

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-422-2019**
:
vs. :
:
ARTHUR SMITH, :
Defendant :

OPINION AND ORDER

Before the court is Defendant’s oral motion to preclude the Commonwealth from presenting testimony of Defendant’s prior bad acts and expert testimony of narcotics distribution.

By way of background, the allegations against Defendant are that the police discovered a firearm in Defendant’s residence because of the following circumstances. At approximately 4:30 p.m. on January 14, 2019, Officer Joshua Bell and Officer Clinton Gardner, of the Williamsport Bureau of Police, were patrolling the 1400 block of Memorial Avenue of Williamsport, an area that is “pretty busy with drug activity.” Officer Bell observed two males walking away from him toward a vehicle. The vehicle was parked on Memorial Avenue and a female was in the driver’s seat. One male got into the front passenger seat and the other male got into the back passenger seat. The driver then drove the vehicle from its parked position into the flow of traffic without utilizing a turn signal. Based on this Vehicle Code violation, Officer Bell and Officer Gardner followed the vehicle. When the driver made a turn at the intersection of Cemetery and Park Street without utilizing a turn signal, Officer Bell decided to conduct a traffic stop. He stopped the vehicle at the Conoco Station on Wildwood Boulevard.

Officer Bell and Officer Gardner spoke to the occupants of the vehicle. They

identified the driver as Ms. Rachel Hamilton, the front seat passenger as Mr. Charles Buday, and the rear seat passenger as Mr. Arthur Smith (hereinafter “Defendant”). While speaking with the occupants, the officers observed scattered throughout the vehicle torn Brillo padding and metal screening, which drug users typically use as a filter for the stems of pipes and other devices for smoking crack cocaine. They also observed torn plastic baggies scattered throughout the vehicle. According to the officers’ descriptions, the baggies were partially clear, worn corners of cellophane, typically used to package small amounts of cocaine.

Based on their observation of this drug paraphernalia, the officers conducted a search of the vehicle, which uncovered one or two plastic pens and a cutoff straw typically used to snort or smoke crack cocaine.

The officers took all of the occupants into custody and searched them. The officers found paraphernalia on Ms. Hamilton and a cell phone and \$186 in currency on Defendant. The \$186 consisted of three \$20 bills, five \$10 bills, and the rest were \$5 bills and \$1 bills. The officers transported all of the occupants to City Hall.

Officer Bell interviewed Ms. Hamilton, who told Officer Bell that she knew Defendant as “Art”; she had known him for about a month; and that she had purchased cocaine from him approximately five times in the past. In these transactions, they would typically pick up Defendant at his residence, take a ride under the ruse of going to a store and then return to the area of Defendant’s residence. The transaction would take place toward the end of the trip. According to Ms. Hamilton, Defendant previously asked her and Mr. Buday if they could locate cartridges for a .44 caliber handgun.

Defendant’s residence was identified as 1438 ½ Memorial Avenue, which is

in the immediate vicinity of where the officers observed Mr. Buday and Defendant enter the vehicle.

Officer Gardner interviewed Mr. Buday. Mr. Buday indicated that he was in Defendant's residence on Memorial Avenue just prior to the vehicle stop. He went to the residence with the intent to try to obtain cocaine. While in the residence just prior to the vehicle stop, Mr. Buday observed packaged cocaine. Although Mr. Buday and Ms. Hamilton did not have the funds to purchase cocaine, they were going to ask Defendant to "front" them some cocaine. Mr. Buday also indicated that the largest amount of cocaine he had ever observed in Defendant's residence in the past was approximately ½-ounce of cocaine. Mr. Buday also informed Officer Gardner about conversations he had with Defendant, in which Defendant allegedly admitted that he possessed a sawed-off shotgun and Defendant requested .44 caliber cartridges. Defendant also allegedly had conversations with Mr. Buday about a "Dirty Harry"-style handgun.

Officer Bell applied for and obtained a search warrant for Defendant's residence. During the search, law enforcement officers found seven grams of cocaine, heroin, pills, a "works kit" for using heroin, small bags, scales, and indicia of occupancy by Defendant. The officers found most of these items in a room that they believed was Defendant's bedroom. Additionally, officers found empty, used bags of heroin and used syringes in the two other bedrooms and in the closet area of the living room. The officers found a .45 caliber revolver in the attic. The attic is accessed through the room that the officer's believed was Defendant's bedroom.

Officer Bell filed a criminal complaint against Defendant and charged him

with possession with intent to deliver cocaine, possession with intent to deliver heroin, persons not to possess firearms, possession of cocaine, possession of heroin, and possession of drug paraphernalia. The Magisterial District Judge (MDJ) dismissed the firearm charge but held all of the other charges for court. See CP-41-CR-256-2019.

On March 4, 2019, Officer Bell re-filed the persons not to possess firearms charge and the MDJ held it for court. It is the sole charge in this case.

In an order dated April 8, 2019, which was filed on April 29, 2019, the court ordered the parties to file all motions in limine and 404(b) motions¹ no later than the date of the pre-trial unless the reasons for such were discovered afterwards. The first pre-trial in this case was held in July 2019; the most recent pre-trial was held on September 22, 2020.

