

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**DONALD HILL,
Defendant**

:

: No.: CR-2156-2013

:

: Motion in Limine

: to Preclude “Bad Acts” Evidence

OPINION AND ORDER

Before the Court is Defendant’s Motion in Limine to Preclude “Bad Acts” evidence against the Defendant.

Defendant is charged with Simple Assault and related offenses as a result of an incident that allegedly occurred between he and his wife on December 7, 2013. It is alleged that Defendant pushed his wife down into a household appliance and to then got on top of her and punched her in the face several times. It is further alleged that as a result of Defendant’s assault, his wife suffered numerous injuries.

Jury Selection was held in this matter on Wednesday, May 21, 2014. On May 20, 2014, the Commonwealth filed a 404 (B) (4) Notice and on May 21, 2014, the Commonwealth filed an additional 404 (B) (4) Notice. The May 20, 2014 Notice advised the Defendant that the Commonwealth intends to introduce evidence of the December 2, 2013 incident between the Defendant and his wife in which the wife was allegedly pushed and struck with a broom; and an incident on September 5, 2013 when the Defendant “body slammed and backhanded” the victim in the face. The May 21, 2014 Notice advises Defendant that the Commonwealth intends to introduce evidence of an incident that occurred on October 12, 2013 in which the Defendant choked his wife, struck her in the face with his hand, and damaged her Nissan automobile.

By Motion in Limine filed on May 21, 2014, the Defendant seeks to preclude the Commonwealth from introducing the evidence alleging that it is more prejudicial than probative.

During jury selection, the issue of the bad acts evidence was brought before the Court. The Court deferred a ruling on the Motion noting that it needed to review the applicable case law. The Court noted as well that it might permit a continuance of the case should it allow the evidence.

Argument on the motion was recently held before the Court. Defendant asserted that the evidence is more prejudicial than probative while the Commonwealth argued that the evidence is permissible to prove intent, motive, malice, absence of mistake or accident, and ill will. More specifically, the Commonwealth argued that: the October 12 and December 2 incidents arose out of Defendant's jealousy and/or his belief that the victim was cheating on him or sleeping around which also was the basis for the current incident; the prior incidents tend to show that the current incident was not the result of an accident such as a fall down the stairs; the motive for the current incident was the fact that Defendant was essentially evicted from the house by the police as a result of the December 2 incident; and all three incidents show an escalating series of events. Defendant argued that the jury likely would convict him based solely on acting in conformity with his prior character which is prohibited by Rule 404, and that the jury could not dispassionately consider the evidence regarding the current incident once it heard evidence about the alleged prior incidents. Furthermore, the trial would result in mini trials on four separate incidents which would confuse the jury instead of properly focusing the jury on what happened on December 7, 2013.

The admissibility of bad acts evidence is governed by 404 (b) of the Pennsylvania Rules of Evidence, which states:

(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 conformity 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 only upon a showing that a probative value of the evidence 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).

Pennsylvania courts have allowed evidence of prior bad acts where the distinct crime or bad act was part of a chain or sequence of events which form the history of the case and was part of its natural development. Commonwealth v. Walker, 540 Pa. 80, 656 A.2d 90, 99 (1995)(citations omitted), cert denied. 516 U.S. 854, 116 S.Ct. 156 (1995). Furthermore, Pennsylvania courts have allowed evidence of prior bad acts where the evidence is relevant to show both the defendant's intent and malice and the nature of the relationship between the defendant and the victim. Commonwealth Powell, 598 Pa. 224, 956 A.2 406, 420 (2008); Commonwealth v. Ulatoski, 472 Pa. 53, 371 A.2d 186, 190 (1977).

There are a host of Pennsylvania cases which have allowed prior acts of abuse by one spouse toward another. These cases permitted the evidence as illustrative of the defendant's continual abuse of the spouse and as proper to showing ill will and malice toward the spouse establishing motive. Commonwealth v. Drumheller, 570 Pa. 117, 808 A.2d 893, 905

(2002); Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764, 772 (1986), cert denied. 480 U.S. 951, 107 S. Ct. 1617 (1987).

