IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
Vs.	:	No. CR-249-2014
	:	
RANDY CEPEDES ORTEGA, Defendant	:	

Brian Gazo, Esquire — Counsel for Commonwealth
Assistant District Attorney

Thomas P. Sundmaker, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - June 10, 2016

Before this Court is the Defendant's Motion for Judgment of Acquittal to the charge of criminal use of a communication facility[1] which a jury found him guilty of after trial on March 3, 2015. For the reasons stated in this opinion, this Motion is DENIED.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Randy Cepedes Ortega (hereinafter "Ortega") was arrested by Weatherly Police and charged with the following

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[1] 18 Pa.C.S.A. §7512(a)

[2] Pennsylvania Rule of Criminal Procedure 704(B), under extraordinary circumstances, allows a Judge to hear an oral motion in arrest of judgment, for a judgment of acquittal or for a new trial. In this case, Defendant's counsel, Thomas Sundmaker, Esquire, at the sentencing hearing made an oral motion for a judgment of acquittal. The Commonwealth, through District Attorney, Jean Engler, indicated that she was not prepared to address that motion without an opportunity to research it and prepare an argument. Accordingly, and while admittedly improper [See *Commonwealth v. Grohowski*, 980 A.2d 113, 116 (Pa. Super. Ct. 2009)], it was done out of an abundance of caution and to allow both sides and the Court an opportunity to properly address this complex issue.

offenses: 1) Criminal Conspiracy (18 Pa. C.S.A. §903); 2) Possession with intent to manufacture or deliver a controlled substance (35 Pa.C.S.A.§780-113(A)(30); 3) Criminal use of a communication facility (18 Pa.C.S.A. §7512(a); 4) Simple possession of a controlled substance (35 Pa.C.S.A. §780-113(A)(16) and possession of drug paraphernalia (35 Pa.C.S.A. §780-113(A)(32). These charges stemmed from an undercover investigation into illegal drug trafficking in the Weatherly area and involved a Co-Defendant, Megan Rhoades, and a confidential informant.[3] A jury trial was held on March 2, 2015 and March 3, 2015. A verdict was rendered by the jury on March 3, 2015 finding the Defendant Guilty of Criminal Use of a Communication Facility, Simple Possession, and Possession of Drug Paraphernalia, and Not Guilty of Possession With Intent to Deliver and Conspiracy to Commit Possession with Intent to Deliver.

At the trial, the confidential informant testified that he contacted Megan Rhoades (hereinafter "Rhoades") for the purpose of purchasing heroin from her. Rhoades and Ortega appeared at the designated location where they met the confidential informant for purposes of this transaction. Once together, the Weatherly Police arrived and arrested Rhoades and Ortega.

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[3] This confidential informant was later identified at trial as Christopher Miller.

Sergeant Michael Bogart (hereinafter "Bogart") testified that he had arrested the confidential informant for driving under the influence and after discussing what the confidential informant could possibly do to "help himself", the confidential informant agreed to arrange this drug deal. Bogart testified that he arrived at the designated location, approached the vehicle, and eventually arrested both Ortega and Rhoades. The heroin, later determined to be fifty (50) bags with a weight of 1.2 grams, was pulled by Rhoades from her sweat pants and given to Bogart.

Agent Charles Horvath (hereinafter "Horvath") testified as an expert in narcotics investigations. Horvath testified that he reviewed the evidence involved in this case and based upon the quantity of heroin seized, the packaging, the money found, the location of where it was seized from and the lack of "user" paraphernalia, it was his expert opinion that these circumstances were indicative of possession with the intent to deliver drugs and not possession for personal use. Horvath also testified on re-cross that it was not uncommon for a female drug dealer to bring male protection to a drug deal. He also testified that he never heard of a "middle man" bringing protection.

Rhoades also testified for the Commonwealth.[4] She testified that she was contacted by the confidential informant to reach out to Ortega for heroin, unbeknownst to her that this was going to result in a "bust operation"[5] should it come to fruition. Rhoades testified that she reached out to Ortega since the confidential informant himself was unsuccessful in doing so. She also testified that she called Ortega about selling heroin and needed a "brick" for a sale in Weatherly. She testified that she went to Hazleton to pick up Ortega and travelled back to Weatherly. She also testified that Ortega brought the heroin with him and the only reason she was found with it in her pants is because when the police began to surround their car, Ortega threw it at her and told her to "hide it." Rhoades claimed that she was only the "middle man" and that Ortega was the dealer.

Ortega took the stand in his own defense. He testified that he knows Rhoades from their time doing various drugs together. On this occasion, Ortega testified that Rhoades called him to accompany her to a location where she was to deliver a quantity of heroin to another individual. In exchange for doing so, Rhoades gave Ortega several bags of heroin which Ortega admitted he snorted on the ride from Hazleton to

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[4] While Rhoades was also charged in this case, she agreed to testify for the Commonwealth in exchange for a more favorable disposition of her charges.

