracy has first been established by the preponderance of the evidence to the satisfaction of the court."[7] Here, there is no dispute whether the conspiracy is, or will be, proven by a preponderance of the evidence. Rather, the single question posed is whether statements made after the homicide are "during the course of and in furtherance of" the murder-for-hire conspiracy.

The "[d]uration of a conspiracy depends on the fact-specific scope of the original agreement, but generally a conspiracy terminates upon accomplishment of the principal objective unless specific evidence is introduced indicating that the scope of the original agreement included acts taken to conceal the criminal activity."[8] Defendants argue that the primary objective of the charged conspiracy was only the murders of Joseph and Olga Connell, and therefore, the conspiracy terminated upon the accomplishment of the murders. Their position is unavailing.

Where a conspiracy includes payment as a final term, "[i]t is too easy to argue that the conspiracy was at an end when the object of the conspiracy as charged was realized."[9] The cases seem fairly aligned along the proposition that in a murder-for-hire case, the conspiracy ends when the "hiree" has been paid.

For example, in *State v. Cruz*, a murder-for-hire prosecution, the Arizona Supreme Court held:

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[4] D.R.E. 801(d)(2)(B).
[5] D.R.E. 801(d)(2)(C).
[6] D.R.E. 801(d)(2)(D).
[7] D.R.E. 801(d)(2)(E).
[8] *Smith v. State*, 647 A.2d 1083, 1089 (Del. 1994).
[9] *U.S. v. Kahan*, 572 F.2d 923, 935 (2d Cir.), *cert. denied* 439 U.S. 833 (1978); *see also State v. Cruz*, 672 P.2d 470, 476 (Ariz. 1983) ("In some cases, however, the object of the conspiracy includes more than the commission of a substantive offense.").

> The transfer of money by appellant to them [the contracted killers] was one of the main objectives of the conspiracy as far as they were concerned. At the time the statements were made, the transfer [of money] had not been accomplished and the parties, including appellant, were still attempting to accomplish the transfer. Consequently, the conspiracy had not terminated and the statements were made in the course of the conspiracy."[10]

Arizona is not alone on this point; to be sure, other federal and state courts have held the same.[11] The Court finds no circumstance here to warrant departure from that conclusion.

In accordance with *Smith v. State*, the Court must determine the end of a conspiracy based on the "fact-specific scope of the original agreement."[12] In this case, the State alleges that Rivers hired Bey who then contracted with two other individuals to murder Joseph and Olga Connell in exchange for an agreed upon sum of money. Surely receiving the agreed upon payment was a primary objective of the co-defendants original plan—they had no other motive for committing the murders. Accordingly, the Court has little difficulty concluding that statements by co-defendants made after the murders and intended to secure payment are admissible under the co-conspirator statement exception to the hearsay rule.

B. Evidence of the "failed attempt" is admissible in this case.

The State has proffered that there is evidence that an unindicted individual was asked to kill the Connells and indeed, received a firearm and went to the Paladin Club Condominiums where the Connells resided for the purpose of shooting them, but upon further reflection, declined. This remarkable display of

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[10] *State v. Cruz*, 672 P.2d at 477.

[11] *See, e.g.*, *United States v. Johnson*, 443 F. App'x 85, 92-93 (6th Cir. 2011) (duration of murder-for-hire conspiracy spanned from date of original agreement to date of final payment after commission of the murder); *State v. Jones*, 873 P.2d 122, 130 (Idaho 1994) (conspiracy for a paid murder "was not complete until final payment was made, and all statements made in furtherance of the conspiracy until final payment are admissible [under the co-conspirator hearsay exception]"); *People v. Saling*, 500 P.2d 610, 615 (Cal. 1972) (where money offered to kill victim motivated defendant to participate in the plan and payment was one of the plan's main objectives, statements made before payment occurred were admissible as being made during the conspiracy).

[12] *Smith*, 647 A.2d at 1089.

good sense, in a case remarkably devoid of such evidence, saved the would-be shooter from enormous legal difficulties.

At some point, the State "flipped" co-conspirator Joshua Bey. To say that Bey's expected testimony is important to the State would obviously be an understatement. As with "flipped" co-defendants everywhere, his testimony may be expected to be questioned closely. Indeed, in this Court there is a standard jury instruction directing jurors to view the testimony of admitted participants and co-conspirators with "suspicion and with more care and caution" than the testimony of non-participating witnesses.[13] It is completely expected that Bey's cross-examination will be a pivotal point in this trial.

It is therefore quite understandable that the State would seek to corroborate Bey's testimony with any fact at its disposal. Apparently it was Bey that first told detectives about this "failed attempt," and it would not have been discovered but for Bey's statement. And the State has appended a transcript of a statement made by the would-be shooter that does indeed corroborate that such an attempt did take place. It is certainly fair to say that Bey's and the failed shooter's statements do not agree in every respect, but it is also fair to say that the failed shooter's statement is generally corroborative of Bey's testimony.

In addition to corroborating the expected testimony of witness Bey, the failed attempt evidence has independent relevance. Defendants are charged with Conspiracy First Degree. We know that a conspiracy is a completed offense as soon as a party commits an "overt act" in furtherance of the conspiracy.[14] Thus, the crime of conspiracy does not depend on the completed act, in this case, of homicide. The testimony can be expected to include reference to any number of overt acts, including procuring a weapon and going to the Paladin Club Condominiums to observe the Connells. In addition, although Bey may have tipped the police to the other individual's involvement in this "failed attempt," that individual gave a statement to the police in which he admitted to these overt acts and his testimony stands independent of Bey's testimony. So, even if the jury rejects Bey's testimony and disbelieves every word of it, the jury may nonetheless find one or more defendant guilty of Conspiracy First Degree on the basis of the

[13] Delaware Criminal Pattern Jury Instruction § 4.11.
[14] *See* 11 *Del. C.* §§ 511-513.

overt acts committed by the other individual, whose testimony does not rely upon Bey for its credibility.

