

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1229-2015
 :
 DERRICK JERMAINE BOONE, : Opinion and Order re Commonwealth's
 Defendant : Motion in Limine and Commonwealth's
 : Motion to Admit Statements

OPINION AND ORDER

This matter came before the court on October 16, 2017 for a hearing and argument on the Commonwealth's motion in limine and the Commonwealth's motion to admit statements.

By way of background, the defendant is charged with criminal homicide, two counts of aggravated assault, persons not to possess firearms, carrying a firearm without a license, possession of an instrument of crime (weapon), and simple assault arising out of an incident at the 5th Avenue Tavern, during which Yusef Wilson (the Victim) was shot and killed. It is anticipated that the defendant will present a claim of self-defense.

On October 3, 2017, the Commonwealth filed a motion in limine to preclude the defendant from admitting at trial certain bad acts of the Victim and a motion to admit statements made by Terrance Perez to Taylon Hamilton.

In its motion in limine, the Commonwealth seeks to preclude the defendant from discussing in his opening statement and admitting at trial the following adjudications and convictions of the Victim: (1) a 2003 juvenile adjudication of delinquency for simple assault (M2) and conspiracy to commit simple assault (M2); (2) a 2008 conviction in

Lycoming County for simple assault (M2), terroristic threats (M1), defiant trespass (M3) and disorderly conduct (M3); (3) a 2009 conviction in Philadelphia County for simple assault (M2) and recklessly endangering another person (M2); and (4) a 2012 conviction in Lycoming County for aggravated assault (F2). The Commonwealth argued that this evidence was not admissible because the evidence will clearly show that the Victim was the initial aggressor and the defense has not made a proffer that the defendant was aware of any of the Victim's prior adjudications or convictions.

Defense counsel countered that, absent a stipulation by the Commonwealth that the Victim was the initial aggressor, the Victim's prior convictions were admissible to establish such. Furthermore, defense counsel anticipates that the defendant is going to assert self-defense and testify that he reasonably believed that he was in imminent danger of death or serious bodily injury. Such belief was based at least in part on the defendant's knowledge of the Victim's violent propensities. Defense counsel is expecting the defendant to testify at trial that the Victim was a boxer who had made statements that his hands were registered weapons and the defendant was aware of the Victim's aggravated assault conviction, as well as the Victim's violent acts in Philadelphia, due to his relationship with the Victim's girlfriend or former girlfriend, Ashley Devine.

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 Pennsylvania 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 mentioned 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). “Only those past crimes of the

victim that are similar in nature and not too distant in time will be deemed probative, with the determination as to similar nature and remoteness resting within the sound discretion of the trial judge.” *Commonwealth v. Mouzon*, 53 A.3d 738, 741 (Pa. 2012)(citing *Amos*, 284 A.2d at 752).

Unfortunately, the court does not have sufficient information at this time to render a definitive ruling on the Commonwealth’s motion. At this point, the most the court can say is: (1) it is not likely that the court would permit the 2003 juvenile adjudication under the second prong due to the fact that it occurred approximately 12 years prior to the incident at the 5th Avenue Tavern; (2) if it is clear that the defendant did not instigate the verbal argument and was not the initial aggressor in the physical confrontation, it is not likely that any of the convictions or adjudications would be admissible under the second prong; (3) if the defendant testifies at trial that he reasonably believed he was in imminent danger of death or serious bodily injury and he was aware of the Victim’s prior convictions for assaultive behavior, then it is likely that at least some of the Victim’s convictions would be admissible under the first prong; and (4) based on the limited proffer regarding the defendant’s anticipated trial testimony, it is likely that the 2012 conviction in Lycoming County for aggravated assault and the 2009 convictions in Philadelphia County for simple assault and recklessly endangering another person would be admissible under the first prong.

The Commonwealth also filed a motion to admit statements made to Taylon Hamilton by Terrance Perez concerning his conspiracy with Derrick Boone to shoot the Victim. The Commonwealth seeks to introduce statements that Perez told Hamilton that he

handed his gun to Derrick Boone inside the bathroom at the bar and that Perez bragged to Hamilton that Derrick Boone shot J-Roc with Perez's handgun after coming out of the bathroom.

At the argument, the Commonwealth indicated that it intended to call Terrance Perez as a witness but acknowledged that he may invoke his right to remain silent, in which case the Commonwealth would seek to introduce Perez's statements through Taylon Hamilton. The Commonwealth admitted a transcript of Taylon Hamilton's police interview (Commonwealth's Exhibit #1) and argued that the statements were admissible under Rule 804(b)(3) of the Pennsylvania Rules of Evidence.

Rule 804(b)(3) provides that the following are not excluded by the rule against hearsay when the declarant is unavailable:

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency...to expose the declarant to civil or criminal; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

PA. R. EVID. 804(b)(3).

