

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

JACKIE REED,

:  
:  
:  
:  
:

CR-110-2012

CRIMINAL DIVISION

**OPINION AND ORDER**

AND NOW, this 4<sup>th</sup> day of January, 2013, after oral argument held on the Commonwealth's Motion in Limine, it is hereby ORDERED and DIRECTED as follows:

1. The Commonwealth's motion, as it pertains to Oren Mitch, is GRANTED.
2. The Commonwealth's motion, as it pertains to Marie Taylor, is GRANTED.
3. The Commonwealth's motion, as it pertains to Joyce Snyder, is GRANTED.
4. The Commonwealth's motion, as it pertains to Jerry Kimble, is DENIED.
5. The Commonwealth's motion, as it pertains to Defendant's CR-1941-1997 conviction is DENIED.

**I. Motion to Admit Evidence of Other Crimes, Wrongs, or Acts**

**a. Legal Standard**

Pursuant to Pa. R.E. 404(b), the Commonwealth requests that the Court admit evidence of Defendant's bad acts during his criminal jury trial scheduled for January 24, 2012. The Commonwealth argues that these prior bad acts support its theory that Defendant schematically defrauded individuals by promising to perform residential construction on their homes under the condition paying a large down payment on the project.

Pa. R.E. 404(b)(2) provides for the admission of "other crimes, wrongs, or acts" for purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa. R.E. 404(b). *See Commonwealth v. Constant*, 925 A.2d

810, 819 (Pa. Super. Ct. 2007), *appeal denied*, 932 A.2d 1285 (Pa. 2007) (prior bad acts admitted to prove the defendant's intent and motive). When considering the admission of prior bad acts to prove a common plan or scheme, the Court should consider "the elapsed time between the crimes, the geographic proximity of the crime scenes, and the manner in which the crimes were committed." *Commonwealth v. Cain*, 29 A.3d 3, 6-7 (Pa. Super. Ct. 2011), *appeal denied*, 41 A.3d 1280 (Pa. 2012). In *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa. Super. Ct. 2003), *appeal denied*, 845 A.2d 817 (Pa. 2004), our Superior Court explained that "the importance of the time period is inversely proportional to the similarity of the crimes in question." *Id.* at 971 (citing *Commonwealth v. Miller*, 664 A.2d 1310, 1319 (Pa. 1995), *cert. denied*, 516 U.S. 1122 (1996)).

The Court should admit this evidence only when its probative value outweighs its undue prejudice. Pa. R.E. 404(b)(3). *See O'Brien*, 836 A.2d at 972. When considering its probative value, the Court should consider the Commonwealth's necessity for the evidence. *See Commonwealth v. Gordon*, 673 A.2d 866, 870 (Pa. 1996); *O'Brien*, 836 A.2d at 972.

First the Court will consider if the proffered evidence supports the Commonwealth's common plan theory. Then, the Court will consider if the probative value of the evidence outweighs its undue prejudice.

**b. Evidence of Other Crimes, Wrongs, or Acts to Prove Common Plan**

Instantly, the Commonwealth charged Defendants two counts of Theft by Deception; one count pertains to John Pryor and the other Jeffrey Siverling. In both instances, Defendant allegedly agreed to perform a construction job at the men's residences, accepting a large down payment. As it pertains to Mr. Pryor, Defendant allegedly accepted a \$7,000.00 down payment in March 2011 to replace sixteen (16) windows and two (2) doors. *See Commonwealth Ex. 4.*

As it pertains to Mr. Siverling, Defendant allegedly accepted a \$5,100.00 down payment in June 2011 and an additional \$400.00 down payment in July 2011 for construction. *See id.* Defendant allegedly did not start the projects prior to the filing of the information.

