

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-115-2017  
:   
vs. :   
:   
KELLI VASSALLO, :   
Defendant : Defendant's Motion in Limine

**OPINION AND ORDER**

Before the court is Defendant's Motion in Limine filed on May 2, 2018.

Defendant is charged by Information filed on January 27, 2017 with aggravated indecent assault, institutional sexual assault, indecent assault, corruption of minors and criminal use of a communication facility with respect to a then 13 year old female (M.B.). Defendant is also charged with corruption of minors and criminal use of a communication facility with respect to a then 17 year old female (L.F.). By Order dated April 12, 2017, the court severed the charges by victim for trial purposes.

Defendant's Motion in Limine seeks to preclude the Commonwealth from offering testimony of Defendant's prior bad acts. Specifically, Defendant seeks an Order precluding the Commonwealth from introducing in evidence the testimony from the two different alleged victims in the other's separate trial.

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 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 for 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. Defendant took L.F. to the pool, texted her, and bought her gifts. The alleged victim's mother got suspicious and either obtained a court order or had an attorney send Defendant a letter to preclude Defendant from having contact with L.F.

Despite the mother's efforts, the parties continued to meet and develop a relationship. They had contact surreptitiously through landlines, texting, other phones and Facebook accounts.

During the summer, in "either June, July or August" of 2010, when L.F. was 17, the relationship between the parties turned intimate and sexual.<sup>1</sup> It "started in the bathroom and then moved to [the homeowner's] bedroom." 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. Defendant told L.F. that nobody could know about their relationship because L.F. was underage when it first started. After L.F. turned 18, the parties continued their relationship.

As of April of last year, M.B. was 16 years old and in high school at Loyalsock Township. Between September of 2013 and through August of 2014, M.B. was 13 years old and in 8<sup>th</sup> 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 8<sup>th</sup> grade basketball coach suggested that M.B. talk with the defendant who M.B. previously knew through being a

---

<sup>1</sup> L.F. turned 18 in the late fall of 2010.

member of the basketball team. M.B. and Defendant eventually developed a friendship. Together they went to the mall, watched TV, communicated via text, ate dinner together, ran errands and had “sleepovers” with others. Defendant also bought M.B. gifts and stuffed animals. Their joint activities increased in frequency as time passed.

In September of 2013, approximately a year after they met, when they were at Defendant’s house sitting on the couch, Defendant told M.B. that she “had feelings” for M.B. 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, and stomach. 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. The sexual acts continued from September of 2013 to August of 2014.

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 argues that the “law of the case” doctrine compels that the court grant the motion. Defendant submits that the issue has already been fully litigated by the parties and decided by the court during the litigation of Defendant’s severance motion.

While Defendant’s argument on its face would appear to have merit, the issue

raised in this motion is technically different than the issue raised in the severance motion. The law of the case doctrine simply does not apply. In the severance motion, this court needed to determine whether the charges regarding the separate alleged victims would be severed for trial purposes. While among other conclusions, the court held that the evidence of separate crimes would not be admissible in separate trials. However, the court also was required to consider other factors in addressing the overall severance issue. As well, since the severance issue was decided, the appellate courts have issued Opinions addressing the introduction of bad acts evidence. These Opinions compel this court to address the bad acts admissibility conclusion in a different light.

In this motion, the court must decide in specific terms the admissibility of the evidence in connection with the different trials. The court must consider said admissibility in a temporal context as well as of weighing the Commonwealth's need for the evidence against its potential prejudicial effect.

Relevance is the threshold for admissibility of evidence. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. All relevant evidence is admissible, except as otherwise provided by law.

One such law that limits the admissibility of relevant evidence is Rule 404. Under Rule 404, evidence of a crime, wrong or other act is inadmissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with the character. However, this evidence may be admissible when relevant for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

*Commonwealth v. Lynn*, 2018 PA Super 190, 2018 WL 3153472 at \*3 (June 28, 2018)(citations and quotation marks omitted)(“*Lynn IV*”).

When other act evidence has a permissible purpose such as a common plan or scheme, the court must weigh the Commonwealth's need for the evidence against its potential prejudicial effect. *Commonwealth v. Aguado*, 760 A.2d 1181, 1187 (Pa. Super. 2000). The evidence must be evaluated against the unfair prejudice standard of Pa. R.E. 403. *Commonwealth v. Kinard*, 95 A.2d 279, 286 (Pa. Super. 2014). “‘Unfair prejudice’ means a tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” Pa. R. E. 403, comment.