Relying on *Commonwealth v. Robins*, 812 A.2d 514 (Pa. 2002) and *Commonwealth v. Cascardo*, 981 A.2d 245 (Pa. Super. 2008) and the factors contained therein, the Commonwealth asserted that the surrounding circumstances corroborated the trustworthiness of the statements. The Commonwealth noted: (1) the statements were made

in a non-custodial environment at a party in a private residence where the young men were smoking marijuana and multiple people were listening; (2) the declarant admitted passing a gun to the defendant inside a bathroom in the bar, which implicated the declarant in, at the very least, an aggravated assault; (3) the Commonwealth was not aware of any improper motive or other motivations for the declarant to make the statements; (4) by implicating himself in at least an aggravated assault, the declarant could be subject to severe consequences; (5) it was not clear whether the statements were solicited or not, but it appeared to the prosecutor that they were not; (6) the statements were made within 10 to 15 minutes after the events; (7) the declarant is the defendant's stepson; and (8) as he was making the statements, the declarant was in possession of a handgun, which the Commonwealth contended added to the reliability of the statement.

Defense counsel argued that the statements were not against the declarant's penal interests. He noted that the statements were not given to a police officer, the declarant was not in a custodial environment, and there was no point that the declarant thought he was facing criminal circumstances. Instead, the declarant was at a party, bragging and getting "stoned." Furthermore, the Commonwealth's witness, Taylon Hamilton, clearly had other motivations; he was trying to get out of jail and get home to his pregnant girlfriend. Defense counsel also argued that the statements were similar to double hearsay in that Perez likely would not be testifying about what he did and what the defendant said to him, but rather the Commonwealth would call Hamilton to testify to what Perez said about the defendant's statements and conduct, as well as his own conduct.

The shooting occurred on April 25, 2015. On January 26, 2017, the District Attorney's Office received a letter from Taylon Hamilton, indicating that he had information concerning the killing of the Victim, as well as another homicide. Commonwealth Exhibit 1, at 3. The next day, Hamilton was interviewed by Agent Trent Peacock and Agent Edward Lucas of the Williamsport Bureau of Police. Hamilton told the Agents that he was at a college party on Second Street in Williamsport. He, Terrance Perez, Denzel Cradle and another "black dude" went upstairs and were laughing and "smoking weed." Perez was playing with his gun. The defendant called Perez and told him to put the call on speakerphone. The defendant then said "he needed the gun" and "such and such." Commonwealth Exhibit 1, at 6. Perez, Cradle and the other black dude got up and they left the party. When they came back 15 or 20 minutes later, they were out of breath and Perez was bragging about how he went in the bathroom, gave the defendant the gun, and the defendant came out of the bathroom and shot the Victim. Id. at 7, 14.

At other points in the interview, however, Hamilton didn't know if the defendant was on speakerphone, he didn't know where Perez was when the shooting happened (he "guessed" Perez was inside the bar but Perez didn't specifically say where he was) and, according to Hamilton's interview, the defendant and Perez gave various reasons why the defendant wanted the gun which ranged from the defendant was going to kill the Victim to the Victim was going to shoot or rob the defendant. Id. at 11, 16-17. Hamilton also indicated that Perez was telling the story but he didn't know if it was all true, and Perez said more but Hamilton couldn't really say it because he didn't "want to not say the truth or

whatever” and he honestly didn’t remember the whole story. *Id.* at 14-15.

“The circumstances to be examined in this inquiry are limited to those attendant to the making of the statement.” *Robins*, 812 A.2d at 525. Factors the courts have evaluated include, but are not limited to:

the circumstances under which the statements were uttered, including the custodial/non-custodial aspect of the setting and the identity of the listener; the contents of the statement, including whether the statements minimize responsibility of the declarant or spread or shift the blame; other possible motivations of the declarant, including improper motive such as to lie, curry favor, or distort the truth; the nature and degree of the ‘against interest’ aspect of the statements, including the extent to which the declarant apprehends that the making of the statement is likely to actually subject him to criminal liability; the circumstances or events that prompted the statements, including whether they were made with the encouragement or at the request of a listener; the time of the statement in relation to the events described; the declarant’s relationship to the defendant; and any other factors bearing upon the reliability of the statement at issue.

Id. at 525-526.

The statements were made in a noncustodial setting. The declarant was at a party, smoking marijuana with his friends. The listener claims to be a friend of the declarant.

In the statements, the declarant allegedly admits that he provided a firearm to the defendant in the bathroom of the bar and that the defendant shot the Victim with that firearm. The declarant does not appear to be trying to shift or spread the blame. Although the Commonwealth could not see any other motivations for the declarant’s statements, it appears to the court that the declarant may have been bragging to try to impress his friends.

