

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**WILLIAM KEMP,
Defendant**

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: No.: CR-525-2012

:

: Decision on Defendant's Motion in Limine

: Filed on August 29, 2013

OPINION AND ORDER

By way of background, defense counsel filed a Motion in Limine on August 29, 2013. Argument was held before the Court on September 3, 2013. Several issues were raised during the argument, some of which related to the Motion in Limine and others of which related to matters previously addressed by the Court. Several of the issues raised may not be resolved by trial. If not, they will need to be determined at trial based upon the evidence. Some of the issues, however, are ripe for decision.

The first issue concerns statements made by the Defendant during an unrelated hearing in Clinton County on December 24, 2009. In response to questioning about an incident that occurred at Wegman's grocery store where the Defendant withdrew a knife from his pocket but did not use it, Defendant made statements about his possession of guns and knives. Defendant testified that he normally drove with guns in his car. The judge then asked him why. Defendant responded, "Well, honestly, because I have the right to; and I feel like I should exercise it. And what's the point in having the guns and the permit to carry if you're not going to make use of it?" Defendant then stated that he carries a weapon routinely. He stated, "If I don't have the .45 on my hip, I would have a knife in my pocket at almost all times." He indicated that he was concerned that the individual who struck the grocery cart might attack him, because of the strange look about him and the way he was speaking to him.¹

¹ Earlier in his testimony, the Defendant testified that the individual was twice his size.

Then he said, “And that’s why I tend to carry weapons. I don’t have any desire to get into a fight that I can’t win.” Later in the proceedings, when the Defendant was asked on cross examination if his mother’s testimony that sometimes he had problems with his temper was true or not, Defendant said “I’m an Irishman. I have a temper.”

The Commonwealth contends that these statements are relevant to show the Defendant’s specific intent to kill and malice in this case. Specifically, the Commonwealth argues that the Defendant’s statement “what’s the point in having the guns and the permit to carry it if you’re not going to use it,” as well as the statement “I don’t have any desire to get into a fight that I can’t win,” shows that the Defendant intended to use the guns he possessed to kill. The Court disagrees. First, the statements made by the Defendant in 2009 do not evidence and are not relevant to Defendant’s state of mind, specific intent to kill or malice with respect to an event that allegedly occurred on February 13, 2012. Moreover, there was no connection between the individual at Wegman’s and the victim in this case. See Commonwealth v. Stanley, 484 Pa. 2, 398 A.2d 631 (1979). Second, the Commonwealth’s argument misconstrues the Defendant’s statements and takes them out of context. The Defendant indicates that he has a right to carry guns, he has a permit to carry guns, and he carries guns because of concerns about being attacked. The phrase “if you’re not going to make use of it” refers to the permit, not the guns. Despite the fact that the Defendant testified that the individual was twice his size, the Defendant did not use the knife or guns against the individual. Instead, the individual turned and walked away and the Defendant put the knife back in his pocket. Moreover, to the extent that there is even minimal relevancy, it would be substantially outweighed by prejudice to the Defendant. Additionally, Defendant’s admission as to his temper is clearly not

admissible to prove action in conformity with such. Therefore, the Court will preclude the Commonwealth from introducing any of the above-listed statements from the dependency hearing transcripts in its case-in-chief. Until the Court hears the Defendant's evidence, the Court cannot determine whether this evidence would be admissible in cross-examination of Defendant or his witnesses or in rebuttal, other than to note the limitations of Pa.R.E. 405(a)(2).

The next issue concerns statements allegedly made by Diane Hoover to Agent Delker. The Commonwealth concedes that any statements as to Defendant's character are not admissible to prove action in conformity with such character. This shall not preclude the Commonwealth, however, from introducing proper reputation character evidence in rebuttal as permitted by the Rules of Evidence.

The next issue concerns knives which were found on the Defendant's person or in his vehicle. The Commonwealth contends that it should be permitted to introduce evidence that the Defendant had a knife in the console of his vehicle as well as two knives on his person. The Commonwealth also wishes to introduce evidence that, in addition to the two knives on the Defendant's person, the Defendant also possessed a Leatherman's tool.

