IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	
	:	
vs.	**: No. CR-1296-2016**	
	:	
PAUL MATLOSZ,	**: Commonwealth's**	
Defendant	**: Motion in Limine to Introduce 404 (b) Evidence**	

OPINION AND ORDER

Defendant is charged under Information filed on August 10, 2016 with 50 counts of endangering the welfare of children, 50 counts of corruption of minors – sexual offenses, and 50 counts of indecent assault.

The Commonwealth alleges that from May 1, 2013 to approximately May 31, 2014, when the victim was between 13 and 14 years old, Defendant showed the victim child pornography, watched the pornography with the victim and then fondled the child over the child's clothing.

The Commonwealth alleges that at the time, Defendant was 23 or 24 years old and had met the victim through the Christian Church of Cogan Station Youth Group. Defendant transported the victim to and from church in a vehicle belonging to Defendant's parents. During the rides, Defendant allegedly reached over and placed his hand on the victim's crotch over his pants. Incidents of this type of fondling occurred approximately 50 to 60 times both in the vehicle and at Defendant's residence.

The victim "slept over" at Defendant's house several times and Defendant would make him take his shirt off and/or his pants and have him walk around topless in his

boxers. There were a few times where Defendant would have the victim lay beside him wearing only his boxers and cuddle with him. There were approximately five to six occasions where Defendant reached into the victim's pants inside the victim's underwear and touched his bare penis while he was sitting in a chair in Defendant's room.

Defendant is alleged to have groomed the victim over time. Defendant is alleged to have bought the victim "things like clothing and other small items as his family never had money." Sometimes when the victim would have an erection, Defendant would place his hand on it and comment saying "wow, you're so hard."

Before the Court is the Commonwealth's Motion to Introduce 404 (b) Evidence. Specifically, the Commonwealth asks that the Court permit evidence that on December 12, 2014, Defendant followed a teenaged boy into the public restroom at Faxon Bowling Lanes and pushed the boy into a stall. Defendant then closed the stall door and began undressing the boy against the boy's wishes. Defendant used his hand to touch the boy's penis, and covered the boy's mouth whenever a person would walk into the restroom. Defendant asked the boy if he wanted to see Defendant's penis, and finally exited the stall when somebody entered the restroom and called out to Defendant that it was his turn to bowl.

The hearing and argument were held before the Court on May 8, 2017. The parties stipulated that the Court could consider the Affidavits of Probable Cause from both alleged cases, those being Information No. 1296-2016 (the present case) and Information No. 291-2017 (Faxon Bowling Lanes case). Furthermore, the Commonwealth introduced as Commonwealth's Exhibit 1 a portion of the police report in connection with the Faxon

Bowling Lanes case.

The admission of prior bad acts evidence is governed by Rule 404 (b) of the Pennsylvania Rules of Criminal Procedure. Rule 404 (b) (1) prohibits evidence of other crimes, wrongs, or acts in order to show acts in conformity therewith. Generally speaking, a defendant should not be forced to defend against other alleged crimes as well as the one for which he stands charged. *See* ***Commonwealth v. Wright***, 393 A.2d 833, 836-37 (Pa. Super. 1973).

This evidence may, however, be admissible for other purposes such as proving identity. Pa. R. E. 404 (b) (2). The exception language of 404 (b) (2) is not exclusive or exhaustive. Pa. R. E. 404, Comment; ***Commonwealth v. Johnson***, 2017 Pa. LEXIS 1198, *29 (Pa. 5/25/17); ***Commonwealth v. Dillon***, 925 A.2d 131, 137 (Pa. 2007); ***Commonwealth v. Brown***, 52 A.3d 320, 325 (Pa. Super. 2012). Numerous cases, for example, admit bad acts evidence to explain a course of conduct. ***Commonwealth v. Akens,*** 990 A.2d 1181, 1185 n. 2. (Pa. Super. 2010) ("Pa. R. E. 404 (b) embodies the common scheme or plan exception to the prohibition against the use of prior crime evidence"); ***Commonwealth v. Judd,*** 897 A.2d 1224, 1231-32 (Pa. Super. 2006); ***Commonwealth v. Barzyk***, 692 A.2d 211, 217 (Pa. Super. 1997).

In this particular case, the Commonwealth argues that the evidence regarding the Faxon Bowling Lanes incident is admissible against Defendant to show a common scheme, plan or design, as well as intent and absence of mistake or accident. (Motion in Limine, paragraph 11).

In addressing the common scheme or plan exception, the evidence is admissible to demonstrate a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others. ***Commonwealth v. Elliott***, 700 A.2d 1243, 1249 (Pa. 1997); ***Commonwealth v. Semenza***, 127 A.3d 1, 8 (Pa. Super. 2015).

As noted, in determining whether evidence of one crime is admissible to prove a common plan, scheme or design, the court must be satisfied that the two crimes or bad acts are so related to each other that proof of one tends to prove the other. ***Semenza*****,** *supra*. The following factors should be considered in establishing similarities: the lapse of time between the crimes, the geographical proximity of the crimes and the manner in which the crimes were committed. ***Commonwealth v. Cain***, 29 A.3d 3, 7 (Pa. Super. 2011).