The Commonwealth also asserts that the statements are clearly against the declarant’s penal interest because the statements would expose the declarant to liability

(presumably as an accomplice or co-conspirator) for, at a minimum, an aggravated assault, which carries severe consequences. However, it is unclear from the listener's conflicting descriptions of the defendant's request for the firearm whether the defendant intended to commit a murder or aggravated assault with the firearm or whether he intended to defend himself from the Victim. In any event, it does not appear that the declarant in any way realized that his statements could subject him to criminal liability.

Other than the identity of the person shot, which may have been prompted by questions from a person named Denzel, it does not appear that the declarant's statements were made with the encouragement or at the request of the listener. The statements were allegedly made 15 to 20 minutes after the incident, and the declarant is the defendant's stepson.

Other factors bearing on the reliability of the statements include the fact that the listener disclosed this information to law enforcement to curry favor with the District Attorney to try to expedite his release from jail so he could go home to his pregnant girlfriend, and the listener did not disclose these statements until approximately 21 months after the incident.

Viewing the totality of the circumstances, based on the record created by the parties, the court cannot find that the statements were against the declarant's (Perez's) penal interest or that the circumstances clearly indicate the trustworthiness of any of the statements. Perez' statement that he provided the gun to the defendant would only be against Perez' penal interest if, at the time he provided the firearm, Perez knew that the defendant was

going to use the firearm to kill or seriously injure the Victim in cold blood as opposed to protecting himself from an attack by the Victim or if Perez was aware that the defendant was a person who was not permitted by law to possess a firearm. Perez's bragging statement to Hamilton that Derrick Boone shot J-Roc (the Victim) with Perez's handgun is a statement implicating **the defendant** in criminal activity, not Perez.

Even if the statements are considered against Perez's interest, the circumstances surrounding the statements do not corroborate their trustworthiness. It is not clear if Perez was inside the bar and actually saw the shooting or if Perez heard that information from the defendant or others.¹ Therefore, portions of the statements may be double hearsay, as asserted by defense counsel.

It also does not appear that Perez in any way apprehended that the statement could actually subject him to criminal liability. Instead, it appears that Perez was at a party, under the influence of controlled substances, and trying to impress his friends. The court agrees with defense counsel that this case is more akin to *Robins* where the statements were not admissible. Finally, the listener provided the statements to law enforcement approximately 21 months after they were allegedly made solely to try to curry favor with the

¹ In one of the statements to Hamilton allegedly made by Perez, he said "I went to the bathroom and handed it to him as soon as I walked out he just started shooting at him" and stuff like that. Id. at 14. It is unclear if the shooting began after Perez walked out of the bathroom or after he walked out of the bar. Agent Peacock specifically asked if Perez was inside the bar or outside the bar and whether Perez specifically said where he was. Hamilton "guessed" Perez was inside the bar, but Perez didn't say specifically where he was. Furthermore, according to representations made by the Commonwealth with respect to its motion in limine regarding the Victim's bad acts, the video clearly shows that the Victim was the aggressor and the defendant did not shoot the Victim until the Victim threw a chair and charged at the defendant as the defendant was trying to back out of the bar. Therefore, unless the bathroom was right next to the exit, the shooting would not have occurred immediately after the defendant and Perez exited the bathroom.

District Attorney to get himself out of jail.

ORDER

AND NOW, this ___ day of October 2017,

1. Upon consideration of the Commonwealth's motion in limine, the court does not have sufficient information at this time to render a definitive ruling on the Commonwealth's motion. At this point, the most the court can say is: (1) it is not likely that the court would permit the 2003 juvenile adjudication for the purpose of showing that the Victim was the initial aggressor due to the fact that it occurred approximately 12 years prior to the incident at the 5th Avenue Tavern; (2) if it is clear that the defendant did not instigate the verbal argument and that the Victim initiated the physical confrontation, it is not likely that any of the convictions or adjudications would be admissible to show that the Victim was the initial aggressor; (3) if the defendant testifies at trial that he reasonably believed he was in imminent danger of death or serious bodily injury and he was aware of the Victim's prior convictions for assaultive behavior, then it is likely that at least some of the Victim's convictions would be admissible; and (4) based on the limited proffer regarding the defendant's anticipated trial testimony, it is likely that the 2012 conviction in Lycoming County for aggravated assault and the 2009 convictions in Philadelphia County for simple assault and recklessly endangering another person would be admissible to corroborate the defendant's knowledge of the Victim's violent character to corroborate the defendant's anticipated trial testimony that he reasonably believed he was in danger of imminent death or

serious bodily injury.

2. The court DENIES the Commonwealth's motion to admit Terrance Perez's statements through the testimony of Taylon Hamilton.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow/Martin Wade, Esquire (DA)
William Miele/Nicole Spring, Esquire (PD)
Gary Weber, Esquire (Lycoming Reporter)
Work File