Through the pending motion, the Commonwealth provided that it would offer testimony from Mr. Mitch, Ms. Taylor, Ms. Snyder, and Mr. Kimble, to support its common plan theory. The Court will entertain Mr. Mitch, Ms. Taylor, and Ms. Snyder's testimony. The Court believes that the testimony of these individuals tend to prove Defendant's plan to defraud; these actions occurred between November 11, 2010 and August 1, 2012, within the same geographic proximity (Northumberland and Lycoming Counties), and in the same manner (residential construction contracts with large down payments that Defendant did not even commence work on). However, the Court does not believe that Mr. Kimble's testimony supports the Commonwealth's theory because Mr. Kimble hired Defendant to perform work on his real estate property and Defendant completed this contracted work. The Court will address its reasoning in turn.

The Court believes that Mr. Mitch's testimony would support the Commonwealth's common plan or scheme theory. If allowed to testify, Mr. Mitch would relay to the Court that on November 11, 2010, he hired Defendant to perform work on his mobile home on Torbet Ave., Watontown, Northumberland County. Mr. Mitch would testify that Defendant was contracted to remove the old skirting and five windows from the mobile home and replace them with new skirting and windows. Additionally, Mr. Mitch would testify that he paid a \$2,500.00 down payment to Defendant to perform this work. *See Commonwealth Ex. 2.*

The Court also believes that Ms. Taylor's testimony would support the Commonwealth's theory. If permitted to testify, Ms. Taylor would provide that she contracted with Defendant on

May 16, 2011, to perform work on her property on Meadowville Dr., Watsonstown, Northumberland County, Pennsylvania. Ms. Taylor would testify that she contracted with Defendant to replace some windows, doors, and a light in her home and that she paid a \$4,500.00 down payment to Defendant. *See Commonwealth Ex. 3.*

Defendant argues that his dealings with Ms. Taylor did not result in an arrest or the filing of criminal charges and should not be admitted. The Court does not agree. The Court believes that a subsequent arrest or filing should be considered only when weighing the evidence's probative value since the rule is not limited to crimes; the rule includes crimes, bad acts, and other wrongs. Pa. R.E. 404(b)(2)-(3). *See Commonwealth v. Constant*, 925 A.2d 810, 819-21 (Pa. Super. Ct. 2007), *appeal denied*, 932 A.2d 1285 (Pa. 2007) (the defendant's prior incidences with police, which did not result in an arrest or filing of criminal charges, admitted to prove intent, lack of mistake, and motive); *Commonwealth v. Ardinger*, 839 A.2d 1143, 1145 (Pa. Super. Ct. 2003) (trial court erred when it held that a subsequent, pending criminal charge, despite proving a common plan, was too prejudicial because it was only a pending charge). The Court will take this factor into consideration when determining the probative value of this testimony.

Turning to Ms. Snyder, the Court believes that her testimony would also support the Commonwealth's theory. If allowed, Ms. Snyder would testify that she hired Defendant to place a new roof on her home in Muncy Creek Township, Lycoming County. Ms. Snyder would testify that from April 17, 2012, to June 18, 2012, she paid Defendant \$12,000.00 to perform this work. She would also testify that, to date, Defendant has not started any of the work on her home. *See Commonwealth Ex. 1.*

Defendant argues that his actions with Ms. Snyder occurred after the filing of the instant charges and therefore do not fall within the purview of Pa. R.E. 404(b)(2).<sup>1</sup> The Court does not agree. The Court believes that it is irrelevant that Defendant's conduct with Ms. Snyder occurred subsequent to the instant charges because the rule does not distinguish between subsequent bad acts; it merely addresses bad acts. *See* Pa. R.E. 404(b)(2); *Commonwealth v. Wattley*, 880 A.2d 682, 685, 688 n.8 (Pa. Super. Ct. 2005), *appeal granted*, 901 A.2d 498 (Pa. 2006), *appeal denied*, 924 A.2d 1203 (Pa. 2007). Again, the Court will take this fact into consideration when considering the probative value of Ms. Snyder's testimony.