The Court concludes that the evidence of the separate crimes are not so related to each other that proof of one tends to prove the other. The facts of each crime are not so sufficiently comparable, nor are there matching characteristics that elevate the incidents to a unique pattern that distinguishes them from the typical child assault. Indeed, the similarities at issue are confined to insignificant details that would likely be common elements regardless of who committed the crimes. ***Commonwealth v. Hughes,*** 555 A.2d 1264, 1283 (Pa. 1989); ***Commonwealth v. Bryant***, 530 A.2d 83, 86 (Pa. 1987).

While there are similarities between the two sets of offenses, those similarities do not constitute a signature of Defendant. To the contrary, the similarities would unfortunately be present in most child abuse cases. The victims were between 13 and 14

years old and both males. The perpetrator fondled the victim's penis. The acts occurred under circumstances in which the perpetrator took advantage of a relationship with the victim.

The differences are even more pronounced. In the instant case, Defendant groomed the victim over a long period. There were rides to church and home visits.

In the Faxon Bowling case, while the perpetrator and the victim were "both in the bowling league", there is no evidence that they knew each other. There is no evidence that this was anything other than an opportunistic isolated incident.

In the instant case, the abuse occurred while the parties were in the "privacy" of a vehicle or in a home. In the Faxon Bowling case, the incident occurred in a public bathroom.

In the instant case, there appears to be no evidence whatsoever that there were any threats made against the victim or his family, or that any force was used. In the Faxon Bowling case, the child was followed into a bathroom stall, held against his will and not only he but his family was threatened.

The Commonwealth argues that Defendant used similar language in referencing the fact that the child's penis was erect. Allegedly on both occasions, the Defendant used the term "wow" along with other statements. The Court concludes that this isolated word stated in conjunction with other facts does not tip the scale to permit the evidence to come in under the common scheme exception.

The Commonwealth further argues that the crimes are admissible to establish the identity of Defendant. Again, the issue is whether there is such a logical connection

between the crimes that proof of one will naturally tend to show that that the accused is the person who committed the other. Given the many differences as set forth above, the Court cannot conclude such.

Additionally, identity is not an issue in this particular case. This is not a situation where the identity of the alleged perpetrator is unknown.

Finally, the Commonwealth argues that this evidence would prove an "absence of mistake or accident." The theory is that a prior incident tends to decrease the likelihood that the same man would be involved in two such similar accidents. ***Commonwealth v. Donahue***, 549 A.2d 121, 127 (Pa. 1988). There is no evidence in this case, however, at this point that the defense intends to raise such a defense. Moreover, consent is not an issue. If the defense is raised, the Court will reconsider its ruling but at this stage the evidence is not admissible to show an absence of mistake or accident.

Furthermore, the Court agrees with Defendant that the evidence is not admissible because its probative value, if any, is outweighed by its potential for unfair prejudice. In criminal cases, "bad acts" evidence is admissible "only if the probative value of the evidence outweighs its potential for unfair prejudice." Pa. R. E. 404(b)(2). Unfair prejudice is the tendency to cause judgments and conclusions upon an improper basis. Pa. R. E. 403, Comment.

There are a few factors which cause the Court to reach this conclusion. First, it does not appear that the Commonwealth needs the prior bad act evidence. Other, much more compelling evidence is available to the Commonwealth. Secondly, the Commonwealth

could not indicate to the Court how the bad acts evidence would be presented. The Commonwealth could not represent that there would be first-hand knowledge. The weakness of this prior bad act evidence is certainly an issue that the Court cannot ignore. As well, the Court cannot ignore the prejudice to Defendant in needing to essentially fight two cases instead of one. Finally, the other act is arguably far more disturbing than those for which Defendant is on trial in this case.

> The admission of evidence is solely within the discretion of the trial court, and the trial court's evidentiary rulings will be reversed on appeal only upon an abuse of discretion. An abuse of discretion will not be found based on a mere error of judgment, but rather occurs where the court has reached a conclusion that overrides or misapplies the law, or where the judgement exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Witmayer, 144 A.3d 939, 949 (Pa. Super. 2016) (citing ***Commonwealth v. Woodard,*** 129 A.3d 480, 494 (Pa. 2015); see also ***Commonwealth v. McGriff***, 2017 PA Super 118, 2017 Pa. Super. LEXIS 288, *17 (April 21, 2017).

Utilizing the Court's discretion and the parameters of Rule 404 (b), the Court will deny the Commonwealth's Motion in Limine.

ORDER

AND NOW, this 30th day of May 2017, following a hearing and argument, the Court DENIES the Commonwealth's Motion in Limine to Introduce 404 (b) evidence.

By The Court,

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Marc F. Lovecchio, Judge

cc: Anthony Ciuca, Esquire (ADA)
James Protasio, Esquire
Gary Weber, Lycoming Reporter
The Honorable Marc F. Lovecchio