[5] A "bust operation", as this scenario was described as by Horvath, is short of a full blown drug delivery insofar as the police intervene in the matter before the drugs and money exchange hands. That is what occurred here.

Weatherly. He also testified that when the police arrived and arrested both of them, they also seized the empty packets containing the heroin residue.[6] Ortega also testified that at no time was he a drug dealer and specifically not on this occasion. Ortega did testify that while he was a passenger in Rhoades' car, he was fully aware of what Rhoades intended to do that day: deliver drugs to another person.

The following is a summary of the uncontroverted testimony presented at trial: 1) a telephone call occurred between Ortega and Rhoades which centered around the delivery of drugs; 2) Ortega, when he entered the vehicle, was aware that a delivery of drugs was to take place in Weatherly; 3) the vehicle which both Rhoades and Ortega occupied on November 22, 2013 was eventually surrounded by police and a quantity of drugs, fifty (50) bags of heroin, was confiscated from Rhoades; and 4) that the quantity, along with other factors, was tantamount to possession with intent to deliver a drug versus a simple possession of a controlled substance.

Based upon this testimony, the jury returned its split verdict.

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[6] Defendant was convicted of simple possession and possession of drug paraphernalia. Defendant's own testimony was sufficient to allow a jury to convict him of these offenses.

LEGAL DISCUSSION

Pennsylvania Rule of Criminal Procedure 704(B)(1) reads in pertinent part, as follows:

"Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion[7]: . . . for a judgment of acquittal . . . ." This motion is an attempt by the Defendant to overturn a jury verdict and correct what he perceives as an otherwise egregious error at the time of sentencing as opposed to addressing it in post-trial motions. Most motions, if granted under this rule, are manifestly and obviously meritorious and righteous. Some claims, however, are not.

In the case *sub judice*, the jury found the Defendant guilty of the charge of criminal use of a communication facility. This charge, 18 Pa. C.S.A. §7512(a) reads as follows in relevant part:

> "a person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission . . . of any crime which constitutes a felony . . . under this title or under the act . . . known as the controlled substance, drug, device and cosmetic act."

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[7] While this Court may have harmlessly erred by granting Commonwealth's request to continue sentencing and require the Defendant to file a written motion, it sees no prejudice to Defendant. While Pennsylvania Rule of Criminal Procedure 704 does not permit the filing of a written motion, it also does not prohibit it, yet the Appellate Courts have frowned upon this practice and have gone so far as to "disallow" such proceedings. *Commonwealth v. Askew*, 907 A.2d 624, FN7 (Pa. Super. Ct 2006). This Court further suspects Defendant will file for post sentencing relief to preserve this issue for appeal.

The predicate offenses, as applicable to this case, were felony counts of conspiracy (18 Pa.C.S.A. §903) and possession with intent to deliver [(35 Pa.C.S.A. §780-113(a)(30)].

Defendant argues that the Court, notwithstanding the jury's finding of guilt on the criminal use of a communication facility charge, should set the verdict aside in favor of acquittal on the basis that the jury's rendering of "not guilty" on both the possession with intent to deliver charge [35 Pa. C.S.A. §780-113(A)(30)] and the conspiracy to commit that offense (18 Pa. C.S.A. § 903) is inconsistent based upon the facts of this case.

At the onset, the Court points out that inconsistent verdicts are permissible in Pennsylvania and such inconsistencies do not automatically serve to invalidate a conviction. *Commonwealth v. Frisbie*, 889 A.2d 1271 (Pa. Super. Ct. 2005); *Commonwealth v. Rose*, 960 A.2d 149 (Pa. Super. Ct. 2008). The *Rose* Court quoting the *Frisbie* case has stated:

> Inconsistent verdicts, while often perplexing, are not considered mistakes and do not constitute a basis for reversal. Rather, the rationale for allowing inconsistent verdicts is that it is the jury's sole prerogative to decide on which counts to convict in order to provide a defendant with sufficient punishment. When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the court looks upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity. Thus, this Court will not disturb guilty verdicts on the basis of apparent inconsistencies as long as there is sufficient evidence to support the verdict. *Id.* at 158.

