

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1712-2012
	:
vs.	: CRIMINAL DIVISION
	:
BENJAMIN VILLANUEVA, III,	: Opinion and Order re
Defendant	: Defendant's Motion in Limine
	:
	<u>OPINION AND ORDER</u>

This matter came before the Court on August 21, 2013 for a hearing and argument on Defendant's motion in limine filed on August 6, 2013. The relevant facts follow.

On October 11, 2009, two masked individuals armed with handguns robbed the A Plus Sunoco in South Williamsport. During the robbery, the suspects assaulted the clerk and stole numerous packs of cigarettes and approximately \$159 in cash. The suspects fled in the direction of Citizen and Northern Bank.

Video surveillance from the store showed both suspects. The taller of the two suspects was wearing a black ski mask, a green coat with a patch on the right arm, and blue jeans, and he was carrying a blue tote bag with a white design on it. The shorter suspect was a white male wearing a Halloween mask, black gloves and blue jeans. Video surveillance from the ATM machine at Citizen and Northern Bank also showed images of the suspects. From a still photograph from the ATM, it appears that the taller suspect wearing the ski mask was wearing something white underneath the ski mask.

Two days later, the police received a report of suspicious activity near the Woodlands Bank in South Williamsport. The report included two suspicious individuals who appeared to be carrying something behind the properties of the 700 block of Matthews

Boulevard and a third suspicious individual in a gold colored vehicle. One of the suspects was also seen behind a dumpster near the Woodlands Bank.

The registration plate on the gold Chrysler vehicle came back to Christine Hall. She reported that the plate was stolen from her Dodge Caravan. The driver of the vehicle was Stephen Moore. The police asked Ms. Hall if she knew Stephen Moore; she stated that Moore was a friend of her son, Philip Hall.

The police subsequently stopped Defendant, who was one of the suspicious individuals walking in the area. Upon being confronted, Defendant asked if “Stephen” got locked up.

Near the Woodlands Bank dumpster, the police found a rubber, flesh-colored Halloween mask and a pair of black gloves. This Halloween mask was the same or similar to the one used in the A Plus Sunoco robbery. Lying nearby, the police also recovered a white Halloween mask with synthetic red hair. A loaded handgun was wrapped inside the white mask.

The police impounded the gold Chrysler vehicle and obtained a warrant to search it. During the search, the police recovered numerous items used in the robbery of the A Plus Sunoco, including a blue tote bag with a white design on it, a black ski mask that had some red synthetic fibers stuck to the inside of it, a green coat with a patch on the right arm, and two pair of blue jeans.

The white Halloween mask with the red synthetic hair and the black ski mask with some red fibers inside of it were sent to the Pennsylvania State Police (PSP) Crime Lab for comparison. The lab report showed that the red fibers from the black ski mask and the

red hair from the white Halloween mask were visually, microscopically and chemically consistent.

The police obtained a search warrant to seize blood and hair samples from the Defendant so DNA tests could be conducted. The police sent the samples and the two Halloween masks to the PSP Crime Lab for analysis. The report from the Crime Lab indicated that Defendant's DNA matched the DNA recovered from the white Halloween mask with red synthetic hair. DNA testing also showed that DNA from the flesh-colored Halloween mask matched co-defendant Philip Hall.

On July 6, 2012, Defendant was charged with robbery, a felony of the first degree; conspiracy to commit robbery, a felony of the first degree; robbery, a felony of the second degree; conspiracy to commit robbery, a felony of the second degree; theft by unlawful taking, a misdemeanor of the first degree; conspiracy to commit theft, a misdemeanor of the first degree; receiving stolen property, a misdemeanor of the first degree; conspiracy to receive stolen property, a misdemeanor of the first degree; simple assault by physical menace, a misdemeanor of the second degree; conspiracy to commit simple assault by physical menace, a misdemeanor of the second degree; and recklessly endangering another person. The alleged co-conspirator for each conspiracy count was Philip Hall.

On June 17, 2013, the Commonwealth gave Defendant notice that it intended to introduce at the trial, evidence of Defendant's prior conviction for conspiracy to commit robbery under CR-2079-2009.¹ In CR-2079-2009 Defendant pled guilty to conspiring with Stephen Moore to rob the Woodlands Bank in South Williamsport. The Commonwealth

¹ The notice incorrectly states that the conviction was for attempted robbery. At the argument on Defendant's motion in limine, the Commonwealth indicated that the conviction was actually for conspiracy to commit

indicated that the evidence would include certified records and witness testimony. The Commonwealth seeks to introduce this evidence to show: (1) the identity of Defendant as the true actor in this case; (2) a common plan or scheme which encompassed both this case and CR-2079-2009; and (3) a relationship between Defendant and his co-defendant, Philip Hall.