“In balancing the need for the evidence against the possible prejudice to the jury, the court is to look to the actual need for evidence of prior bad acts in light of the issues, the other evidence available to the prosecution and the strength or weaknesses of the prior bad act evidence in supporting the issue.” *Commonwealth v. Schwartz*, 419 Pa. Super. 251, 264, 615 A.2d 350, 356 (1992), *appeal denied*, 535 Pa. 617, 629 A.2d 1379 (1993).

The Commonwealth argues that the evidence in this case consists primarily of the testimony of the alleged victims. “This is a case of she said vs. she said.” The Commonwealth argues that Defendant will assert the defense that the criminal incidents or sexual conduct never occurred. There is no other direct evidence to support the victims’ claims. There are apparently no eyewitnesses, there is no physical evidence, and there is no forensic evidence.

The Commonwealth further argues that the bad acts evidence will be necessary to explain the lack of a prompt complaint and to rebut credibility attacks upon the victims. Clearly, these defenses are “in play” and will in all likelihood be utilized at trial on behalf of Defendant.

A “common scheme, plan or design embrac[es] the commission of two or more

crimes so related to each other that proof of one naturally tends to prove the others...”  
*Commonwealth v. O’Brien*, 836 A.2d 966, 969 (Pa. Super. 2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004). The court is to look at the shared details, which includes the perpetrator’s actions in addition to the location of the crimes and commonality of the relationship between the defendant and the victims. *See Commonwealth v. Newman*, 528 Pa. 393, 598 A.2d 275, 278 (1991). While the court in its severance motion focused on the differences between the incidents, the court is compelled in this analysis to consider the similarity of the crimes and the acts which constitute them.

With respect to the trial of the charges of which M.B. is the alleged victim, the court finds that the testimony of L.F. would be relevant and admissible under Rule 404(b). Defendant denies ever having sexual contact with M.B. The issue in M.B.’s trial is whether the sexual conduct occurred. In this case, there are sufficient similarities with respect to the “grooming” behavior, how the relationships allegedly developed or evolved into a sexual one and the sexual activities which occurred to imply a common scheme or a plan. However, because Defendant is not charged with aggravated indecent assault or indecent assault of L.F., the court cannot find the testimony of M.B. regarding the sexual offenses Defendant committed against her admissible in the trial involving the corruption of minors and criminal use of a communication facility charges against L.F.

L.F., then 16, then met Defendant in 2009. Defendant allegedly “groomed” L.F. for approximately a year prior to the sexual relationship beginning when L.F. was 17. Defendant warned L.F. not to disclose that L.F. was underage when their relationship first started. The relationship continued after L.F. turned 18, and the relationship ended abruptly.

M.B. met Defendant in approximately 2012. Defendant allegedly “groomed”

M.B. in a similar manner to how she allegedly groomed L.F. and for a similar length of time. The grooming lasted for approximately a year prior to the sexual relationship beginning when M.B. was 13. The sexual relationship began similarly to how it began with L.F. and the sexual conduct was similar. The relationship continued until it too ended abruptly. As well, and similar to the situation with the L.F., Defendant told M.B. that M.B. should not tell anyone about the relationship.

As indicated previously, of great import to the court in assessing similar issues of admissibility is the degree to which the probative evidence is necessary to prove the Commonwealth's case or disprove the defendant's allegations. *O'Brien, supra; Commonwealth v. Gordon*, 673 A.2d 866 (Pa. 1996), *Commonwealth v. Ardinger*, 839 A.2d 1143, 1145 (Pa. Super. 2003).

In M.B.'s trial, the balance in this case must be struck in favor of the Commonwealth. In examining the details and surrounding circumstances of the incidents, the patterns of the defendant are similar with respect to time, place and type of victim. *Commonwealth v. Tyson*, 119 A.3d 358 (Pa. Super. 2015). The evidence is not too remote in time not to be probative. *Id.* While clearly prejudicial, the needs of the Commonwealth to present such are significant and determinative. Evidence of a common scheme or plan can be admissible to bolster the credibility of similarly situated complainants. *Commonwealth v. Hacker*, 959 A.2d 380, 393 (Pa. Super. 2008), *reversed on other grounds*, 15 A.3d 333 (Pa. 2011); *O'Brien, supra* at 970.

