

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH,	: No. CP-41-CR-0001481-2022
Appellant	:
vs.	:
	:
	:
MICHELLE L. PULIZZI	:
	: 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order entered on May 25, 2023, which denied the Commonwealth's email request to preclude the defense from introducing evidence regarding the specific charges pending against J.T., the alleged victim, and to limit the defense to stating that the charges against J.T. included a felony of the first degree with a maximum penalty of 40 years.

By way of background, Michelle Pulizzi was charged with criminal solicitation of institutional sexual assault and institutional sexual assault-sexual contact with a student.<sup>1</sup> The Commonwealth has alleged that between February 1, 2018 and June 10, 2018, Ms. Pulizzi engaged in sexual conversations, exchanged nude photographs, and set up a time and date to have sexual intercourse with J.T., a 18-year old high school student. She also allegedly "made out" with J.T. and touched or rubbed her hand over his pants in his groin area. J.T. did not disclose these alleged activities until after he was charged with

---

<sup>1</sup> 18 Pa.C.S.A. §§902(a), 3124.2(a.2)(1).

unlawful contact with a minor, rape of a child, involuntary deviate sexual intercourse (IDSI), sexual assault, indecent assault of a complainant less than 13 years of age, indecent assault without consent, and indecent exposure in 2022.

On May 16, 2023, a jury was selected and the trial was scheduled for May 25, 2023. Between jury selection and the trial date, both parties filed motions, one of which was Ms. Pulizzi's second motion in limine that sought to permit defense counsel to introduce into evidence at the time of trial the docket sheet of J.T.'s charges. During the morning of May 24, 2023, the court held argument on the motion and granted in part the defense motion. See Order of May 24, 2023. During the afternoon on May 24, 2023, the Commonwealth sent an email to the court and defense counsel requesting that the name of the charges against J.T. be precluded as such would only serve to inflame the jury. The Commonwealth relied on the case of *Commonwealth v. Lane*, 621 A.2d 566 (Pa. 1993) and asserted that "the PA Supreme Court upheld the decision of the trial court to limit the defense to referring to pending charges against a prosecution witness as 'other serious felonies.'" The Commonwealth asked the court to address this issue the next morning prior to the start of trial.

Immediately prior to the time scheduled for trial to commence, the court permitted counsel for both parties to argue their positions on the record. The Commonwealth argued to preclude the defense from stating the names of any of the charges filed against J.T. and to limit the information to the fact that J.T. was charged with a felony of the first degree with a maximum possible sentence of 40 years. See Transcript, 05/25/2023, at 2-4. Defense counsel argued that the court had already ruled in his client's favor the previous day and he was concerned with the way this issue came to the court. Nevertheless, he was prepared to

counter the Commonwealth's arguments and relied on *Commonwealth v. Davis*, 652 A.3d 885 (Pa. Super. 1994) to argue that the victim, as an accuser, must be subject to the utmost scrutiny, particularly where, as here, there were no other witnesses to corroborate the accuser's testimony. *Id.* at 4-6. Each attorney then responded to the other's arguments. *Id.* at 6-8. The court took a brief recess to review the cases cited by the attorneys. Then it returned to the courtroom and ruled in favor of the defense and overruled the Commonwealth's objection. However, the court explained that it would provide a cautionary instruction to the jury at the time the evidence was presented. *Id.* at 9-10. The court reduced its ruling to an order that specifically set forth the cautionary instruction it intended to read to the jury. Order, 05/25/2023. The prosecutor asked for a brief recess to consult with other members of the District Attorney's Office. After the recess, the prosecutor indicated that the Commonwealth was going to appeal the court's ruling, and the court discharged the jury without the jury being sworn.

On May 26, 2023, the Commonwealth filed its notice of appeal. The court directed the Commonwealth to file a concise statement of errors on appeal. In its concise statement, the Commonwealth asserts the following issue:

1. The trial court erred in its determination that the probative value of the jury knowing the name of the pending charge against the victim/witness in the above captioned case, rape of a child, outweighed the danger of unfair prejudice against that witness, and therefore the [C]ommonwealth's case, and that an instruction to the jury regarding the issue would be sufficient to avoid such prejudice.