"One narrow exception to this rule exists where the jury specifically acquits the defendant of an underlying crime, and that underlying crime is a **necessary predicate** to a second crime. In that case, the conviction for the second crime cannot stand, '[g]iven the special weight afforded acquittals.'" *Commonwealth v. Rose*, 960 A.2d 149, 158 (Pa. Super. Ct. 2008), *quoting Commonwealth v. Magliocco*, 883 A.2d 479, 493 (Pa. 2005). (Emphasis in original). It appears in cases where the predicate offense is actually charged and prosecuted, an acquittal means the Commonwealth failed to prove the Defendant committed that offense, and therefore, the conviction for the connected crime cannot stand. *See Id.*

In *Magliocco, supra*, the Supreme Court held that an acquittal on a predicate charge of terroristic threats precludes a conviction for ethnic intimidation finding that a terroristic threat conviction is a specific statutory element of the offense of ethnic intimidation. *Id.* at 492.

In *Commonwealth v. Rose*, 960 A.2d 149 (Pa. Super. Ct. 2008), the Court reversed a trial court's granting of a motion to set aside a jury's verdict on one (1) count of criminal use of a communication facility. In that case, Defendant was charged with using a computer to bring about the underlying crime of attempted unlawful contact with a minor. While the

special interrogatory verdict slip was intended by the trial court to guide the jury on reaching a verdict on the criminal use of a communication facility charge, the Superior Court found this slip to be problematic.[8] Accordingly, the Court found that, even if the predicate offense as ultimately found by a jury is a misdemeanor (indecent assault) as opposed to a felony (sexual intercourse with a minor), the conviction of the criminal use of a communication facility will stand if there is ample evidence

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[8] The Superior Court explained this problem in the following way:

> "First, for unknown reasons, the trial court placed only two sex-crime "candidates" on the slip: indecent assault (a misdemeanor) and sexual intercourse (a felony). The slip did not instruct the jury that it could find Rose guilty of count 2 if Rose intended **any** felonious contact with the 12-year-old.
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> Second, and more importantly for our purposes, the jury plainly disregarded the instructions on the slip. Specifically, the jury found Rose guilty of count 2 even though the jury found that Rose's sexual intent on count 1 was to commit indecent assault (a misdemeanor). The jury disregarded the court's instruction to find Rose **not** guilty under that circumstance." *Rose* at 157.

The Appellate Court then went on to explain the applicability of the general rule permitting inconsistent verdicts in the context of that case by stating,

> "At most the jury chose to declare that Rose's intent on count 1 met only the level of indecent assault (a misdemeanor), rather than sexual intercourse (a felony). This choice did not preclude the jury from convicting Rose on count 2. On that charge, the jury remained free to find that Rose's intent did indeed rise to the level of sexual intercourse. The jury's decision as to count 1 may best be described as an exercise of lenity . . . Thus, the only relevant question is whether there was sufficient evidence to support the verdict on count 2. Here, there was sufficient evidence to support a verdict of guilt. The Commonwealth presented ample proof that Rose used a computer to facilitate attempted unlawful contact with a minor, with the specific intent to commit a felony (sexual intercourse) with the 12-year-old girl. We conclude that the highly regarded trial court erred as a matter of law in setting aside the verdict on count 2." *Id.* at 159.

to support that felony charge and it appears to be the jury's prerogative to decide the verdict "as an exercise in lenity."

In the case of *Commonwealth v. Miller*, 35 A.3d 1206 (Pa. 2012), the court limited *Magliocco* and *Reed*[9] and distinguished them from the *Miller* case, "by the plain text of their particular governing statutes." *Miller* at 1213. In *Miller*, the Defendant was convicted of second degree murder but acquitted of the robbery charge. The Superior Court, in addressing the Defendant's appeal, vacated that conviction on the basis that the Defendant could not be convicted of second degree murder when he was acquitted of the predicate offense of robbery. The Supreme Court granted allocatur and reversed, reinstating the conviction and holding that "a jury verdict that Defendant was not guilty of robbery but was guilty of second degree murder predicated on the robbery did not require a vacatur of the conviction for the second degree murder." *Id* at 1206. In so holding, it disapproved of the holding in *Commonwealth v. Austin*, 906 A.2d 1213 (Pa. Super. Ct. 2006).[10]

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[9] *Commonwealth v. Reed*, 9 A.3d 1138 (Pa. 2010), which dealt with the charge of unlawful contact with a minor for purposes of engaging in sexual relations with that minor.

[10] The holding in this case was that an acquittal on a robbery charge precludes a second degree murder conviction when the robbery is the predicate offense for the murder charge.

In the *Miller* case, the Court focused on the language of the second degree murder charge and specifically the Defendant's involvement, if any, in the predicate offense.