On May 21, 2019, the Commonwealth filed a motion to consolidate this case and case CR-256-2019. On June 10, 2019, the cases were consolidated, but the order expressly noted that pursuant to case law, the persons not to possess firearms charge could not be tried at the same time as the charges in CR-256-2019; therefore, the persons not to possess firearms charge must be severed for trial.

At the time of jury selection on October 9, 2020, the court issued a clarifying order expressly granting Defendant's oral motion to sever this case from CR-256-2019, as the persons not to possess firearms charge was the only charge filed in this case and it must be severed otherwise the jury would be prejudiced against Defendant.

On November 4, 2020, at 10:02 a.m., six weeks after the last pretrial and

¹Pa. R.E. 404(b) governs the admissibility of prior crimes, wrongs or acts evidence and requires the Commonwealth to provide reasonable notice in advance of trial.

almost four weeks after jury selection, the Commonwealth filed its Notice of Intent to Offer Testimony of Defendant's Prior Bad Acts and Expert Testimony of Narcotics Distribution (hereinafter "Notice"). In its Notice, the Commonwealth notified Defendant of its intent to offer the following evidence from Ms. Hamilton, Mr. Buday and Officer Bell at the trial scheduled for November 12 and 13 on the persons not to possess firearms charge. The Commonwealth represented that it would present testimony from Ms. Hamilton that she knew Defendant for one month, purchased drugs from him several times, and on at least one occasion in late December of 2018 or early January of 2019, Defendant requested ammunition from her. Mr. Buday would provide testimony that he purchased drugs from Defendant and Defendant frequently talked about a .45 caliber pistol. Officer Bell would provide expert testimony that: drugs were recovered from Defendant's bedroom during the execution of the search warrant; firearms are tools of the drug trade; drug dealers are often found in possession of firearms; firearms are a necessary implement for drug dealers to have in order to protect their illegal property and illegal proceeds; and drug dealers commonly receive firearms in exchange for drugs. The Commonwealth asserted that this evidence was admissible to show identity, motive and intent. Notice, ¶ 9. More specifically, the Commonwealth alleged that "Defendant's identity as a drug dealer makes it more likely than not that he was the person who possessed the firearm as opposed to some occupant or guest of the house not involved in the same enterprise" (Notice, ¶8) and that "the motive for Defendant to possess the firearm is to protect his product—namely, the narcotics found in the execution of the search warrant and the narcotics he previously sold to Rachel Hamilton and Charles Buday" (Notice, ¶10). Furthermore, the Commonwealth asserted that the evidence

was probative of Defendant's constructive possession of the firearm.

At 11:30 a.m. on November 4, 2020, the parties were before the court on Defendant's motion to compel discovery. Toward the end of the hearing, Defendant's counsel indicated that he had just received the Notice from the Commonwealth. He orally requested that the court preclude the Commonwealth from presenting any evidence related to drugs or drug dealing. He asserted that the evidence was not relevant and the evidence was unduly prejudicial. He also asserted that the Commonwealth was arguing identity, motive and intent based on the common usage of those terms, not their legal meanings or requirements in the context of Rule 404(b).

The prosecutor objected to the court conducting the argument at that time, arguing that Defendant had not filed a written motion in limine, she did not have notice, and she was not prepared to argue the issue. The court overruled the objection. The Rules do not mandate a written motion in limine. Furthermore, it was the only time available for the court to hear argument given its schedule leading up to the trial. During the next week, the court had a two-day trial in another matter scheduled for Monday and Tuesday, Wednesday is a legal holiday (Veteran's Day), and trial in this case was scheduled to begin at 9:00 a.m. on Thursday morning.

As to the timeliness of the Notice, the court concludes that it is untimely and that the Notice was unreasonable in violation of Rule 404(b).² A court order required the

²The court also found it ironic that the prosecutor believed it was unreasonable for the court to require her to argue in support of her Notice, which she had filed earlier that day so the legal basis for her positions should have been fresh in her mind, but she thought it was reasonable to expect the defense attorney to be prepared to meet expert testimony at trial after the jury had been selected and only four working days before the evidence would be presented at trial.

Notice to be filed by the time of the pre-trial. The Commonwealth argued that it did not file a separate Notice in this case because the charges were consolidated at the time of the pre-trial. The court does not find this argument persuasive. The order consolidating the cases specifically noted that the persons not to possess firearms charge must be severed for trial. The court clarified that order and explicitly severed the firearm charge at jury selection on October 9, 2020, and the Commonwealth decided to proceed with the firearms charge first. Jury selection was nearly four weeks ago. The Commonwealth was aware of the information contained in the notice at the time of jury selection but did not file the notice until only four working days prior to trial. The reason given by the prosecutor was specifically, “That’s when I filed it” and then, she reiterated, “Given my schedule, that’s when I could get to it.” This is not a sufficient reason. Moreover, the court credits the defense argument that the defense is prejudiced. The defense now has to change strategies from using a constructive possession defense to defending against allegations that he is/was a drug dealer. Additionally, four days is less than sufficient time to prepare a completely new defense.

