

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **No. 525-2012**
 : **CRIMINAL DIVISION**
WILLIAM KEMP, :
 Defendant :

OPINION AND ORDER

The Commonwealth filed a Motion in Limine on May 1, 2013. At the request of the Defendant, the parties were to file briefs on four (4) issues: a) whether the expert testimony of Michael S. Doane about the decedent’s knife shall be precluded; b) whether Agent Raymond O. Kontz, III may testify about what the Defendant did not mention when interviewed by the Williamsport Bureau of Police; c) whether defense counsel may introduce Michael Updegraff’s criminal convictions; and d) Whether defense counsel may introduce the decedent’s criminal convictions.

Discussion

a. Whether the expert testimony of Michael S. Doane about the decedent’s knife shall be precluded

The Commonwealth has alleged that the expert testimony about the knife is not relevant to self-defense.¹ The expert testimony deals with the specifics of the knife, whether it was an offensive knife, and whether it was a prohibited knife. The Defendant disagrees and argues that the victim’s possession of an “offensive weapon” is material to a justification defense.² The

¹ Pennsylvania Rules of Evidence defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pa.R.E. 401.
²The Defendant has additionally argued that an expert witness may be used to prove that a knife meets the definition of a prohibited offensive weapon under 18 Pa.C.S. § 908. The statute, however, is not at issue in this case and states that “[a] person commits a misdemeanor of the first degree if, except as authorized by law, he makes repairs, sells, or otherwise deals in, uses, or possesses any offensive weapon.” The cases cited by the Defendant similarly apply 18 Pa.C.S. § 908. See Commonwealth v. Lawson, 977 A.2d 583 (Pa. Super. 2009); Commonwealth v. Hitchbon, 549

Court is only in possession of excerpts from Doane’s report and is unaware of the knife’s appearance. Without knowledge of the details of the knife, the Court is unable to fully assess the “offensive” or “prohibited” nature of the knife and whether it is relevant to this proceeding.³ A justification defense does not require that a weapon be offensive or illegal, however, the Court will not address the admissibility of the expert testimony and will defer the decision for the trial judge, who will have the benefit of the testimony and evidence presented to determine if it is relevant.

b. *Whether Agent Raymond O. Kontz, III may testify about what the Defendant did not mention when interviewed by the Williamsport Bureau of Police*

The Commonwealth has stated in their brief that the parties have reached an agreement with regards to this issue and require that the Court schedule a hearing to place the stipulation on the record. As it has been resolved by the parties themselves the Court will not address this issue.

c. *Whether defense counsel may introduce Michael Updegraff’s criminal convictions*

The Commonwealth has argued that Michael Updegraff’s (Updegraff’s) prior criminal convictions should not be admitted because he was not the victim and they are too remote in time. In Beck, the Pennsylvania Supreme Court stated that the holding in Amos was that:

[P]rior convictions involving aggression by the victim of a homicide may be introduced into evidence by the defendant where a claim of self-defense is made for either one of two purposes: ‘(1) to corroborate his alleged knowledge of the victim’s quarrelsome and violent character to show that the defendant reasonably believed that his life was in danger; or (2) to prove the alleged violent propensities of the victim to show that the

A.2d 943 (Pa. Super. 1988).

³ “To avail oneself of deadly force for self-protection, three factors must be found to exist. First, the actor must have reasonably believed himself to be in imminent danger of death or serious bodily harm, and that it was necessary to use deadly force against the victim to prevent such harm. Second, the actor must have been free from fault in provoking or continuing the difficulty which resulted in the slaying. Third, the actor must have violated no duty to retreat.” Commonwealth v. Brown, 421 A.2d 660, 662 (Pa. 1980) (citing Commonwealth v. McQuire, 409 A.2d 313 (Pa. 1979)).

victim was in fact the aggressor.’

Commonwealth v. Beck, 402 A.3d 1371, 1373 (Pa. 1979) (citing Commonwealth v. Amos, 284 A.2d 748 (Pa. 1971)); see also Commonwealth v. Darby, 373 A.2d 1073 (Pa. 1976).

The Court is unable to find how the holdings in Amos is applicable for Updegraff. All the cases that apply the requested exception of Pa.R.E. 404(a) for use of prior convictions in a claim of self-defense have been applied to deceased victims. See Commonwealth v. Stewart, 394 A.2d 968 (Pa. 1978); Commonwealth v. McCain, 587 A.2d 798 (Pa. Super. 1971); Commonwealth v. Ignatavich, 482 A.2d 1044 (Pa. Super. 1984); Commonwealth v. Harris; 418A.2d 763 (Pa. Super. 1980). The victim of the homicide in this case was not Updegraff and therefore the Court finds that the Defendant’s reasoning under Amos is not applicable. The Court believes that the exception was intended and reasoned for victims of homicides and applying the rule beyond this scope would be improper.

Further, Amos stated that for there to be probative value of the victim’s record the crimes should be of the same nature and not too distant in time. Amos, 284 A.2d at 752. There is no definitive answer on how remote a prior conviction can be for it to be probative. The decision to allow the prior convictions is within the sound discretion of the trial judge. In Beck, the Pennsylvania Supreme Court determined that a three year old conviction was not too remote to have probative value. Commonwealth v. Beck, 402 A.2d 1371, 1373 (Pa. 1979). Further, in Quarles, the Pennsylvania Superior Court stated that they could not “find any appellate decision in Pennsylvania which has ever upheld the admissibility of a conviction which was more than three years removed.” Commonwealth v. Quarles, 456 A.2d 188 (Pa. Super 1983).

Here, Updegraff has convictions in 2001, 2002, 2003, and 2004, which were well after three (3) years. After 2004 Updegraff did not have any additional convictions. While the Court

does not find it is limited to convictions within three (3) years, the length of time here is persuasive. Moreover, there is no indication that the Defendant was aware of the convictions. Based on the remoteness, the Court would also not have allowed the prior convictions to be admitted even if applicable under Amos.⁴

d. *Whether defense counsel may introduce the decedent's criminal convictions*

Neither party addressed the admissibility of the decedent's criminal convictions in their briefs. As the Defendant requested to brief this issue, the Court will not address the issue as there may be an agreement between the parties.

ORDER

AND NOW, this _____ day of August, 2013, after a conference on the Commonwealth's Motions in Limine and a review of the briefs filed by both parties, the Court finds the following:

1. While the Court does not believe that expert testimony on the offensive or prohibited nature of the decedent's knife is relevant, the Court will defer the decision to the trial judge as there is insufficient information to make a ruling at this time.
2. The Court will not address whether Agent Kontz may testify about what the Defendant did not mention in his interview with the Williamsport Bureau of Police because the parties have reached an agreement.
3. The prior convictions of Michael Updegraff are not admissible under the reasoning of Amos and Beck. Commonwealth v. Amos, 284 A.2d 748 (Pa. 1971); Commonwealth v. Beck, 402 A.3d 1371(Pa. 1979). Updegraff was not the victim of the homicide and

⁴The Court is not making a ruling on the applicability of Pa.R.E. 404(b), which was used in the Defendant's

in addition the prior convictions are too remote in time to be probative.

By the Court,

Nancy L. Butts, President Judge

xc: Honorable Marc Lovecchio
William Miele, Esq.
Robert Cronin, Esq.
Eric Linhardt, Esq.
Ken Osokow, Esq.