## **DISCUSSION**

For decades the law in Pennsylvania has permitted a defendant to cross-examine a Commonwealth witness regarding his or her pending criminal charges because such is

relevant and admissible to the witness's credibility, more specifically a bias or expectation of leniency that if the witness testified favorably for the Commonwealth the witness could receive some benefit on his or her own pending charges. *See Commonwealth v. Hill*, 523 Pa. 270, 566 A.2d 252, 253 (1989); *Commonwealth v. Evans*, 511 Pa. 214, 512 A.2d 626-627 (1986); *Commonwealth v. Hyland*, 875 A.2d 1175, 1186-1187 (Pa. Super. 2005) ("Failure to allow cross-examination of this nature is error and will require a new trial unless the error can be shown to have no impact on the outcome of the case."), quoting *Commonwealth v. Buksa*, 665 A.2d 576, 579-580 (Pa. Super. 1995), *appeal denied*, 664 A.3d 972 (Pa. 1995); *Commonwealth v. Davis*, 652 A.2d 885 (Pa. Super. 1994).

The scope of cross-examination is generally within the discretion of the trial court and its rulings will not be overturned absent a clear abuse of discretion or an error of law. *Commonwealth v. Mullins*, 665 A.2d 1275, 1277 (Pa. Super. 1995). "An abuse of discretion is more than merely an error of judgment but is rather the result of an error of law or is manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will." *Commonwealth v. Perrin*, 291 A.3d 337, 342 (Pa. 2023).

The court did not rule against the Commonwealth as a result of partiality, prejudice, bias, or ill-will. The court ruled against the Commonwealth because the law allows the defense to cross-examine a Commonwealth witness about pending criminal charges.

[W]henever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exists, the jury should

know about it.

*Evans*, 512 A.2d at 631-632. The *Evans* Court noted that while this rule was new (in 1986), it evolved from principles in existence since 1908.

It is always the right of a party against whom a witness is called to show by cross-examination that he has an interest direct or collateral in the result of the trial.... The right is not to be denied or abridged because incidentally facts may be developed that are irrelevant to the issue and prejudicial to the other party.

*Evans*, 512 A.2d at 632, citing *Commonwealth v. Cheatham*, 239 A.2d 293, 296 (Pa. 1968)(quoting from *Lenahan v. Pittston Coal Min. Co.*, 70 A. 884, 885 (Pa. 1908)).

In *Hill*, a case that originated in Lycoming County, the Pennsylvania Supreme Court extended *Evans* to situations where the Commonwealth's victim/witness had entered a guilty plea on his charges but was awaiting sentencing. 566 A.2d 252 (Pa. 1989). The Court held that trial court and Superior Court erred in precluding Hill from cross-examining the victim/witness about his guilty plea prior to the imposition of sentence. *Id.* at 273. In so holding, the Court stated:

The jury may choose to believe the witness even after it learns of actual promises made or possible promises of leniency which may be made in the future, but *the defendant, under the right guaranteed in the Pennsylvania Constitution to confront witnesses against him, must have the opportunity at least to raise a doubt in the mind of the jury as to whether the prosecution witness is biased.* It is not for the court to determine whether the cross-examination for bias would affect the jury's determination of the case.

*Id.* (emphasis added)(quoting *Evans*, 512 A.2d at 632).

For further support for the fact that the individual is the victim does not preclude such

cross-examination, the court would rely on *Commonwealth v. Borders*, 560 A.2d 758 (1989). In *Borders*, the Court held that it was reversible error to preclude the defense from cross-examining the victim/accuser regarding his pending juvenile matters even though the acts giving rise to them occurred subsequent to the criminal act and identification of the appellant by the victim/accuser. The Court explained:

Indeed, the victim, as accuser, must be subject to the utmost scrutiny if his accusations are to fairly form the basis of the criminal prosecution at hand. The strength or weakness derived from an attempt to show that the victim has some ulterior motive for continuing his role as an accuser due to subsequent acts, bringing him into the sphere of influence of the prosecutor, must rightly be determined by the jury, which, after hearing all the evidence in the matter before them, will be most able to ferret out the presence or absence of improper motive on the part of the victim.