The Court will preclude the Commonwealth from introducing evidence as to the fact that Defendant had a knife in the console of his vehicle. The Court will, however, permit the Commonwealth to present evidence that the Defendant had two knives and a Leatherman's tool on his person. The Commonwealth persuasively argued that this evidence was relevant to show that if the Defendant truly had a reasonable fear that he was in danger of imminent death or serious bodily injury at the hands of the victim he had the means to defend himself without

taking the time to enter his vehicle and retrieve his gun; therefore, the evidence is relevant to show malice, specific intent to kill and to refute the Defendant's anticipated self-defense claims related to the victim's alleged possession of a knife.

The final issue concerns three portions of a telephone call that was made on January 25, 2013 between the Defendant and his mother Diane Hoover. The Commonwealth contends the three separate portions of the telephone call are relevant as consciousness of guilt.

The first portion, designated as Portion "A," is approximately one minute and seventeen seconds long. Among other things, Defendant notes that matters ended up where they did because of the way it happened, that the calls are being recorded and that he could end up being burned alive.

The Court fails to see any relevancy whatsoever with respect to these statements by the Defendant. Moreover, their admission would require the jury to completely speculate as to what Defendant meant and to the context in which he made the statements. Finally, to the extent there is any relevancy, such is far outweighed by the potential for prejudice and confusion of the jury.

The second portion of the telephone call is designated by the Commonwealth as Portion "B." It is approximately 4 ½ minutes long. During this conversation, the Defendant tells his mother on more than one occasion not to talk to the DA and that the DA is the bad guy. There is also a heated exchange regarding psychological information that the Commonwealth allegedly obtained.

Again, the Court fails to see the relevancy of these statements. The suggestion that they prove consciousness of guilt cannot be accepted. Again, the interpretation of the

statements would require the jury to speculate. To the extent they are relevant, if at all, said relevancy would be far outweighed by the prejudicial impact and the potential confusion to the jury. There are a myriad of reasons why one, under the circumstances which the Defendant faces, would believe that the District Attorney is “the bad guy” and would not want his mother not to talk to the District Attorney.

The last portion of the telephone call is designated by the Commonwealth as Portion “C.” This portion is approximately one minute and fifteen seconds long. During it, Defendant’s mother states to the Defendant an alleged scripture verse along the lines that “the truth will set you free” to which the Defendant remarks that she should not quote scripture to him. Later the Defendant tells his mother to stop meddling because “it’s always for the worst.”

Despite the Commonwealth’s assertions that these statements are relevant, the Court again disagrees. First, the truth will set you free statement is in the context of a dispute between Defendant and his mother about her intentions to bring child support proceedings against him, as verified by the conversation that occurred prior to the statement being made. Secondly, the Court finds no relevancy whatsoever. Again, as with the other statements, it requires the jury to unfairly speculate as to the meaning and context. Finally and as with the other statements, even if they are marginally relevant, they are far too prejudicial and would certainly confuse the jury.

Accordingly, the Court will grant Defendant’s Motion and preclude the Commonwealth from using any portions of the telephone call except if such portions become relevant in rebuttal depending upon the trial evidence.

ORDER

AND NOW, this 4th day of September 2013, the Court GRANTS the Defendant's Motion in Limine. The Commonwealth is precluded from utilizing Defendant's statements in the December 24, 2009 transcript in its case-in-chief. The Commonwealth concedes that it will not use Diane Hoover's statements to Agent Delker in its case-in-chief, but this does not preclude the Commonwealth from utilizing proper reputation character evidence in rebuttal as permitted by the Rules of Evidence. The Commonwealth is precluded from introducing evidence as to the fact that Defendant had a knife in the console of his vehicle. The Court, however, will permit the Commonwealth to introduce evidence that the Defendant had two knives and a Leatherman's tool on his person. The Court also precludes the Commonwealth from using any portions of the Defendant's telephone call with his mother, unless the evidence presented at trial makes the portions of the telephone relevant in rebuttal.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA (EL) (KO)
PD (WM) (RC)
Gary Weber, Esquire (Lycoming Reporter)