Lastly, and perhaps determinatively, since this court issued its decision on the severance on April 13, 2017, the appellate courts issued numerous Opinions in cases involving Williams J. Lynn. Lynn was appointed Associated Vicar in the Office of the Vicar for the

Administration in the Arch Diocese in Philadelphia in January 1991. As part of his duties, he assisted Monsignor James Malloy and served as Secretary for the Clergy for the Arch Diocese of Philadelphia from 1992 until 2004. As part of his duties as Secretary, Lynn was responsible for receiving and investigating incidents of sexual abuse by priests within the Arch Diocese, as well as suggesting placements for, and for supervising, priests previously accused of abuse. In 2011, following a Grand Jury investigation, he was charged with endangering the welfare of children. The charges arose from allegations that he, in his capacity as Secretary, negligently supervised two priests. It was alleged that he knew that both of the priests had been accused of sexually abusing juvenile parishioners and despite this knowledge he recommended that the one live in a rectory nearby a church with a grade school attached where a young boy was eventually molested.

At Lynn's first trial, the Commonwealth sought to introduce evidence of prior bad acts, consisting of defendant's knowledge of abusive behavior of other priests and how he improperly reacted to such in his supervisory capacity.

The trial court allowed the evidence pertaining to 20 different priests. This was considered admissible bad acts evidence pursuant to Rule 404 (b). The defendant was convicted and sentenced. The Superior Court reversed on a sufficiency claim based upon the ground that the endangering welfare of children statute required evidence of direct supervision without addressing the other claims including a claim that the trial court erred in admitting the bad acts evidence. The Supreme Court reversed the Superior Court and remanded with instructions to address the defendant's remaining claims. *Commonwealth v. Lynn* 631 Pa. 541, 114 A.3d 796 (April 27, 2015)(*Lynn II*).

Not by way of substance but simply to note the procedural background, this



court reviewed a non-precedential decision issued by the Superior Court on December 22, 2015. The Superior Court reversed the conviction in part due to the bad acts evidence being not highly or substantially probative or marginally probative. The bad acts evidence in the balancing was described as varied and of often questionable value. Lynn was granted a new trial.

In a published Opinion released by the Superior Court on June 28, 2018, the court cited the previously referenced opinion as follows:

The probative value of the individual portions that made up the large quantity of other – acts evidence in this case differed greatly. A limited portion of that evidence was substantially relevant to, or probative of, permitted uses under Rule 404 (b)(2), but far more was only marginally relevant for such purposes. The potential for this evidence to unfairly prejudice [Lynn] was high, both because it involved the sexually abusive acts of numerous priests committed against children over several decades, and because of the high volume of the evidence admitted. Therefore, we conclude that the probative value of the evidence, *in toto*, did not outweigh its potential for unfair prejudice.

*Lynn IV*, 2018 WL 3153472, at \*2 (citing *Commonwealth v. Lynn*, No. 2171 EDA 2012, at 42-43, 2015 WL 9320082 at \*20 (Pa. Super., filed December 22, 2015) (unpublished memorandum)(“*Lynn III*”).

Following the Superior Court’s reversal, Lynn filed an Omnibus Pretrial Motion seeking to exclude all of the bad acts evidence utilized by the Commonwealth in the first trial. The Commonwealth filed a Motion in Limine seeking the admission of nine of the 21 instances of other acts evidence introduced at Lynn’s first trial. The trial court determined that “the appropriate balance between the probative value of the evidence and its prejudicial effect” would be found by allowing the Commonwealth to present other acts evidence related to three separate sexual abuse claims while excluding other acts evidence.

The Commonwealth appealed. On appeal, the Commonwealth focused on the court's discretion in conducting the balancing test as set forth above. In referring to the Supreme Court's decision in *Commonwealth v. Lark*, 543 A.2d 491 (Pa. 1988), the Superior Court noted that the trial court is not required to sanitize the trial to eliminate all unpleasant facts but that other acts evidence is by default inadmissible unless a category under Rule 404 is applicable and the probative value of that evidence outweighs its potential for prejudice. *Lynn IV*, at \*4 (quoting *Lark*, 543 A.2d at 501, and *Lynn III*, at \*14).

In addressing the discretion of the court in connection with the balancing requirement, the *Lynn IV* Court reviewed the degree of relevancy against the risk of improper prejudice. The Court found no error in the trial court's determination that the six instances excluded were only marginally probative but highly prejudicial. Clearly, the Superior Court's decision placed high emphasis on the balancing requirement.

