IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**: No. CR-708-2013**
	:
vs.	**:**
	:
	:
GLENN JACKSON,	**:**
Defendant	**:**

OPINION AND ORDER

This matter came before the court for a hearing and argument on the following motions: (1) Defendant's motion in limine filed on January 21, 2015 regarding decedent's reputation for violence, and edged weapons and books that were seized from Defendant's residence; (2) Defendant's motion in limine filed on April 6, 2015; (3) Defendant's motion for special relief filed on April 22, 2015 related to Defendant's request to inspect and copy criminal files of witness Jackie Reed; (4) Defendant's motion in limine/motion to suppress asserting a violation of Defendant's Miranda rights, which was filed on April 23, 2015; (5) Defendant's motion to compel discovery filed on April 10, 2015; (6) Defendant's motion in limine filed on May 15, 2015 to preclude additional opinions of Dr. Roney that were just disclosed to the defense; (7) Commonwealth's motion filed on April 30, 2015 to dismiss Defendant's motion in limine/motion to suppress as untimely; and (8) Commonwealth's motion in limine filed on May 14, 2015 to preclude the defense from questioning Jackie Reed about a second statement Defendant allegedly made to him. At the hearing, the parties also raised an issue concerning the number of alternate jurors that would be selected.

Initially, the court notes that Defendant's motion for special relief filed on April 22, 2105 and the motion to compel filed on April 10, 2015 were addressed in a separate

order dictated in the presence of the parties on May 15, 2015. The parties also agreed that there would be four (4) alternate jurors selected and each side would receive two (2) peremptory challenges for the alternates.

Defendant filed a motion in limine/motion to suppress on April 23, 2105. Defendant's motion seeks to preclude the Commonwealth from introducing evidence that Defendant dropped his head when he received the search warrant and that Defendant made a statement that he would be detained for the rest of his life during a conversation with Corporal Brad Eisenhower, because this evidence was obtained in violation of Defendant's Miranda rights. The Commonwealth filed a motion to dismiss Defendant's motion, claiming it was untimely.

A motion to suppress must be filed within thirty (30) days after formal arraignment as part of a defendant's omnibus pretrial motion, unless the opportunity to raise the issue did not previously exist or unless otherwise required by the interests of justice. See Pa.R.Crim.P. 581(B).

While the court does not want to encourage parties to file suppression motions at such a late date, the court believes the interests of justice, including interests of judicial economy, are best served by addressing Defendant's motion on the merits. The court notes that although Defendant has always been represented by members of the public defender's office, there was a change in assigned counsel "late in the game" because the assistant public defender assigned to handle this case left the public defender's office in December 2014.

The court also took the testimony on the issues raised in the motion on May 15, 2015, which took no more than an hour. On the other hand, the trial in this case is

scheduled for eight days. Under the unique circumstances of this case, the court believes it is better to rule on the merits now so that it can be addressed, if necessary, in any direct appeal rather than run the risk that years from now Defendant could receive a new trial through an ineffective assistance of counsel claim in a Post Conviction Relief Act (PCRA) proceeding. Therefore, over the Commonwealth's objection, the court will address the merits of Defendant's motion.

Two witnesses testified regarding the issues raised in Defendant's petition. Corporal Joseph Akers testified that in the evening of May 6, 2013 the Pennsylvania State Police received information that a body might be buried in Defendant's residence. They confirmed the information over the next several hours and then requested and obtained a warrant to search Defendant's residence. At approximately 4:15 a.m. on March 7, 2013, law enforcement officers went to Defendant's residence and set up a perimeter. Cpl. Akers then hailed Defendant through one of the police cruiser's public address system. Cpl. Akers told Defendant they had a search warrant for his residence and asked him to come outside. Within a minute, Defendant came out of the residence. Cpl. Akers then asked Defendant to get on his knees, which he did. Cpl. Akers handcuffed Defendant's hands behind his back, stood him up and walked him over to one of the police cruisers. He placed Defendant in the back seat, but left the door open. Cpl. Akers explained who he was and that he had a warrant to search the residence. When speaking to Defendant, Cpl. Akers did not itemize everything that the police were searching for, but he did tell Defendant that they were looking for the body of Michael Krauser. As Cpl. Akers told Defendant he was being detained and was laying the search warrant in his lap, Defendant dropped his head.