It is difficult to make a definitive ruling in this case prior to hearing the evidence at trial because the attorneys agreed that the victim stated that she fell down the stairs in her preliminary hearing testimony and there appears to be some differences between what the prosecutor argued and the information contained in or written on the Commonwealth's exhibits. For example, the prosecutor argued that the December 2 incident arose out of Defendant's jealousy or fears and allegations that the victim was cheating on him. The police report for this incident, however, indicates that the victim advised that Defendant "became irate after an argument over [the victim's] daughter." The prosecutor also argued that the December 2 incident provided the motive for the instant offense because Defendant was essentially evicted from the house by the police. The police report, however, states that the victim only wanted the Defendant to leave, which he was doing when the police arrived.

The Court is inclined to grant Defendant's motion in limine with respect to the September incident, because the prosecutor's proffer about that incident was vague.

The admissibility of evidence regarding the other two prior incidents will depend on the evidence presented at trial. If the victim testifies that she fell down the stairs and denies that Defendant caused her injuries, the Court is inclined to grant Defendant's motion in limine, unless the Commonwealth has other competent, non-hearsay evidence to establish that Defendant caused the victim's injuries. Absent other competent evidence, the danger is too great that Defendant would be convicted for his propensity to act in conformity with his character which is prohibited by Rule 404 (b)(1). On the other hand, if the victim

testifies that Defendant struck her, pushed her down the stairs, or otherwise caused her injuries, the Court is inclined to admit the October 12 and December 2 incidents to show lack of accident, intent, malice and/or ill will. The caveat for the October incident, however, is that the victim must testify that she suffered personal injury and not just the damage to her vehicle depicted in Commonwealth's exhibit 1C. Similarly, if the victim testifies that the current incident arose out of Defendant's anger over being required to leave the residence on December 2, that incident also would be admissible for the purpose of showing motive.

The Defendant argues nonetheless that any probative value would be outweighed by the prejudicial impact of said evidence. "Prejudice...is not simply prejudice in a sense that [the defendant] will be linked for the crimes for which he is being prosecuted.... The prejudice...is rather that which would occur if the evidence tended to convict [the defendant] only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence." Commonwealth v. Boyle, 733 A.2d 633, 638 (Pa. Super. 1999). "'Unfair prejudice' means the tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa. R. E. 403 comment; Commonwealth v. Page, 965 A.2d 1212, 1220 (Pa. Super. 2009).

Evidence will not be prohibited merely because it is harmful to a defendant. "[E]xclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." Page, supra., quoting Commonwealth v. Owens, 926 A.2d 1187, 1191 (Pa. Super. 2007).

“In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental prohibitive value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degrees to which the evidence probably will rouse the jury to overmastering hostility.” Page, 965 A.2d at 1221, quoting McCormick, Evidence, § 190 (6th ed. 2006).

Considering all of the circumstances, the Court concludes that the evidence is not sufficient to rouse the jury to overmastering hostility and, accordingly, concludes that the probative value of the evidence is not outweighed by the danger of unfair prejudice. The timeframes in context of the probative value are substantial, the evidence is necessary, the past conduct evidence is strong and alternative proof is lacking.

The Court, however, will provide to the jury, at the time the evidence is to be admitted as well as in its closing instructions, a cautionary instruction which fully and carefully explains to the jury the limited purpose for which that evidence will be admitted. Commonwealth v. Claypool, 508 Pa. 198, 206, 495 A.2d 176, 179 (Pa. 1985).

As the Court provided in Drumheller, 808 A.2d 906, the instruction will be similar to the following: “Ladies & Gentlemen, there has been throughout this trial a significant quantity of evidence regarding prior bad conduct on the part of the defendant that has been entered into the record. I have permitted this evidence to be entered into the record not as evidence that he committed the offenses for which he is on trial. Rather, this evidence that was entered with respect to prior bad conduct or acts is permitted solely and only for the

purpose of the Commonwealth attempting to prove malice and ill will, motive, intent and to show that chain in sequence of events on the part of the defendant. That is the limited purpose for which this conduct was entered into the record and the only purpose for which you may consider it.”

As the parties well know, the law presumes that the jury will follow the instructions of the Court. Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (2001).

ORDER

AND NOW, this ____ day of May 2014, following a hearing and argument, the Court will not permit the Commonwealth to introduce evidence concerning the September 5, 2013 incident. If the Commonwealth presents competent evidence at trial that supports the arguments made by the prosecutor, the Court will permit the Commonwealth to introduce evidence regarding the October 12, 2013 and December 2, 2013 incidents and give the jury an appropriate cautionary instruction that explains the limited purposes for which such evidence may be considered.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA (MW)
PD (RC)
Gary Weber, Esquire (Lycoming Reporter)
Work File