In this case, with respect to the charges where M.B. is the alleged victim, the balance as indicated above is in favor of the admissibility of the evidence. The evidence is far from marginally probative. Looking at the actual sexual offenses charged against Defendant with respect to M.B. and the similarities in the grooming and conduct Defendant allegedly engaged in with both females, it is highly probative. Furthermore, given the lack of eyewitnesses or other physical or forensic evidence, it is of great need by the Commonwealth. L.F.'s testimony in M.B.'s trial would not be unduly prejudicial, because even if Defendant engaged in sexual activity with L.F. it did not constitute indecent assault or aggravated indecent assault as charged against M.B. because L.F. was not less than 16 years of age and, even according to L.F., the relationship was consensual. The court also finds that any prejudicial impact could be cured with an appropriate limiting or cautionary instruction, if

requested by Defendant. In sum, the admission of evidence of other substantially similar sexual conduct in the trial of the sexual offenses committed against M.B. shows a common plan or scheme and is not unduly prejudicial.

The same cannot be said, however, with respect to charges involving L.F. Evidence is only admissible as a common plan or scheme when the crimes are so related that evidence of one tends to prove the other. Defendant is not charged with indecent assault or aggravated indecent assault against L.F.; she is only charged with corruption of minors and criminal use of a communication facility. Defendant is charged with committing those sexual offenses against M.B. but she is not charged with committing any sexual offenses against L.F. The court is not aware of any cases where evidence of sexual offenses against a minor less than 16 years of age was admitted in a separate trial where there are no underlying sexual charges being decided by the jury and the alleged victim is over the age of 16. The details of Defendant's alleged sexual offenses against M.B. also do not make it more or less probable that Defendant's alleged conduct with respect to L.F. corrupted or tended to corrupt L.F.'s morals or that Defendant utilized a communication facility to commit, cause or facilitate any such corruption.

Even if the evidence is marginally relevant, its probative value is far exceeded by its prejudicial effect. Due to the differences in the victim's ages and legal ramifications thereof, the apparent concession by L.F. that the relationship was consensual and continued after she reached the age of 18, and the failure of the Commonwealth to charge Defendant with any Chapter 31 sexual offense with respect to L.F.,<sup>2</sup> the evidence regarding Defendant's

---

<sup>2</sup> While a consensual sexual relationship between a 17 year old and an adult who is in her late twenties or early thirties may be repugnant, it generally does not constitute a crime under Chapter 31 of the Crimes Code absent forcible compulsion; threat of forcible compulsion; a mental disability of the victim; unconsciousness or

alleged sexual conduct with M.B. is highly prejudicial. The public tends to have a visceral reaction to sexual offenses against children and that reaction only increases as the age of the child decreases. M.B.'s testimony would have a high likelihood of inflaming the passions of the jury, confusing or misleading the jury into believing that Defendant may have also committed indecent assault and aggravated indecent assault against L.F. even though she is not charged with such, and diverting the jury's attention of weighing the evidence impartially. The court also does not believe that this undue prejudice can be cured by a limiting or cautionary instruction.

This does not mean that L.F. cannot explain her reasons for initially denying that any sexual conduct occurred when she was less than 18 years old, but claiming several years later that such conduct began when she was 17. L.F. can explain her own actions and statements, including referencing that she heard that Defendant was involved with a younger girl or a 13 year old. If requested by Defendant, the court can give the jury a limiting or cautionary instruction that this evidence is not being offered for the truth of the matter asserted or as substantive evidence and can only be considered in determining the credibility of L.F.'s testimony and her explanation for not reporting Defendant's conduct in 2010 but doing so in 2016. The Commonwealth, however, cannot utilize M.B.'s testimony in the separate trial of the corruption of minors and criminal use of a communication facility charges involving L.F., unless Defendant opens the door to such testimony.

## **ORDER**

---

unawareness of the victim; or the actor substantially impairing the victim's ability to appraise or control her conduct by administering or employing, without the victim's knowledge, drugs or intoxicants. None of those circumstances, however, are alleged to be present in this case.

**AND NOW**, this \_\_\_\_ day of July 2018, following a hearing, argument and the submission of briefs, the court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion in Limine. In the trial of the charges where M.B. is the alleged victim, the court will permit the Commonwealth to introduce the testimony of L.F. In the trial of the charges where L.F. is the alleged victim, L.F. will be permitted to explain her lack of a prompt complaint, but the Commonwealth will not be permitted to introduce the testimony of M.B. unless Defendant opens the door to such testimony.

By The Court,

---

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)  
Michael A. Dinges, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work File