

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

| | | |
|-------------------------------------|---|---------------------|
| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | CR-1976-2015 |
| v. | : | |
| | : | |
| ANTHONY W PORTER JR, | : | PRETRIAL |
| Defendant | : | |

OPINION AND ORDER

On September 13, 2016, Defendant's Counsel, filed a Motion in Limine requesting the Court preclude the Commonwealth's proffered prior bad acts evidence. The Court heard argument on the Motion on November 4, 2016.

Background

Anthony W. Porter, Jr. (Defendant) is charged with Official Oppression.¹ The charges stem from an alleged incident on or about September 6, 2015, whereby Defendant is accused of taking advantage of his authority or purported authority at SCI Muncy to mistreat an inmate. To wit: the Defendant while serving as a corrections officer at SCI Muncy did request a female inmate disrobe and display her buttocks and genitalia.

The Commonwealth seeks to admit the statement of Lisa Smith, Victim:

2 weeks ago on the first day he saw ME using the bathroom. And he said he saw my butt. And told I have a nice butt. Than he would everyday he would come to my door and Look in the window and tell me you look good. [Defendant] would look in my window to see if I was getting dress [sic] he always told me when I walked by that he wanted all of me. He said he love to give it to me in my butt. About see me naked he always wanted me to take my clothes off. [Defendant] would always talk real quiet so nobody would: I was really scare because I was scare that if I didn't do what he was told that I would get in trouble. On Saturday he came by my window and ask to take it all off. Because he wanted to SEE my pussy, butt, boobs. So I did because I was really scare feeling if I didn't that he would SOME how find a way to get me in trouble. He would whisper dirty stuff to ME every time I would walk by him. He would flirt with me. Telling me I wish I could find a place to go to have sex with you. Every time I

¹ 18 Pa.C.S. § 5301(1).

would be cleaning in ck. He would always watch ME. When I bent down and say mmmm I like to put my dick in that butt. He always would make sure my roommate was sleeping when he came by my door because he said I can't let nobody hear me talking to you. He would never leave me alone. I felt very uncomfortable every day. [Defendant] has seen all my body parts just ONE time. I just Joke about going to the closet with him. But I would never. I'm married and happy. I just wanted to feel like I wasn't being watched everytime. Today on 9/8/15, [Defendant] told me not to say nothing to them. When I was called to the security room. Mr. Wright ask to see a picture of ME today of ME with long hair. [Defendant] looked at it too.

Statement of Lisa Smith, 9/8/2015.

The Commonwealth seeks to offer the following statement of Brandi Martin:

[Defendant] and my celli Lisa Smith have been talking each other sexually. [Defendant] has been coming to me call (1027) for the last three days tell Lisa "he wants that ass!!" On the 6th day of September, he came to the door asking Lisa to take off her clothes. Lisa took off her clothes and did a dance for [Defendant]. During the days of 5th, 6th, and 7th, he made multiple stops at our cell telling Lisa he wants that ass and saying mm-mm-mm. He was working on SA side the other day and kept coming to SB to see Lisa. Today he kept giving her sexy eyes and saying mmm. On my way over here he told me to say I don't know anything. Lisa asked [Defendant] to go into the utility closet but he declined.

Statement of Brandi Martin, 9/8/2015.

Discussion

I. Motion in Limine

The Commonwealth seeks to admit into evidence 404(b) evidence against Defendant: two written statements, one by victim Lisa Smith and one by witness Brandi Martin supra. The statements are dated September 8, 2015, (two days after the date of the crime charged), and were taken by Security Officer Captain Waltman of the SCI Muncy facility.

The Defense seeks to preclude the statements as prior bad act evidence being submitted to show the Defendant acted in conformity with his character. Defense argues that the Commonwealth does not have a permissible use for the evidence.

Permissible uses would be proving motive, opportunity, absence of mistake, or lack of accident; however, the list provided in Pa.R.Crim.P. 404(b)(2) is not exclusive. If the evidence can be used for a permissible use, the Court must determine whether the probative value of such evidence outweighs its potential for unfair prejudice and provide an appropriate limiting instruction. Commonwealth v. Paddy, 569 Pa. 47, 68, 800 A.2d 294, 307, 2002 Pa. LEXIS 1376, *23 (Pa. 2002).

The Commonwealth argues that the statements show the behavior leading up to the specific date and offers the Court Commonwealth v. Dunkle, 602 A 2d 830, 838, where the Supreme Court of Pennsylvania affirmed the lower court's decision to admit testimony regarding the defendant's past sexual behavior with victim. The Supreme Court of Pennsylvania reasoned that "the testimony concerning [defendant's] misconduct was admissible to show that the [defendant's] misconduct was of a continuing and escalating nature."

The Defense counters that common scheme is no longer a permissible use citing Paddy; however, the Commonwealth has not offered the evidence to prove common scheme. In Paddy, the Supreme Court of Pennsylvania affirmed the admission of the murder victim's prior statement to police that she had witnessed Defendant murder two other people. The Commonwealth submitted the statements as evidence of Defendant's motive. Additionally, the Supreme Court accepted the Commonwealth's argument that evidence was submitted under the *res gestae* exception to the rule against admission of prior bad acts evidence. Paddy at 308.

The Court here finds the statements to be admissible under the *res gestae* exception. Additionally, as in Dunkle, the statements are admissible as they are part of

a series of continuous series of sexual acts or conduct between the Defendant and Victim.

The Court finds the probative value of the evidence outweighs its potential prejudicial impact. The Court considered five factors in making this determination: (1) Need (2) Convincingness (3) Similarity (4) Time of Other Act and (5) Prejudice. The evidence is probative as it will help the jury reach a decision on the ultimate charge. Both statement writers will be witnesses at trial and both the Commonwealth and Defense Counsel will elicit testimony from them. The statements can be used to corroborate, contradict and/or refresh the memory of the witness thus helping the Jury make credibility issues and determine the truth of the underlying charge. The Court finds the evidence convincing given that both statements are sworn statements to security personnel. The statements substantially align with each other and were taken close into proximity to the events of the crime charged. The statement writers impart their view of the incident that resulted in the criminal charge making the prior bad act evidence much more than similar to the crime charged: it is in part, the crime charged. The Commonwealth is not seeking to admit this evidence to paint Defendant as a bad man and so therefore worthy of any guilty verdict just on that bad character alone. Rather, the evidence supports the Commonwealth's case and goes directly to helping the jury determine an ultimate fact the Commonwealth is required to prove at trial.

ORDER

AND NOW, this 17th day of January, 2017, based upon the foregoing Opinion, Defense Counsel's Motion in Limine is DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Nicole Ippolito, ADA
William Miele, Defendant's Counsel
Gary Weber, Lycoming Law Reporter
Work file (law clerk)