Yet, the Court does not believe that Mr. Kimble's testimony would be relevant for the purposes of Pa. R.E. 404(b). Mr. Kimble would testify that, in his capacity with Kimble Realty, he hired Defendant in 2011 to perform construction work on a house. Mr. Kimble would testify that he paid a down payment of \$3,000, and that he had hard time getting Defendant to complete the construction project. However, Mr. Kimble would testify Defendant completed the job. Additionally, Mr. Kimble would testify that he had other encounters with Defendant resulting similarly. The Court does not believe that this testimony supports the Commonwealth's theory. With the prior three witnesses discussed, Defendant was hired to perform construction work on residences. However, Mr. Kimble hired Defendant to work on a property for his real estate company. Additionally, Mr. Kimble has hired Defendant on at least two occasions, knowing the construction difficulties he might face with Defendant. Most importantly, not only did Defendant start the work on the Kimble property, but he finished it. Therefore, the Court cannot find that Mr. Kimble's testimony would support the Commonwealth's theory, and it will not entertain Mr. Kimble's testimony.

---

<sup>1</sup> The Commonwealth alleges that Defendant's dealings with Ms. Snyder took place between April 17, 2012, and August 1, 2012. The instant criminal information is dated February 17, 2012.

**c. Probative Value Outweighs Undue Prejudice**

The Court finds that the probative value of the testimony of Mr. Mitch, Ms. Snyder, and Ms. Taylor will outweigh any undue prejudice. In this matter, the Commonwealth's case is based on Defendant's intent to defraud. These prior bad acts committed against these witnesses will bolster the testimony of the complaining Commonwealth witnesses; witnesses whose testimony is the basis of the Commonwealth's case. Therefore, the probative value of the testimony far outweighs the prejudice caused. As long as these witnesses are prepared to testify about their dealings with Defendant, the Court will entertain their testimony. *See Cain*, 29 A.3d at 5; *Ardinger*, 839 A.2d at 1146.

As to the Commonwealth's motion to admit bad act testimony, the Court believes that Defendant's interactions with Mr. Mitch, Ms. Taylor, and Ms. Snyder may be admitted to prove a common plan or scheme to defraud. However, this testimony will be limited to a comparison between their dealings with Defendant and the pending charges, under the Commonwealth's common plan, scheme, or design theory. *See Miller*, 664 A.2d 1319-20. The Court will give a limiting instruction to the jury to insure that it understands the purpose of these witnesses' testimony.

**II. Motion to Admit Evidence of a Prior Conviction**

The Commonwealth also requests the Court to admit Defendant's 1998 conviction of Theft by Unlawful Taking or Disposition, pursuant to 18 Pa. C.S. § 3921(a), for impeachment purposes. The Court will not admit this evidence.

If Defendant chooses to testify, the Commonwealth may impeach him by introducing evidence of his prior *crimen falsi* convictions; theft involves *crimen falsi*. *See* Pa. R.E. 609; *Commonwealth v. Meadows*, 787 A.2d 312, 321 (Pa. 2001); *Commonwealth v. Randall*, 528

A.2d 1326, 1329 (Pa. 1987); *Commonwealth v. Vickers*, 394 A.2d 1027, 1029 (Pa. Super. Ct. 1978). *Crimen falsi* convictions are *per se* admissible for impeachment purposes for the ten (10) years following the conviction date or the last day of confinement. *Meadows*, 787 A.2d at 321. However, if more than ten years have elapsed since these dates, these convictions are admissible only if the Court finds “that the probative value of the conviction substantially outweighs its prejudicial effect.” Pa. R.E. 609(b). In this matter, the Court finds that the 1998 conviction’s probative value does not substantially outweigh its prejudicial effect.

In this instance, the Commonwealth requests the admission of Defendant’s August 1998 conviction into evidence, if Defendant chooses to testify. The Court has not received any information regarding this conviction, other than it arose out of Defendant’s guilty plea to a theft charge. The Court is unaware of any punishment Defendant received. Regardless, this conviction occurred in August 1998, fourteen and a half (14 ½) years ago. Without any information on the underlying theft, the Court believes that the conviction is too remote in time to substantially outweigh any prejudice it might cause in the mind of the jury. Therefore, the Court denies the Commonwealth’s motion to admit this conviction.

BY THE COURT,

\_\_\_\_\_  
Date

\_\_\_\_\_  
Richard A. Gray, J.

cc: Martin L. Wade, Esquire, DA  
Katie Bellfy, Esquire, PD  
Gary L. Weber, Esquire