Even if the Notice was timely, the court finds that it is not admissible for the purposes asserted in the Notice. The court agrees with defense counsel that the prosecutor’s arguments do not satisfy the legal definitions or requirements for identity, motive or intent.

“Evidence of one crime is generally inadmissible against a defendant being tried for another crime.” *Commonwealth v. Crispell*, 193 A.3d 919, 936 (Pa. 2018), citing *Commonwealth v. Peterson*, 307 A.2d 264, 269 (Pa. 1973); Pa. R.E. 404(b)(1)(“Evidence of a crime, wrong or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”). The

evidence may be admissible for another purpose, such as proving motive, intent, and identity. Pa. R.E. 404(b)(2). In a criminal case, however, such evidence is only admissible if the prosecutor provides reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, and if the probative value of the evidence outweighs its potential for unfair prejudice. Pa. R.E. 404(b)(2), (3). “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.

The Commonwealth first asserts that the other acts evidence is admissible to establish identity.

Evidence of another crime can be introduced to prove the identity of the actor where there is a sufficient resemblance between the crime at issue and the other criminal acts. *Commonwealth v. Nypaver*, 69 A.3d 708, 717 (Pa. Super. 2013). The similarities must describe a crime so distinctive in method and so similar to the charged crime that proof that a person committed one tends to prove he committed the other. *Id.* In other words, the other crimes by the accused must be so nearly identical in method and so unusual and distinctive as to be like a signature. *Commonwealth v. Ross*, 57 A.3d 85, 102 (Pa. Super. 2012). Unlike Marv and Harry, also known as the “Wet Bandits” from the popular holiday movie “Home Alone”, who left their signature on every burglary they committed by turning on the faucet before they left the premises, the Commonwealth has not alleged, let alone demonstrated any distinctive signature or *modus operandi* in Defendant’s alleged crimes to enable the court to admit them as proper evidence of identity.

The Commonwealth also asserts that the evidence is admissible to prove

motive. Again, the court cannot agree.

For bad acts evidence to be admissible to establish motive, there must be a firm basis for concluding that the crime currently on trial grew out of or was caused by the prior set of facts and circumstances. *Commonwealth v. Bidwell*, 195 A.3d 610, 626 (Pa. Super. 2018). This is not a situation where Defendant allegedly accepted the firearm as payment from Ms. Hamilton or Mr. Buday, where any witness would provide testimony that this Defendant allegedly acquired the firearm to protect himself or drugs from potential violence or threats of violence from Ms. Hamilton Mr. Buday or anyone else or even where the proposed testimony from Ms. Hamilton or Mr. Buday would be that Defendant made statements to them regarding how or why he acquired or possessed the firearm. In fact, there is no evidence in this case Defendant acquired the firearm through an exchange of controlled substances. Nevertheless, the Commonwealth wishes to present expert testimony from a law enforcement officer that drug dealers commonly receive firearms in exchange for drugs. This is classic propensity evidence. While some drug dealers may receive firearms in exchange for drugs, the Commonwealth has not even suggested any evidence to show that this particular defendant acquired his firearm in such a manner. The only specific evidence in this case that is not based on overly broad generalizations about drug dealers are Ms. Hamilton's and Mr. Buday's proposed testimony regarding Defendant's statements about requesting .44 caliber ammunition and possessing a pistol.

The evidence also does not relate to intent as argued by the Commonwealth. The weapon was allegedly found in an attic, removed from direct access to Defendant when any drug transaction allegedly took place. There is no allegation that Ms. Hamilton or Mr.

Buday ever saw Defendant in possession of the weapon either on January 14, 2019 or during any alleged prior transactions. As for the “expert” testimony, it is completely speculative under the facts of this case. The relevance, if any, of the Commonwealth’s proposed evidence is minimal at best.

Finally, and perhaps determinatively, any probative value is far outweighed by the potential for unfair prejudice. As soon as a jury would hear that Defendant is a drug dealer, it will inflame their passions against Defendant. Their minds would be made up regardless of any cautionary instruction that the court could give. If the Commonwealth wanted to try the drug case first, it certainly could have. It chose not to. The testimony of the witnesses regarding Defendant talking about firearms and ammunition does not need to reference drug transactions.

This is a clear attempt by the Commonwealth to do either one of two things: (1) try this case not on the evidence but on Defendant’s alleged status as a drug dealer and overly broad generalizations about drug dealers, or (2) create an issue that the Commonwealth can appeal in order to correct its error in choosing which case to try first and to then try the drug case during the appeal.

ORDER

AND NOW, this ___ day of November 2020, upon Defendant’s oral motion in limine, the court precludes the Commonwealth from presenting any evidence contained in its Notice other than the testimony from Ms. Hamilton and Mr. Buday regarding Defendant’s statements about firearms and ammunition.

By The Court,

Marc F. Lovecchio, Judge

cc: Devin Walker, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Work file