

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1744-2010
vs. : CR-1812-2010
: Opinion and Order re
SHALAMAR K. BROWN, : Defendant's Motion in Limine
Defendant :

OPINION AND ORDER

By Information filed at No. 1744-2010, the Defendant is charged with two counts of Theft by Deception, and two counts of Receiving Stolen Property, all misdemeanor one offenses. At Information No. 1812-2010, Defendant is charged with one count of Theft by Deception and one count of Receiving Stolen Property, both Felony 3 offenses.

By Order of Court dated March 14, 2011, the Court granted the Commonwealth's Motion to Consolidate both Informations. The Court concluded that the evidence of the offenses alleged in each Information would be admissible in a separate trial on the other Information, that the evidence and issues were capable of separation and that there was no danger of confusion by the jury. On March 3, 2011, the Commonwealth filed a Notice pursuant to Pa. R.E. 404 (b) giving notice to the Defendant that it intended to introduce into evidence at trial among other things, the Defendant's convictions in 2006 for four theft related offenses and one criminal trespass offense.

By Motion in Limine filed on March 18, 2011, Defendant requested that the Court preclude said evidence, submitting that it was not admissible pursuant to Rule 404 (b).

A hearing and argument were held before the Court on May 2, 2011. It was initially noted by the Commonwealth that it intended to introduce into evidence only the information regarding Defendant's 2006 convictions and not any prior convictions despite

said prior convictions being set forth in the previously filed notice. It was stipulated as well by the parties that the 2006 criminal offenses are admissible against the Defendant at least for impeachment purposes pursuant to Rule 609 (a). The parties dispute, however, that the evidence of the 2006 crimes is admissible pursuant to Rule 404 (b) (1).

Rule 404 (b) (1) prohibits evidence of other crimes, wrongs or acts in order to show acts in conformity therewith. Generally speaking, a Defendant should not be forced to defend against other alleged crimes as well as the ones for which he stands charged. See Commonwealth v. Wright, 259 Pa. Super. 293, 393 A.2d 833, 837 (1973).

Evidence of other crimes, wrongs or acts may be admitted for limited purposes, however, such as to show identity or a common scheme or plan. Pa. R.E. 404 (b) (2); Commonwealth Billa, 521 Pa. 168, 555 A.2d 835, 840 (1989). In criminal cases, such evidence can only be admitted upon the showing that the probative value of such evidence outweighs the potential for prejudice. Pa. R.E. 404 (b) (3).

The exception language of 404 (b) (2) is not exclusive. See Commonwealth v. Watkins, 577 Pa. 194, 843 A.2d 1203, 1215 n.11 (2003), cert. denied, 543 U.S. 960 (2004). Numerous cases, for example, admit bad acts evidence to explain a course of conduct, to complete the story, to evidence the natural development of the case, or even to show a relationship between co-conspirators. Commonwealth v. Williams, 586 Pa. 553, 896 A.2d 523 539 (2006), cert. denied, 549 U.S. 1213 (2007); Commonwealth v. Drumheller, 570 Pa. 117, 808 A.2d 893, 905 (2002), cert. denied, 539 U.S. 919 (2003).

The Commonwealth has limited its argument in this case, however,

contending only that the proffered evidence is relevant to prove intent, knowledge, motive or common plan, scheme or design. Preliminarily, the Court fails to see how the proffered evidence is even remotely probative with respect to knowledge or motive. On the other hand, the evidence may be probative to identity as well as common plan, scheme or design.

The common plan, scheme or design exception, while not expressly listed in Rule 404 (b) (2) has been judicially recognized. Commonwealth v. Judd, 897 A.2d 1224, 1231 (Pa. Super. 2006); see also Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 481 (2004), cert. denied, 546 U.S. 983 (2005); Commonwealth v. Aikins, 990 A.2d 1181, 1185 n.2 (Pa. Super. 2010) (“Pa. R.E. 404 (b) embodies the common scheme or plan exception to the prohibition against use of prior crime evidence”).

In determining whether evidence of one crime is admissible to prove a common scheme or plan, the Court must be satisfied that the two crimes or bad acts are so related to each other that proof of one tends to prove the other. Judd, supra. The following factors should be considered in establishing similarities: the lapse of time between the crimes; the geographical proximity of the crime scenes; and the manner in which the crimes were committed. Judd, supra. at 1232, citing Commonwealth v. Clayton, 506 Pa. 24, 33, 443 A.2d 1345, 1345-1350 (1984).