> "In contrast to the ethnic intimidation statute, the second-degree murder statute does not set forth or require the commission of the predicate offense as an element. To secure a conviction for second-degree murder, the Commonwealth must prove that the defendant committed a murder **"while [he or she] was engaged . . . in the perpetration of a felony."** 18 Pa.C.S. §2502(b). "Perpetration of a felony" is statutorily defined in a very broad manner, encompassing, *inter alia*, "[t]he act of the defendant in engaging in . . . the commission of, or an attempt to commit, . . . robbery . . .." 18 Pa.C.S. §2502(d). Based on a plain reading of this statutory language, and as the Superior court correctly determined in *Austin, supra* at 1220, to convict an accused of second-degree murder, the Commonwealth is **not** required to prove that the accused actually committed the predicate offense.
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> [B]y [statutory] definition, in order to convict for felony murder it is not essential that the jury find that the predicate offense was actually completed. In effect, all the felony murder statute requires is for the jury to conclude that a criminal homicide was committed while the defendant participated in a completed or an attempted delineated, i.e., predicate, offense.
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> . . . to the extent that felony murder does not require the commission, i.e., completion, of the predicate offense, an acquittal of the predicate offense will not always mean that the homicide did not occur in the 'perpetration of a felony.' That is, the homicide could have occurred during the court of, or after, an unsuccessful attempt to commit the predicate offense . . .. Thus, it would be possible for a felony murder to occur even though the predicate offense was not 'committed.'" *Austin, supra* at 1220.

In essence, *Miller* explains that second degree murder does not require, as an element of the crime, the completion of the predicate offense, but rather participation in that offense (emphasis ours).

18 Pa.C.S.A.§7512(a), in pertinent part, reads:

> "A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act . . . known as The Controlled Substance, Drug, Device and Cosmetic Act."

Additionally, in *Commonwealth v. Moss*, 852 A.2d 374, 382 (Pa. Super. Ct. 2004), the Court was faced with a case of first impression as to what evidence is sufficient to sustain a conviction for criminal use of a communication facility. The *Moss* Court stated:

> "With regard to the instant matter, we conclude, and the parties apparently do not dispute, that the Commonwealth must prove beyond a reasonable doubt that: (1) Appellants knowingly and intentionally used a communication facility; (2) Appellants knowingly, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony occurred. Facilitation has been defined as "any use of a communication facility that makes easier the commission of the underlying felony." *United States v. Davis*, 929 F.2d 554, 559 (10th Cir. 1991). If the underlying felony never occurs, then Appellants have facilitated nothing and cannot be convicted under § 7512.
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> The record before us is more than sufficient to establish that Appellants knowingly and intentionally used a communications facility - in this case a telephone - to discuss illicit drug transactions, thus satisfying prong one of the inquiry. The focus of our

> inquiry as to each of the Appellants will be whether the record contains sufficient evidence that these telephone conversations facilitated the actual commission of an underlying felony." *Moss*, at 382.

As it relates to the charge of criminal use of a communication facility, a violation of 18 Pa. C.S.A. §7512(a), in order for the jury to convict Ortega in this case, it must find the following: 1) that Ortega used a communication facility; 2) that Ortega used the communication facility, in this case, a cell phone, to facilitate, that is to bring about, the commission of the crime of possession with intent to deliver heroin and 3) that the crime of possession with intent to deliver, a felony, did in fact occur.

It is clear from the testimony that Ortega's use of the cell phone, even if one were to look at this case in the light most favorable to him, was done to assist Rhoades in delivering heroin to the confidential informant. His own testimony was that he received this call from Rhoades to "accompany" her while she engaged in a drug transaction. This call led him to be present and to participate in that drug deal; not necessarily as an "innocent observer", but as a participant by accepting Rhoades' request for accompaniment.

In applying *Miller* to this case, there are similarities in the text of the two offenses. As previously stated, "participation encompasses the act of engaging in the commission

of a crime." Similarly, with regard to the instant offense, it requires a person to "facilitate the commission . . . of any crime . . ." therefore, neither requires the completion of the predicate crime nor that the predicate crime even be committed by this defendant. All that needs to be shown is that Ortega, being cognizant of Rhoades' involvement in a drug transaction, used his cell phone in some way and that the use of the cell phone and Ortega's involvement facilitated the drug delivery. In rendering their verdict, the jury appears to have found just that.

Accordingly, and consistent with this opinion, the Court enters the following order:

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	:	
RANDY CEPEDES ORTEGA,	:	
Defendant	:	

Brian Gazo, Esquire	Counsel for Commonwealth Assistant District Attorney
Thomas P. Sundmaker, Esquire	Counsel for Defendant

ORDER OF COURT

AND NOW, this 10TH day of June, 2016, upon consideration of the Defendant's Motion for Extraordinary Relief, first made orally in Court on October 19, 2015 and reduced to writing at the request of the Court to allow the Commonwealth to properly respond to the motion and after hearing/argument on the motion, it is hereby **ORDERED and DECREED** that said motion is **DENIED**.

BY THE COURT:

Joseph J. Matika, J.

FILED
2016 JUN 10 PM 2:13
CARBON COUNTY
CLERK OF COURTS
WM. C. MCGINLEY