The last thing Defendants want to hear is evidence corroborating the testimony of Joshua Bey. Perhaps it is in recognition of this fact that Defendants pose the argument that testimony concerning this "failed attempt" is inadmissible pursuant to D.R.E. 404(b). Rule 404(b) and its familiar "*Getz* analysis" [15] are well known and understood: "[e]vidence of other crimes wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[16] For equally obvious reasons, the State disagrees with Defendants' position.

At the outset, it is not at all clear that the proposed testimony "fits" under the rubric of Rule 404(b). This is not an effort by the State to prove that any of these defendants is of a particular character and acted in conformity therewith. In fact, the other individual's statement only implicates Bey himself and arguably co-defendant Aaron Thompson, who is not on trial here. Thus the defense has a difficult time explaining how either defendant in this case is even implicated in evidence of the "failed attempt."

In fact, there may be a stronger argument that the "failed attempt" is simply irrelevant to this case and evidence of some failed attempt ought to be excluded entirely as largely a waste of time pursuant to D.R.E. 401 and 403. This is a somewhat more tempting line of attack.

In Bey's statement, he says that Benson was unwilling to engage in the homicide at night because he was on a curfew as a result of a home confinement sentence he was then serving. According to the would-be shooter in the failed attempt, he began to think about his mother and the fact that if he was caught, he would miss seeing her if and when he went to jail. Whatever his reason, the attempt was a "fail." He saw the Connells, watched them walk by, and did nothing. It is, therefore, evidence of a non-event and, in itself, proof of nothing.

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[15] *See Getz v. State*, 538 A.2d 726, 734 (Del. 1988).
[16] D.R.E. 404(b).

But in the context of this case, it does far more. The Connells were killed outside their condominium at the Paladin Club, generally in the same place the individual was directed to by Bey in the failed attempt. The individual knew Bey and Thompson, and is related to Dominique Benson. Not only is the "failed attempt" evidence that someone in the sphere of defendant Benson actually went out to the condominiums with a handgun to kill the Connells, but the failed attempt evidence also corroborates Bey.

The Court cannot pick and choose what evidence the State may present to make its case any more than the State can pick and choose its witnesses. The State's case hinges in many respects on the credibility of its admitted co-conspirator Joshua Bey, and it must be given the flexibility to prove his credibility in whatever way it can, for just as surely, the defense must have the flexibility to conduct a free and piercing cross examination of Bey. Testimony concerning the "failed attempt" fits most appropriately in this rubric and to that extent, it is highly relevant and its probative value far outweighs any danger of unfair prejudice.[17]

If we were to engage Defendants' argument that the basis for admissibility of the testimony is D.R.E. 404(b), we would necessarily be required to analyze of the subject pursuant to the Delaware Supreme Court's holding in *State v. Getz.* In *Getz*, the Supreme Court laid out a six-part analysis before admitting evidence pursuant to Rule 404(b).[18] The analysis requires consideration of the following:

1. The materiality of the evidence to an issue in dispute in the action. Here, the Court has highlighted the materiality in connection with the above discussion of relevance.
2. The purpose of its introduction must be for a purpose specifically or inferentially sanction by Rule 404(b) or at least not for the improper purpose of character evidence. The Court has already discussed the materiality of the evidence for the purpose of corroborating the testimony of co-conspirator Bey. The Court notes in passing here, however, that even if the Court completely missed the boat with respect to corroborating Bey, the testimony would be admissible as part of a "common scheme or design," one of the "garden variety" exceptions to

[17] *See* D.R.E. 403.
[18] *Getz*, 538 A.2d at 734.

impermissible character evidence. A murder-for-hire plot using one (or more) gunman certainly qualifies when a different gunman is substituted after the first one drops out.

3. Evidence of the other crime must be "plain, clear and conclusive." Here, the State proposes to present the live testimony of the admitted "failed gunman." Whatever might become of his cross-examination, the testimony will be his actual recollection of the events that he himself experienced.
4. The "other crime" must not be too remote in time. Here, the "failed attempt" was in the very same time frame as the alleged successful attempt. It was not "remote" in any way.
5. The probative value must outweigh its prejudicial effect. The Court has already discussed its conclusion that the probative value in corroborating Bey outweighs its prejudicial effect. Defendants are charged with murdering the Connells. Evidence that a different individual did not murder the Connells is not overly, or at least unfairly, prejudicial to the defendants.
6. Because the testimony is being admitted for a limited purpose, the jury should be instructed as to the limitation on its admissibility.

On this last point, the Court has advised the parties that it does not believe that the testimony of the failed attempt is admissible pursuant to Rule 404(b) but rather is part and parcel of the underlying plot to kill the Connells and is admissible pursuant to Rules 401 and 403. Nonetheless, because the testimony passes muster pursuant to Rule 404(b) and out of an abundance of caution, the Court is willing to consider an instruction that limits the relevance of the testimony to the corroboration of Joshua Bey's testimony. The Court has invited the parties to propose a specific instruction that does so.

Judge Charles E. Butler