Defendant filed a motion in limine to preclude the evidence on the basis that it only showed Defendant's criminal propensity. In the alternative, Defendant argues that any relevance is far outweighed by its prejudicial effect.

At the hearing and argument on Defendant's motion, the Commonwealth stated that it also wanted to introduce portions of a recording from Defendant's prison visitation with his mother on July 19, 2012 in which Defendant discussed the mask he had for the "bank situation." The Commonwealth noted that Defendant obtained his own DNA expert, who disputed that the DNA profile from the white Halloween mask with red synthetic hair matched Defendant's DNA. The Commonwealth then argued that Defendant's statements on the prison recording show that Defendant wore the Halloween mask for the bank robbery.

Defense counsel opposed admission of this evidence on the basis that it was propensity evidence and overly prejudicial. Defense counsel also noted that the bank situation never progressed to the point where Defendant put on the mask or attempted to rob the bank.

To the extent that the Commonwealth argues that Defendant admitted during the prison visitation with his mother that he wore the mask for the bank situation, the

robbery.

Commonwealth's argument overstates what is actually contained in the transcript of the recording of that visit. While Defendant admitted that he had a mask for the bank situation, he did not say that he wore the mask. Similarly, the Commonwealth overstates the facts to the extent that it asserts the conviction in CR-2079-2009 establishes a direct relationship between Defendant and Philip Hall. Defendant's conviction was for conspiring with Stephen Moore, not Philip Hall.

Nonetheless, if the Court understands the remainder of the Commonwealth's argument, the Commonwealth believes the conviction and prison recording are relevant to tie Defendant to the white Halloween mask with red synthetic hair and the ski mask, coat and other items that the police recovered from the vehicle registered to Philip Hall's mother but which was being driven by Stephen Moore. This evidence, in conjunction with other evidence, tends to show that Defendant was one of the individuals who robbed the A Plus Sunoco.

It is the Commonwealth's theory that Defendant was the taller individual in the A Plus Sunoco robbery and he wore the white Halloween mask underneath the black ski mask. This theory is supported by the following evidence: the still image from the ATM video surveillance that shows something white in the eye holes of the black ski mask worn by the taller suspect; the red synthetic fibers that were found inside the black ski mask; the lab analysis that these red fibers and the red synthetic hair from the white Halloween mask were visually, microscopically, and chemically consistent; and the expert report that Defendant's DNA matched the DNA obtained from inside the white Halloween mask.

Rule 404(b) of the Pennsylvania Rules of Evidence states:

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, this evidence is admissible only if the probative value outweighs its potential for unfair prejudice.

(3) Notice in a Criminal Case. In a criminal case the prosecutor must 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 the prosecutor intends to introduce at trial.

Pa.R.E. 404(b). The list of permitted uses in paragraph (b)(2) is not exhaustive. Pa.R.E. 404(b), comment; Commonwealth v. Dillon, 592 Pa. 351, 925 A.2d 131, 136-137 (2007).

The Court finds that the evidence is not being admitted to show that Defendant has a propensity to commit robberies, but is relevant circumstantial evidence to show the identity of the perpetrator who wore the black ski mask and green coat in the A Plus Sunoco robbery and to indirectly establish a connection with the alleged co-conspirator, Philip Hall.

Unfortunately for Defendant, the "bank situation" and the Sunoco robbery are intertwined, because the police investigation into the "bank situation" led to the discovery of various items allegedly used during the commission of the Sunoco robbery. Although Defendant's inquiry into whether Stephen got locked up shows that he knew Stephen Moore, it does not link Defendant to the gold Chrysler and its contents in the same manner or to the same extent that his conspiracy conviction does. Defendant was walking around outside when the police arrived to investigate the suspicious individuals and vehicle. If the Court

only allowed the Commonwealth to introduce Defendant's query about Stephen, Defendant could attempt to portray the query as merely expressing concern for a friend or acquaintance. It would not provide as strong of a link to the vehicle and its contents as an admission that Defendant and Stephen were co-conspirators on the date and at the time when Stephen was operating a vehicle which contained some of the clothing that matched the description of the clothing worn by the Sunoco robbers two days earlier. The vehicle also bore a registration plate belonging to Philip Hall's mother's Dodge Caravan. Therefore, the Court finds that Defendant's conspiracy conviction is an important link in the chain of evidence to connect Defendant to Philip Hall and the clothing allegedly worn by the perpetrators of the Sunoco robbery.