At approximately 4:35 a.m. the police read Defendant his Miranda rights and Defendant exercised and/or refused to waive those rights. Defendant was transported to the state police barracks, placed in a holding room and shackled to the floor.

Different people kept an eye on Defendant. Corporal Eisenhower was one of those people. He testified that between 10:15 and 10:45 a.m., while he was writing an unrelated report, he watched Defendant through the open door of the holding room. Defendant began to talk to him. Defendant asked what would happen to his dogs and spoke about his family heritage and how he came to Jersey Shore. At one point, Defendant asked Cpl. Eisenhower how long he was going to be detained. Cpl. Eisenhower asked, "Were you shown a copy of the search warrant?" Defendant said, "Yes." Cpl. Eisenhower said, "So you know what the troopers are looking for, right?" Again, Defendant said, "yes." Cpl. Eisenhower then said, "Well, they're going to search the entire residence and depending on what they find it could be the rest of your life." Defendant replied, "Well then I guess it will be for the rest of my life."

The Commonwealth intends to introduce this statement and the fact that Defendant dropped his head when he was shown the search warrant as evidence of Defendant's consciousness of guilt. The defense contends that this evidence is not admissible, because it was obtained in violation of his *Miranda* rights.

Defendant contends that the Commonwealth should be precluded from utilizing evidence that he dropped his head because he was in custody and had not yet been read his Miranda rights. The court cannot agree.

While the court questions the relevancy of this evidence, especially since

Corporal Akers testified that the search warrant was put in Defendant's lap and it seems entirely reasonable for Defendant to drop his head to either see what Corporal Akers was doing or to read the search warrant, the court sees no basis to suppress it based on any constitutional violation.

"The law is clear that *Miranda* is not implicated unless the individual was in custody *and* subjected to interrogation." *Commonwealth v. Snyder*, 60 A.3d 165, 170 (Pa. Super. 2013)(citations omitted). "'[I]nterrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to illicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); see also *Commonwealth v. DeJesus*, 787 A.2d 394, 402 (Pa. 2001); *Commonwealth v. Umstead*, 916 A.2d 1146, 1149 (Pa. Super. 2007). There is nothing in the record to show that Corporal Akers questioned Defendant or said anything to him; he merely handed him a copy of the search warrant, which he was required to do. See Pa.R.Crim.P. 208. Simply put, there was no interrogation.

Defendant next argues that his conversation with Corporal Eisenhower was improper interrogation; therefore his statement "well, I guess it will be for the rest of my life" should be suppressed. Again, the court cannot agree.

"As a general rule, the prosecution may not use statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel." *Umstead*, supra.

Although Defendant clearly was in custody, the court finds this statement is not subject to suppression for several reasons. First and foremost, Defendant had been advised of his *Miranda* rights several hours before the conversation took place. Second, Defendant initiated the conversation, not Cpl. Eisenhower. Third, the court accepts Cpl. Eisenhower's assertion that he did not intend to elicit any admissions. Finally, although Defendant did not formally waive his *Miranda* rights in writing, he waived them by his conduct. He initiated the conversation with Cpl. Eisenhower. He asked Cpl. Eisenhower how long he would be detained. After Cpl. Eisenhower responded to his question, Defendant added his gratuitous comment, when no response was sought or required. See *Commonwealth v. Abdul-Salaam*, 678 A.2d 342, 350-351 (Pa. 1996)(suppression not required when the defendant makes an incriminating statement during "small talk" with authorities); *Commonwealth v. Yarris*, 549 A.2d 513, 523 (Pa. 1988)(suppression not required when the defendant made an incriminating statement after voluntarily initiating communication with the authorities).

In his motion in limine filed on May 15, 2015, Defendant seeks to preclude the Commonwealth from introducing expert opinions from Dr. Roney that were not disclosed in his initial report. Defense counsel became aware of these additional opinions when the Commonwealth sent an email on May 14, 2015 outlining additional information that it would be seeking to introduce through testimony from Dr. Roney. The defense objects to this information on two grounds: (1) it was required to be disclosed by July 2104 pursuant to a stipulated order entered in April 2014; and (2) the opinions are not expressed to the requisite degree of certainty.

