IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)		
Plaintiff,)		
v.)	I.D.	1207017385
MARK J. KENNEY,)		
Defendant.)		
)		

ORDER

- 1. Defendant was convicted by a jury of theft and conspiracy in the second degree. The jury acquitted him of the sole remaining charge, attempted burglary in the second degree.
- 2. Defendant has moved for a judgment of acquittal.

 He argues that his acquittal of attempted burglary in the second degree precludes any finding beyond a reasonable

doubt that he committed an overt act in the pursuance of the alleged conspiracy.

3. Delaware law provides in pertinent part that a person is guilty of second degree conspiracy when

A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

- (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
- (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy. ¹

Defendant was prosecuted under subsection 1. Although this subsection makes no reference to an overt act in pursuance of the conspiracy, the Delaware Supreme Court has interpreted this subsection as requiring the State to prove such and act.²

¹ 11 *Del. C.* sec 512

² Weick v. State, 420 A.2d 159, 164-5 (Del.1980).

4. If the only overt act alleged in the indictment was attempted burglary, Defendant's acquittal of that crime would entitle him to a judgment of acquittal on the conspiracy charge. But here Defendant was charged with other overt acts and that his co-conspirator, Crystal Cheek, also committed one or more overt acts. Count II of the indictment alleges:

Crystal C. Cheek and Mark J. Kenney, on or about the 20th day of July, 2012, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Burglary Second Degree, as set forth in Count I, which is incorporated herein by reference, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting said felony or an attempt to commit said felony or by committing some other substantial step in pursuance of the conspiracy.

5. The Delaware Supreme Court has held that it is sufficient to convict a defendant of conspiracy if the defendant's co-conspirator committed an overt act. In *Younger v. State*³ that court held:

A guilty conspiracy verdict is not always inconsistent with an acquittal on the underlying felony. FN4 An overt act in support of a charge of conspiracy need not be a completed crime or even

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³ 2009 WL 26112520 (Del.)

an act that would amount to a substantial step in furtherance of the underlying felony; rather, it "may be any act in pursuance of or tending toward the accomplishment of the conspiratorial purpose." It is not necessary for a defendant to commit the overt act underlying the conspiracy charge. It is sufficient that a co-conspirator committed that overt act. When the only overt act alleged in the indictment is the underlying substantive crime, a defendant's acquittal on this charge negates the overt act element of a conspiracy charge, unless a co-conspirator committed the overt act. When the State has alleged other overt acts, however, acquittal on the underlying substantive crime does not preclude a conspiracy conviction.⁴

When viewed in the light most favorable to the State, there was more than sufficient evidence to for the jury to find that Defendant of his co-conspirator committed an overt act. The Defendant was seen at the victim's home at the time of the attempted burglary and the victim's hammer (stolen from her porch) was later found in the Defendant's possession. Finally the jury found beyond a reasonable doubt (a finding not challenged in the instant motion) that Defendant was guilty of theft of the victim's property.

In sum, there is sufficient evidence that either Defendant or his co-conspirator committed an overt act in furtherance of

⁴ *Id.* at *2 (footnotes omitted).

the	conspiracy.	The	motion	for	judgment	of	acquittal	of	the			
conspiracy count is therefore DENIED .												

_____ John A. Parkins, Jr.

Date Superior Court Judge

oc: Prothonotary

cc: Sonia Augusthy, Esquire, Wilmington, Delaware – Attorney for the State

Anthony A. Figliola, Jr., Esquire, Wilmington, Delaware – Attorney for the Defendant