IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-115-2017**
	:	
vs.	:	
	:	
KELLI VASSALLO,	:	
Defendant	:	**Motion to Sever**

OPINION AND ORDER

By Information filed on January 27, 2017, Defendant is charged with eight separate criminal offenses. Counts 3 and 6 relate to sexual offenses allegedly committed by Defendant against a then 17 year old female. Counts 1, 2, 4, 5, 7 and 8 relate to sexual offenses allegedly committed by Defendant against a then 13 year old female.

Before the court is Defendant's motion to sever the counts as between the alleged victims. The motion was filed as part of an omnibus pretrial motion filed on February 16, 2017. A hearing and argument were held on March 23, 2017. During the hearing, the parties stipulated for the purposes of considering the severance motion that the court could consider the factual averments set forth in the affidavit of probable cause, the preliminary hearing and the respective police incident reports which were either part of the record or admitted as exhibits.

Count 3, corruption of minors (sexual offenses) and count 6, criminal use of a communications facility, relate to alleged victim, L.F.

According to L.F., during the summer of 2009, she was 16 years old and in high school. She babysat for a family who resided at a home on Mansel Avenue in Loyalsock Township. She met Defendant, who was in her 20's and who was living at the home with the family at the time.

The two became friends, doing many activities together. For example, they might go out to dinner or the movies. Defendant, who was a teacher at Williamsport High School, helped L.F. with her homework and taught L.F. how to drive. The alleged victim's mother got suspicious and obtained a court order which precluded Defendant from having contact with L.F.

Despite the order, the parties continued to meet and develop a relationship. They had contact surreptitiously through landlines, texting, others' phones and Facebook accounts.

During the summer, in "either June, July or August" when L.F. was 17, the relationship between the parties turned intimate and sexual. It "started in the bathroom and then moved to [the homeowner's] bed." The parties first kissed and then Defendant digitally penetrated L.F. The parties had consensual sexual encounters "probably" 30 times while L.F. was 17. All of the encounters happened at the Mansel Avenue house. After L.F. turned 18, the parties continued their relationship.

M.B. is presently 16 years old and in high school at Loyalsock Township. Between September of 2013 through August of 2014, M.B. was 13 years old and in 8th grade. At the time, defendant was 33 years old and a middle school basketball coach at Loyalsock.

M.B.'s very close friend "was suicidal" and the head 8th grade basketball coach suggested that M.B. talk with Defendant. M.B. and Defendant developed a friendship. Together they went to the mall, watched TV, communicated via text, ate dinner together, ran errands and had "sleepovers" with others. Their joint activities increased in frequency as time passed.

In September of 2013 when they were at Defendant's house sitting on the

couch, Defendant told M.B. that she "had feelings" for M.B. As indicated, M.B. was 13 at the time. Defendant "kissed M.B. that night."

Approximately a week or two after that incident, Defendant started touching M.B. The touching involved intimate parts of M.B. Defendant would kiss and touch M.B.'s breasts, stomach and vagina. Defendant would also digitally penetrate M.B.'s vagina. For a few months or so, the sexual acts occurred while M.B. was clothed. Thereafter, the sexual acts occurred after Defendant removed M.B.'s clothing.

Except for one occasion at the Mansel Avenue house during the late spring or early summer of 2014, the sexual acts occurred at Defendant's residence on Lafayette Parkway in Loyalsock Township. Sometimes Defendant would shower with M.B. The sexual acts continued from September of 2013 to August of 2014. They would "hang out" about every day. Defendant would pick up M.B. after sports practices, after school or at M.B.'s house. Defendant would oftentimes text M.B. asking to get together and they would have sexual encounters "two or three times a week" during the entire 11 months.

The encounters ended when M.B.'s mother started getting suspicious and Defendant said "it needed to end." Defendant had previously told M.B. that what was happening was wrong, M.B. should not tell anyone, and if anyone found out, Defendant would go to jail.

Defendant submits that the charges relating to the different alleged victims should be severed. Defendant argues that joinder of the two would have no probative value and would serve only to unduly prejudice Defendant at trial. Defendant also argues that evidence of the crimes against each separate alleged victim would not be admissible in separate trials and further that such evidence would be prohibited by Rule 404 (b) of the Pennsylvania Rules

of Evidence as propensity evidence. Defendant contends that any cautionary jury instruction would be ineffective and that the jury would tend to convict Defendant with respect to both victims even if they decided that Defendant was guilty with respect to one but might not be guilty with respect to the other.

The Commonwealth counters that the evidence of each offense would be admissible in a separate trial for the other, the evidence is capable of separation by the jury so as to avoid the danger of confusion, and that Defendant would not be unduly prejudiced.

Rule 583 of Pennsylvania Rules of Criminal Procedure governs severance. "The Court may order separate trials of offenses…if it appears that any party may be prejudiced by offenses…being tried together." Pa. R. Crim. P. 583; ***Commonwealth v. Dozzo***, 991 A.2d 898, 901-902 (Pa. Super. 2010).

Under Rule 583, the prejudice a defendant suffers due to not severing charges must be greater than the general prejudice any defendant suffers when the Commonwealth's evidence links her to a crime. ***Id.*** at 902 (citing ***Commonwealth v. Lauro***, 819 A.2d 100, 107 (Pa. Super. 2003), *appeal denied*, 574 Pa. 752, 830 A.2d 975 (2003)).