The Commonwealth contends that the defense is not prejudiced by the timing of the disclosure because many of the same or similar opinions were expressed by its other expert, Dr. Ross. Furthermore, the defense has its own expert who addressed those opinions previously expressed by Dr. Ross.

Unfortunately the court is left wanting. While this was a hearing and argument, no testimony was presented by either side. Although the defense made arguments that the email provided information at a late date that was beyond the scope of Dr. Roney's initial report and the Commonwealth argued that the defense was not prejudiced due to information contained in Dr. Ross' report and Defendant's expert response thereto, neither party provided the court any of these expert reports.

Preliminarily, the court notes that this order addresses the subject matter of the opinions and not whether the expert expressed his opinions to the requisite standard. Without seeing an actual report as opposed to an email from the prosecuting attorney, that is a trial issue.

Defendant requests that Dr. Roney only be able to testify regarding the contents of his initial report and any issues within the fair scope of that report. The Commonwealth provided a May 14, 2015 email listing 5 areas of "additional information" supplied by Dr. Roney.

As indicated at the hearing, the court will grant Defendant's motion with respect to paragraph 4. This does not limit the testimony of Dr. Ross, who is expected to be another Commonwealth witness

As to paragraph 3 and as understood at the hearing, either Dr. Ronery or Dr.

Ross may testify to such. Defendant conceded the information was in Dr. Roney's autopsy report.

As to paragraph 5 Defendant conceded that he would not be prejudiced by the information. Accordingly, the Commonwealth will be permitted to have Dr. Roney testify to such.

The remaining disputed issues involved paragraphs 1 and 2. These opinions of Dr. Roney relate to the Defendant's position, upright or laying down, being stabbed with a sword and the presence or absence of defensive wounds.

Defendant claims that the opinions must be precluded in light of the stipulated order entered on April 16, 2014. Defendant claims that it is within the scope of the stipulated order because the expert will likely opine that the victim was unconscious based on the lack of defensive wounds. At the argument the Commonwealth conceded that it would be arguing this point based on other evidence including, but not limited to, Defendant's statements.

The Commonwealth claims that the order did not mention anything about defensive wounds; it was only concerned with whether the victim was conscious or unconscious at the time he was stabbed. Furthermore, even if the new information is covered by the order, the Commonwealth can always continue to investigate the case.

The court agrees with Defendant that the information is within the scope of the April 16, 2014 order. It is not merely the fact that the report was disclosed beyond the deadline set forth in the order, but rather the nature of the information and timing of the disclosure in relation to jury selection and trial.

This case was originally scheduled for trial in January 2015, but it was

continued at the request of the defense. In an order dated November 18, 2014, the parties were notified that jury selection was scheduled for May 19, 2015 and the trial was scheduled for June 1-10, 2015. The Commonwealth had ample time to consult with its expert and obtain the information that it disclosed to the defense in the email that was sent after 5:00 p.m. on Thursday, May 14, 2015.

The court recognizes that the Commonwealth can continue to investigate its case. It cannot however, prejudice the defense with eleventh hour disclosures. Typically, the information discovered in such an investigation is such that the defense can respond to it without much difficulty. It is unreasonable, however, to expect the defense to be able to obtain its own expert response to this testimony before jury selection or trial, especially when the defense has yet to see an actual supplemental report from Dr. Roney.

Defendant has been incarcerated awaiting trial since March 7, 2013. This is an eight-day trial with multiple expert witnesses. Not only is it difficult to find trial dates where all the experts are available, but rescheduling this trial also impacts the scheduling of other homicide cases. At some point, this case needs to be tried. That time is now. Therefore, the court will preclude Dr. Roney from testifying as set forth or rendering any opinion based on paragraphs 1 and 2.

In the motion in limine filed on January 21, 2015, Defendant seeks rulings permitting him to introduce certain evidence regarding the victim's history of or reputation for violence and precluding the Commonwealth from admitting evidence regarding edged weapons and books found in Defendant's residence.