*Id.* at 760.

While the court has been unable to find any case which specifically delineates the scope of such cross-examination with respect to pending charges to show bias, this court has generally taken the same approach as with *crimen falsi* convictions, that is, the court permits the party to introduce the name, time and place of the crime and the potential punishment which could be received. See *Commonwealth v. Creary*, 201 A.3d 749, 754 (Pa. Super. 2018), citing *Commonwealth v. Oglesby*, 418 A.2d 561, 564 (Pa. Super. 1980).

The Commonwealth contended that the defense should be precluded from mentioning the names of the victim's crimes because it is unduly prejudicial. The court could not agree. The alleged victim, J.T., is charged with unlawful contact with a minor, rape of a child, involuntary deviate sexual intercourse with a child, sexual assault, indecent assault of a complainant less than 13 years of age, indecent assault without consent, and indecent exposure. J.T. reported the offenses filed against Defendant over four years after they

occurred and shortly after J.T. was charged. The defense argued that the sexual nature of the charges against J.T. and the timing of the filing of the charges and the progression of Defendant's case as compared to J.T.'s case was information that was relevant and admissible to bring out bias of J.T. in favor of the Commonwealth in the form of hope for or expectation of leniency on his pending charges. The court agreed.

The name of the crime and the potential penalties that could be imposed are what shows the extent of the potential bias that the witness has in favor of the Commonwealth. Furthermore, under the facts and circumstances of this case, the fact that the alleged victim is charged with serious sexual offenses is not unduly prejudicial because the defendant is also charged with sexual offenses. The charges against each are similarly distasteful in the eyes of the community. The court also intended to limit the jury's use of the evidence regarding the alleged victim's pending charges with the following cautionary instruction:

You heard evidence regarding charges that have been filed against J.T. The sole purpose for which you may consider this evidence is whether J.T. has a bias in favor of the Commonwealth.

This evidence must not be considered by you in any way other than the purpose I just stated. You must not regard this evidence as showing that J.T. is a person of bad character or criminal tendencies.

You may not base your decision upon feelings of sympathy for, or prejudice against, anyone involved.

The court based this instruction, in part, on Pennsylvania Suggested Standard Jury Instruction (Crim) §3.08D and §7.05(3).

The Commonwealth contended that pursuant to *Commonwealth v. Lane*, 621 A.2d 566 (Pa. 1993), the court could preclude the defense from naming the charges pending against the alleged victim. Again, the court could not agree. Initially, the court notes that

*Lane* is a plurality decision. Moreover, with all due respect to the Commonwealth's attorney, the court believes that the Commonwealth was confusing the result of the case with its holding. While the Court found that a new trial was not required, it did not "uphold the decision of the trial court to limit the defense to referring to pending charges against a prosecution witness as 'other serious felonies.'" Rather, the Court found that the trial court erred by limiting the disclosure to *crimen falsi* charges, but the error was harmless in light of the information that was disclosed. Furthermore, unlike the Commonwealth's proposal in this case, which would not permit the jury to know the names of any of the charges pending against J.T., the jury was informed of the names of some of the charges pending against the witness in *Lane*. The trial court's ruling permitted the jury in *Lane* to be informed of pending robbery and theft charges, but not the pending kidnapping and rape charges, and the witness volunteered that he had been charged with kidnapping. Therefore, the only charge that was referred to as an "other serious felony" was the rape charge. Due to these differences, the court found that *Lane* was distinguishable.

Finally, the court notes that the Commonwealth somewhat routinely seeks to present other crimes or bad acts evidence against a defendant or defense witnesses and it advocates that a cautionary instruction is sufficient. When, as here, that evidence is relevant and case law permits its admission, the court permits the evidence and issues a cautionary instruction. Similar rules should apply when the witness is being called by the Commonwealth.

Under the facts and circumstances of this case, the court does not believe that it



abused its discretion in ruling against the Commonwealth and in favor of the defense. The court would ask the appellate courts to affirm its decision.

DATE: 8/31/23

By The Court,

---

Nancy L. Butts, President Judge