The Court easily concludes that the evidence of the 2006 crimes is so related to the crimes for which the Defendant presently stands charged that proof of one tends to prove the other. The facts of the crimes are sufficiently comparable, there are matching characteristics that elevate the incidents to a unique pattern that distinguishes them from the typical theft pattern, and the similarities are not confined to insignificant details that would likely be common

elements regardless of who committed the crimes. See Commonwealth v. Hughes, 521 Pa. 423, 555 A.2d 1264, 1283 (Pa. 1989); Commonwealth v. Aikins, supra. at 1186.

The similarities between the alleged crimes are striking. The first four crimes to which the Defendant pled guilty on July 5, 2006 all occurred in a three month span between December 12, 2005 and February 22, 2006. The crimes for which the Defendant presently stands charged allegedly occurred between September 16, 2010 and November 15, 2010. All of the crimes and alleged crimes occurred in the city of Williamsport and the geographical area of Penn College and involved college age student victims. On each of the occasions, the Defendant either approached or allegedly approached unknown third parties, falsely identified himself, claimed to need change for larger bills, convinced the victims to drive the Defendant around, convinced the victims to get money from their respective ATM machines and deceived them out of significant amounts of money.

With respect to identity, in order for such evidence to be admissible, “there must be such a high correlation in the details of the crimes that proof that the defendant committed one, makes it very unlikely that anyone else but the defendant committed the others.” Commonwealth v. Morris, 493 Pa. 164, 176, 425 A.2d 715, 721 (1981). While there must be a pattern and characteristics between the crimes so unusual and distinctive as to be like a signature, not every fact and circumstance must be matched. Commonwealth v. Hawkins, 534 Pa. 123, 127, 626 A.2d 550, 552 (1993); Commonwealth v. Weakley, 972 A.2d 1182, 1190 (Pa. Super.), appeal denied, 986 A.2d 150 (Pa. 2009).

In this particular case, there are sufficient similarities between the different

crimes to show that it is more likely than not that the same individual committed all of the acts.

Accordingly, the Court concludes that the 2006 convictions are probative to both the common plan, scheme or design as well as identity.

A finding of probativeness, however, does not end the inquiry. In the context of bad acts evidence, the evidence is only admissible where the probative value of the evidence outweighs its potential prejudicial impact. Commonwealth v. Treiber, 582 Pa. 646, 874 A.2d 26, 32 (2005), cert. denied, 547 U.S. 1076 (2006).

Probative value is equated with need. Commonwealth v. Schwartz, 615 A.2d 350, 356 (Pa. Super. 1992), appeal denied, 629 A.2d 1379 (Pa. 1993). The greater the need for the evidence of other acts, the more prejudice the judicial process will tolerate. See Commonwealth v. Gordon, 543 Pa. 513, 673 A.2d 866, 869-70 (1996); Commonwealth v. O'Brien, 836 A.2d 966, 972 (Pa. Super. 2003), appeal denied, 845 A.2d 817 (Pa. 2004).

Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially. Pa. R.E. 403, comment.

While the Commonwealth appears to have strong testimony from the victims upon which to identify the Defendant, Defendant has asserted a complete innocence defense. More specifically, Defendant has at least preliminarily asserted that he was not the individual who allegedly committed the offenses against the victims. Thus, the identity of the Defendant is clearly at issue, and there is need for the proffered bad acts evidence to tie the Defendant to the crimes. Indeed, evidence of the 2005/2006 crimes would be extremely strong evidence of

Defendant, in fact, being the individual who committed the crimes at issue.

Although the bad acts evidence would certainly be detrimental to the Defendant's case, it would not, in the Court's opinion, create an undue tendency to suggest a decision on an improper basis. The jury could weigh the facts of the prior bad acts, compare them to the present case and determine whether Defendant was the perpetrator of the crimes. The Court concludes that, with an appropriate limiting instruction, the probative value of the evidence far outweighs its potential for prejudice. Accordingly, it will be admitted.

ORDER

AND NOW, this ___ day of May 2011 following a hearing and argument, Defendant's Motion in Limine is granted in part and denied in part. The Commonwealth shall be precluded from offering into evidence any of the alleged facts set forth in Paragraphs 5 (1) through (6) and 7 of the Notice filed on March 3, 2011. The Commonwealth will, however, be permitted to introduce into evidence the facts set forth in the remaining paragraphs of its Notice.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file