The parties resolved the issue regarding the books. They agreed that the

Commonwealth could introduce the book "The Stiff" but it would not introduce the other books listed in Defendant's motion in limine.

The parties also agreed that two swords and a serrated knife would be admissible. The defense contended that any other knives or weapons were not admissible.

The Commonwealth claimed that because the experts will testify that they do not know what knife caused the wounds and Defendant said that the Commonwealth never got the murder weapon, it should be able to show essentially all of the knives found in Defendant's residence. The court cannot agree. The Commonwealth can only show to the jury those edged weapons that Dr. Roney previously examined and said were possible murder weapons.

Defendant seeks to introduce evidence concerning the decedent's reputation for violence and Defendant's knowledge of decedent's violent tendencies. In paragraph 16 of the motion, Defendant sets forth eight specific statements or incidents that he wishes to present at trial. This type of evidence is governed by Rule 404 of the Pennsylvania Rules of Evidence. Generally, evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait. Pa.R.E. 404(a)(1). In criminal cases, however, a defendant may offer evidence of an alleged victim's pertinent character trait. Pa.R.E. 404(a)(2)(B).

"[A] 'pertinent' character trait for purposes of Pa.R.E. 404(a)(2)(B) is limited to a character trait of the victim that is relevant to the crime or defense at issue in the case." *Commonwealth v. Minnich*, 4 A.3d 1063, 1072 (Pa. Super. 2010). Thus, character evidence to prove the victim's violent propensities is admissible where self-defense is asserted and

where there is a factual issue as to who was the aggressor. *Commonwealth v. Busanet*, 54 A.3d 35, 51 (Pa. 2012), cert. denied 13 S.Ct. 178 (2013); *Commonwealth v. Christine*, 78 A.3d 1, 4 (Pa. Super. 2013).

In *Commonwealth v. Smith*, 416 A.2d 986 (Pa. 1990), the supreme court summarized the law of self-defense regarding the character of the victim as follows:

> In *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1978), we said testimony as to the victim's character is admissible for the following purposes: (1) to corroborate the defendant's alleged knowledge of the victim's violent character to corroborate the defendant's testimony that he had a reasonable belief that his life was in danger and (2) to prove the allegedly violent propensities of the victim to show he was the aggressor. We further noted that, generally, character can be proved only by reputation evidence. In *Commonwealth v. Darby*, 473 Pa. 109, 373 A.2d 1073 (1977), we held that convictions and violent acts of the victim which did not result in conviction, of which the defendant had knowledge, could be introduced for the first purpose mention in *Commonwealth v. Amos*, supra. We further held, however, that violent acts that did not result in conviction could not be offered for the second purpose announced in *Commonwealth v. Amos*, supra.

Id. at 988. Under the first prong, the accused must have knowledge of or be aware of the evidence of the victim's violent character. Under the second prong, the evidence must consist of a conviction of a crime of a violent nature and not too remote in time from the homicide; however, it need not be shown that the defendant was aware of the conviction. *Commonwealth v. Beck*, 402 A.2d 1371, 1373 (Pa. 1979). In the absence of a conviction, specific violent conduct may be proven through eyewitness testimony. *Commonwealth v. Dillon*, 598 A.2d 963, 964 (Pa. 1991); *Commonwealth v. Carbone*, 707 A.2d 1145, 1154 (Pa. Super. 1998); see also Pa.R.E. 405(b)(2)("In a criminal case, when character or a character trait of an alleged victim is admissible under Pa.R.E. 404(a)(2)(B) the defendant may prove the character or character trait by specific instances of conduct.").

With this standard in mind, the court will address each of the eight statements and incidents in Defendant's motion in limine.

Defendant seeks to introduce statements of the decedent to various people, including Defendant, that he had previously been a member of a gang. The Commonwealth opposes the admission of this statement, unless Defendant can allege a recent time frame when the victim was an alleged member of a gang and the Defendant or others can allege the type of gang to which the victim allegedly belonged. Defense counsel indicated that the decedent made statements to Defendant and others that he belonged to the "Hell Angels" gang and killed six people when he lived in New Mexico. The decedent lived in New Mexico seven or eight years before he died, but all the statements were made within two years of the decedent's death. The court finds that this evidence is admissible under the first prong to corroborate Defendant's belief that his life was in danger, but it would not be admissible to show that the decedent was the aggressor without a conviction or eyewitness testimony to the killings.