Similarly, Defendant's statements to his mother during his prison visitation are relevant to show Defendant's relationship to Philip Hall and to the white Halloween mask. Although Defendant neither utters Philip Hall's name nor specifically describes the mask he had for the "bank situation," one can infer from the context of his conversation and the other evidence in this case that Defendant is referring to the white Halloween mask with red synthetic hair and to Philip Hall.

According to the transcript provided by the Commonwealth, the following exchange occurs between Defendant and his mother during a prison visitation on July 19, 2012:

Defendant: ...I don't want nothing to do with this situation, man. Nothing. Know what I'm talking about. Like, the mask they found that's for, that's the bank situation I was...there's nothing, they trying to—

Mom: I know I went to, I went to that. I went to that court. Remember, we went through that, and then, they gave you

conspiracy, remember? You took that plea for conspiracy. But, what they're trying to say is that that mask that ya'll used in the conspiracy, they're trying to say that that's the same mask that ya'll used.

Defendant: It ain't. It ain't mine. The-the mask I had for that, for the other, for-for-for-for the bank situation don't got nothing to do with that situation.

Mom: They're trying to say that your DNA was on it.

Defendant: The other mask, the other guy, I don't know how, the other guy's DNA was on the other mask, I don't got nothing to do with bull, like, you know what I mean? Nothing to do with the bull, like, I mean I know him whatever, whatever, but I ain't got nothing to do with him, nothing, I ain't even know about the situation 'til I got locked up, man.

Mom: Well. Yeah, I figured that much. But, so you don't got nothing to do with it? So, so your DNA that came back on that mask was from the bank that you already, you already went to court for that.

Defendant: Then they trying to say, 'cause you remember they try to give [sic] me the cop out to the, uh, misdemeanor possession of firearm and all that. I mean, uh, no not, instruments of crime, I ain't take it. That's the main reason, you know what I mean? Like, 'cause I seen some shit on the news about that shit happened, like when I got booked, I seen that shit on the news with the bank john. I'm like, damn, what the f*** they talking about.

The flesh-colored Halloween mask and the black ski mask recovered from the gold vehicle were the same or similar to the witness descriptions of the masks worn by the Sunoco robbers and the images of the robbers that were captured on video surveillance from the Sunoco and the nearby ATM machine. The Commonwealth's DNA expert is expected to testify that Philip Hall's DNA matches the DNA from the flesh-colored Halloween mask and Defendant's DNA matches the DNA from the white Halloween mask. Defendant, however, has obtained his own expert who is expected to testify that Defendant's DNA does not match the DNA from the white Halloween mask.

From this evidence, the jury could infer that when Defendant is talking about the other guy's DNA being on the other mask, Defendant is referring to Philip Hall's DNA

on the flesh-colored Halloween mask. Therefore, when Defendant says “I know the bull, like, I mean I know him whatever,” Defendant is admitting that he knows Philip Hall. While this evidence alone does not establish a conspiracy, Defendant is admitting, however minimally, that he has some relationship with Philip Hall.

Similarly, when Defendant talks about the mask they found that was for the bank situation and didn’t have anything to do with this situation and they tried to get him to cop out to possession of a firearm or instruments of crime, a jury could reasonably infer that Defendant is admitting that he had the white Halloween mask, which did not match the descriptions or images of the masks worn by the Sunoco robbers, but which was found wrapped around a handgun. This admission is an important piece of evidence that would tend to support the Commonwealth’s DNA expert and tend to refute Defendant’s DNA expert.

Defendant contends that even if this evidence is relevant, its relevance is outweighed by its potential for prejudice. The Court cannot agree. The masks, handgun, clothing and tote bag from the Sunoco robbery were all discovered when the police responded to investigate the bank situation. Given the close connection between Defendant’s conspiracy conviction and the discovery of the evidence in this case, the prior conviction and Defendant’s statements during the visitation are more relevant than in the typical case where the Commonwealth seeks to introduce such evidence. Given the circumstantial nature of much of the Commonwealth’s evidence, it also appears that the Commonwealth has a legitimate need to introduce this evidence. While the Court is cognizant of the possibility that a jury, upon hearing that a defendant has a prior conviction for the same or a similar

offense, might be inclined to think that he would act in conformity with his prior conduct, this possibility can be eliminated with an appropriate cautionary or limiting instruction which informs the jury that it cannot use the evidence in this manner; it can only consider the evidence to the extent that it shows a connection between Defendant and the items that were used or worn by the perpetrators of the Sunoco robbery.

ORDER

AND NOW, this ___ day of October 2013, the Court DENIES Defendant's Motion in Limine. The Court, however, will give an appropriate limiting instruction to the jury regarding the use of this evidence, and it directs counsel to submit their suggestions for such an instruction to the Court prior to the start of trial.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Trisha Hoover, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file