

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-979-2010
vs. :
 : Opinion and Order Re:
DAWN BALL, : Commonwealth's Motion in Limine
Defendant :

OPINION AND ORDER

Before the Court is the Commonwealth's motion in limine, which seeks to introduce certain records of the Department of Corrections (DOC) pursuant to Rule 404(b) of the Pennsylvania Rules of Evidence.

By way of background, Defendant is charged with aggravated assault by a prisoner, simple assault and harassment, arising out of an incident on December 2, 2009 during which Defendant allegedly spit saliva at Correctional Officer Maurica George (hereinafter C.O. George) hitting her right sleeve, and an incident on December 7, 2009 where Defendant allegedly threw an unknown liquid onto the face of C.O. George.

On January 6, 2012, the Commonwealth filed its motion in limine. The Court held oral argument on the motion on January 18, 2012. The documents the Commonwealth wishes to introduce into evidence at Defendant's trial are a statement allegedly handwritten by Defendant regarding the spitting incident on December 2, 2009 and two waiver of disciplinary procedures forms that Defendant refused to sign.¹

Rule 404(b) states:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

¹ The Court notes that at oral argument on the Commonwealth's motion, the Commonwealth conceded it would not admit the hearing examiner's reports attached to its motion as Exhibits D and E.

therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b).

The first document the Commonwealth wishes to introduce into evidence at trial is a handwritten statement allegedly written by Defendant after the first incident and prior to the second incident. The document is attached as Exhibit A to the motion and states: “You tell that lying fat nigger bitch to suck out my ass after I take a nice shit, w/ her nigger kid’s lips and her old hag of a nigger, mama’s lips. Fuck all you pigs!” The statement is written on a form for the inmate’s version of an incident. The statement is neither signed nor dated.

The Commonwealth argued that this statement was admissible to show Defendant’s intent or motive or that the second incident was not an accident or a mistake. The Commonwealth also argued that its witnesses would testify that Defendant yelled similar vulgar language at C.O. George during the incidents in question.

Defense counsel argued that this evidence would only tend to show Defendant is a horrible person; it would not show whether she spat on or threw an unidentified liquid on C.O. George. Since the statement allegedly was written after the spitting incident, defense

counsel also argued that it was not relevant to show motive or intent.

The Court will preclude the Commonwealth from utilizing this statement at trial. The Court finds the relevance of the evidence is marginal at best and does not outweigh its potential for prejudice. Given the language utilized in the letter, it is likely to inflame the passions of the jury and induce it to render a verdict on an improper basis, i.e., a dislike of Defendant and her incendiary language, instead of the evidence relating to the incident itself. The mere fact that Defendant may have used similar language during the incidents does not tip the balance in the Commonwealth's favor. Rather, it makes it more likely that the jury will use this evidence to improperly find Defendant's conduct in the incidents in question was in conformity with this "other bad acts" evidence in violation of subsection (b)(1).

The Commonwealth also desires to introduce Exhibits B and C, forms which, although not signed by Defendant, purport to waive her right to a disciplinary hearing on the misconduct reports that gave rise to the charges in this case. The Commonwealth argued that Defendant's waiver of a disciplinary hearing constituted a tacit admission to the conduct in question. Pre-arrest silence of a defendant, however, cannot be used as a tacit admission of guilt. Commonwealth v. Molino, 2011 PA Super 237 (November 9, 2011) ("today we hold that the Commonwealth cannot use a non-testifying defendant's pre-arrest silence to support its contention that the defendant is guilty of the crime charged as such use infringes on a defendant's right to be free from self-incrimination."). Instead, it is only admissible to impeach the credibility of Defendant if she takes the stand at trial or in fair response to a defense argument that opens the door to such evidence, such as a claim that the investigation

was one-sided. See Commonwealth v. DiNicola, 581 Pa. 550, 560-61, 866 A.2d 329, 335 (2005). The Court, however, notes that the admissibility of pre-arrest silence as a fair response to an argument by defense counsel is still subject to an assessment of the probative value versus its prejudicial effect. Id. at 561, 866 A.2d at 336. If, during trial, the Commonwealth believes the defense has somehow opened the door to this evidence, it may request a sidebar conference and renew its motion to admit this evidence.

ORDER

AND NOW, this ____ day of January 2012, for the forgoing reasons, the Court DENIES the Commonwealth's motion in limine.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire
Lori Rexroth, Esquire