Defendant also seeks to admit statements by the decedent to various people, including Defendant, that his alter ego was "Damien," who is violent. The Commonwealth objects to testimony about "Damien" unless the testimony relates to the victim informing Defendant who Damien is and if he is vicious. At the hearing, defense counsel indicated that the decedent told Defendant and others not to make him mad or upset, because that would bring "Damien" out or you'd have to deal with "Damien" who is evil and bad. The court finds that this evidence also is admissible under the first prong, but not to show the decedent was the aggressor absent eyewitness testimony to "Damien" being violent.

Defendant next asserts that evidence the decedent had a PFA filed against him on December 5, 2011, where it was alleged that he had choked and assaulted his wife is admissible at trial. Defendant also contends that the decedent's guilty plea on September 28, 2012 for harassment due to choking his wife while intoxicated is admissible. The Commonwealth has no objection to Defendant's testimony of his awareness of an incident where the decedent choked his wife, but it objects to the introduction of the fact that a PFA was entered, as the PFA was entered by agreement and no finding was made that the decedent engaged in abuse. The Commonwealth also objects to any of the decedent's guilty pleas to harassment, disorderly conduct, and public drunkenness as these offenses are not crimes of violence. Defense counsel noted that the PFA order and the harassment conviction arose out of the same choking incident.

The court finds that evidence regarding the choking incident and the decedent's conviction for harassment arising out of that incident are admissible at trial. Defendant's awareness of this incident is relevant to his belief that his life was in danger. The harassment conviction is the decedent's admission to the choking incident; therefore, it corroborates Defendant's testimony regarding that incident. See *Dillon*, supra. The PFA order, on the other hand, was entered upon agreement without an admission. The court finds that the PFA petition and order can only be used at trial to impeach the decedent's wife if she testifies in a manner that is inconsistent with the PFA order or her allegations in the PFA petition.

Defendant seeks to introduce evidence that the decedent pled guilty on

February 1, 2006 to assaulting a New Mexico police officer and that the decedent pled guilty on May 9, 2007 to refusing to obey a New Mexico law enforcement officer. The Commonwealth objects to this evidence and contends that it inadmissible because it is too remote and the New Mexico offenses are not equivalent to crimes of violence in Pennsylvania, but rather are similar to summary offenses such as harassment. The Commonwealth also noted that assault in Pennsylvania involves bodily injury.

The court will permit the defense to introduce the decedent's conviction for assault upon a peace officer. This offense includes an attempt to commit a battery upon the person of a police officer while he is in the lawful discharge of his duties; or any unlawful act, threat or menacing conduct which causes a peace officer while he is the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery. N.M. Stat. Ann. §30-22-21. The New Mexico statute defines battery as "the unlawful, intentional touching **or application of force** to the person of another, when done in a rude, insolent or angry manner." N.M. Stat. Ann. §30-3-4 (emphasis added). There is nothing in New Mexico statute defining the phrase "application of force" or in the record to support the Commonwealth's statement that the term "application of force" is limited to touching. It would seem unlikely that the phrase would be limited to touching when touching is already expressly included in the statute, which would render the "application of force" mere surplusage. Furthermore, Pennsylvania's definition of assault includes not only causing bodily injury but also an attempt to cause bodily injury.

The court simply does not have enough information to definitively rule on the

New Mexico conviction for refusing to obey a law enforcement officer. The parties have not provided the court with any information regarding this offense, and the court has been unable to locate the New Mexico statute defining such an offense. The court doubts that the offense is a crime of violence based on its title, but the court has no idea how the offense is defined.