The Supreme Court has established a three-part test that the lower courts must apply in addressing a severance motion similar to the one asserted in this case. First, the court must determine whether the evidence of each of the offenses would be admissible in a separate trial for the other. Second, the court must determine whether such evidence is capable of separation by the jury so as to avoid the danger of confusion. Third, if the answers to the previous two questions are in the affirmative, the court must determine if the defendant will be unduly prejudiced by the consolidation of offenses. ***Commonwealth v. Collins***, 550 Pa. 46, 703 A.2d 418, 422 (1997), *cert. denied*, 525 U.S. 1015, 119 S. Ct. 538 (1998).

In deciding the first question of whether the evidence of each offense would be admissible in a separate trial for the other, the court is guided by Rule 404 (b) of the Pennsylvania Rules of Evidence, which precludes using evidence of other crimes "to prove the character of a person in order to show action in conformity therewith" but permits such evidence for other purposes, such as a common scheme or plan. Pa. R. E. 404 (b) (1) and (2); see also ***Collins***, 703 A.2d at 422-23.

As the Pennsylvania Supreme Court noted:

> While evidence of distinct crimes is inadmissible solely to demonstrate a defendant's criminal tendencies, such evidence is admissible to show…a common plan, scheme or design embracing commission of multiple crimes… so long as proof of one crime tends to prove the others. This will be true when there are shared similarities in the details of each crime.

Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 481 (2004)(citations omitted); see also ***Commonwealth v. Judd***, 897 A.2d 1224, 1231-32 (Pa. Super. 2006). The following factors should be considered in establishing similarities: the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed. ***Robinson***, supra; ***Judd***, 897 A.2d at 1232. "The probative value of the degree of similarity of the crimes is inversely proportional to the time period separating the crimes." ***Commonwealth v. Gill***, 2017 PA Super 80, 2017 Pa. Super. LEXIS 204, *14-15 (March 28, 2017)(citing ***Commonwealth v. Bronshtein***, 547 Pa 460, 478, 691 A.2d 907, 916 (1997)).

This court is not satisfied that the alleged crimes are so related to each other that proof of one tends to prove the other. The court further concludes that the evidence of the separate crimes is not admissible in separate trials.

The Commonwealth argues that admissibility is premised on a common scheme

or plan. But for the fact that Defendant first became friendly with or "groomed" the respective alleged victims, there are no other similarities.

The one set of incidents first occurred in the summer of 2009. The parties initially did not know each other but met through the alleged victim's babysitting job. They became intimate friends and had frequent sexual contact with each other. In spite of a court order, they continued their relationship. The incidents all occurred at the Mansel Avenue residence and were clearly consensual.

The second set of charges arose out of incidents that allegedly occurred over four years later. The parties met each other through Defendant's coaching job. There was no unusual contact between the parties until the alleged victim sought Defendant's advice.

Defendant allegedly "groomed" the 13 year old. The parties spent much time together getting closer.

The alleged sexual assaults occurred over a period of 11 months happening except for one time, all at Defendant's residence. Clearly, Defendant took the lead and given Defendant's position as the coach and the fact that defendant was 33 and the alleged victim was 13, there was clearly implicit coercion. The relationship cannot be deemed to be consensual.

In sum, except for the alleged grooming, there are no similarities at all between the separate incidents. They occurred four years apart. One alleged victim was 13 while the other was 17 and close to 18. The contact with the 13 year old stopped upon suspicions that it was occurring. The contact with the 17 year old continued despite the presence of a court order and continued after the alleged victim came "of age." With respect to the 13 year old, she was instructed not to say anything to anyone and coerced with the fear that Defendant would go to

jail. No such coercion or threats occurred with respect to the 17 year old. The 13 year old was a member of the middle school basketball team. Defendant was a coach for the middle school. The 17 year old happened to meet Defendant, who was residing in the home where the 17 year old was babysitting the home owner's children.

Moreover, given the lack of similarities between the alleged crimes, the court is also of the opinion that the prior crimes evidence is not admissible to explain a course of conduct by Defendant, to complete the story, or to evidence the natural development of the case.

As well, the purpose of the common scheme exception is to identify the perpetrator. The circumstances must be "so highly similar, distinctive, or unusual as to reveal the handiwork of an individual." ***Gill***, *id.* at *15. The identity of Defendant is not at issue in these cases. Defendant does not contend that someone else was involved; Defendant contends that the sexually related crimes did not occur.

While not necessary, the court will also address the undue prejudice issue. The court finds that Defendant would be unduly prejudiced if the charges were not severed. Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury's attention from its duty of weighing the evidence impartially. Pa. R. E. 403, comment. The practical concern involves whether the jury can separate the evidence with respect to each individual victim or if the jury would automatically find Defendant guilty with respect to the charges involving the one victim because the evidence is clear with respect to the other victim.

The court agrees with Defendant. The evidence appears to be not at all relevant except for improper propensity. The fact that a 13 year old basketball player, on a program being "coached" by Defendant, may have been molested over a period of a year, is far different

from the other situation in which a 17 year old essentially fell in love with Defendant and they had consensual sexual encounters.

O R D E R

AND NOW, this ____day of April 2017, after a hearing and argument, the court **GRANTS** Defendant's motion to sever.

Counts 1, 2, 4, 5, 7 and 8 are severed from Counts 3 and 6 for trial purposes.

By The Court,

____
Marc F. Lovecchio, Judge

cc: CA
Melissa Kalaus, Esquire (ADA)
Michael A. Dinges, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File