Defendant also wants to introduce evidence that the decedent pled guilty on March 5, 2010 to public drunkenness. While this conviction might not be for a violent crime per se, the court finds it would be admissible to show that the decedent became loud, angry and belligerent when he was intoxicated. See *Dillon*, supra. This evidence is relevant because the defense claims that the decedent was drunk and started an argument with Defendant regarding ownership of his microwave and/or owing the decedent some money. The argument then escalated into a physical altercation, with the decedent grabbing Defendant by the neck and choking him.

The defense also wants to introduce evidence that the decedent pled guilty on October 24, 2012 to disorderly conduct – unreasonable noise as a result of him yelling obscenities at Defendant and refusing to leave Defendant's property. This incident occurred only a few months prior to the decedent's death. Again, while this conviction might not be for a crime of violence per se, the court believes it is relevant and admissible to show the nature and volatility of the decedent's relationship with Defendant.

Defendant also filed a motion in limine seeking to preclude the Commonwealth from introducing evidence of Defendant's prior acts of violence, including reputation evidence that he is violent when intoxicated, specific acts of assaultive behavior, and Defendant's simple assault conviction from New York in 2003. The Commonwealth

indicated that is only intended to introduce evidence of Defendant's simple assault conviction and reputation evidence if the defense presented evidence of the victim's character.

The court will deny this motion in limine. Rule 404(a)(2)(B)(ii) states that if the defendant offer's evidence of a victim's pertinent trait, the prosecutor may offer evidence of the defendant's same trait.

The Commonwealth filed a motion in limine to preclude Defendant from introducing evidence of a second statement that Defendant allegedly made to Jackie Reed in the later part of 2014 after Reed was recommitted to the jail. According to the Commonwealth, in March 2013 Defendant made a statement to Redd in which he admitted killing the victim after having knocked the victim unconscious and then stabbing him while the victim was unconscious. In that statement, the Commonwealth contends Defendant never related that the victim regained consciousness prior to being stabbed. In the later statement Defendant indicated that after the victim was knocked down, the victim got back up and then the Defendant stabbed him. The Commonwealth claims that at the time the second statement was made, Defendant was aware that Reed was cooperating with the Commonwealth and the second statement is inadmissible hearsay.

Defense counsel argued that Defendant intends to present evidence that there was only one conversation, not two as alleged by the Commonwealth and the statement is admissible to impeach Reed.

The court finds that this evidence is admissible to impeach Reed, provided the defense presents evidence that there was only one conversation between Reed and

Defendant.

ORDER

AND NOW, this 22nd day of May 2015, it is ORDERED and DIRECTED as follows:

1. The parties agreed that pursuant to Rule 633 there will be four (4) alternates with each side receiving two (2) peremptory challenges.

2. Defendant's motion for special relief filed on April 22, 2015 as well as the motion to compel filed on April 10, 2015 were disposed of by separate order entered on May 15, 2015.

3. The court denies the Commonwealth's motion to dismiss Defendant's motion in limine/motion to suppress filed on April 23, 2015.

4. The court denies Defendant's motion in limine/motion to suppress filed on April 23, 2015.

5. The court grants in part Defendant's motion in limine to preclude expert testimony filed on May 15, 2015. Dr. Roney is precluded from testifying regarding the information contained in paragraphs 1, 2 and 4 of the Commonwealth's email dated May 14, 2015.

6. The court grants in part Defendant's motion in limine filed on January 21, 2015. The only book that the Commonwealth will introduce into evidence is "The Stiff." The Commonwealth can only introduce or show to the jury those edged weapons that Dr. Roney previously examined and said were possible murder weapons. The defense will be permitted to introduce evidence of the decedent's reputation for violence and Defendant's

knowledge of the decedent's violent tendencies as set forth in the Opinion accompanying this order.

7. The court denies Defendant's motion in limine to preclude the Commonwealth from introducing evidence regarding Defendant's reputation for violence and his 2003 simple assault conviction from New York.

8. The court denies the Commonwealth's motion to preclude Defendant's "second statement" to Jackie Reed, with the caveat that the defense must present some evidence at trial that there was only one conversation between Defendant and Reed.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire/Nicole Ippolito, Esquire (DA's office)
William Miele, Esquire/Nicole Spring, Esquire (PD's office)
Work file
Gary Weber, Esquire (Lycoming Reporter)