J-A12026-15

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
TIMOTHY SCOTT SMITH,	:	
	:	
Appellee	:	No. 1403 MDA 2014

Appeal from the Order entered July 30, 2014,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0005596-2013

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
TIMOTHY SCOTT SMITH,	:	
	:	
Appellee	:	No. 1453 MDA 2014

Appeal from the Order entered August 8, 2014,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0005596-2013

BEFORE: BOWES, DONOHUE and ALLEN, JJ.

CONCURRING AND DISSENTING MEMORANDUM BY DONOHUE, J.:

FILED JULY 31, 2015

I agree with the learned Majority that the trial court properly excluded evidence of Appellee's alleged assault upon S.T. I respectfully disagree, however, with the Majority that the trial court abused its discretion by

excluding evidence concerning the incident that allegedly occurred between Appellee and C.H. My reasoning follows.

As the Majority recognizes, evidence that the defendant committed a prior crime, wrong or other act is inadmissible to demonstrate the defendant's propensity to commit the crime in question. Pa.R.E. 404(b)(1). The Majority concludes that the prior bad act allegedly committed by Appellee against C.H. is nonetheless admissible based upon the similarities between that incident and what allegedly occurred between Appellee and the victim in the case at bar such that the acts constituted a common scheme. Maj. at 10-11; ***see*** Pa.R.E. 404(b)(2).

For a prior bad act to be admissible as proof of a common plan, scheme or design, the prior act must be "so related" to the crime in question "that proof of one tends to prove the other[]." ***Commonwealth v. Elliott***, 700 A.2d 1243, 1249 (Pa. 1997), *abrogated on other grounds by* ***Commonwealth v. Freeman***, 827 A.2d 385 (Pa. 2003). The similarity between the two acts "must consist of more than repetition of the same general class of crimes." ***Commonwealth v. Bryant***, 611 A.2d 703, 705 (Pa. 1992). In assessing whether a prior act qualifies as evidence of a common plan, scheme or design, courts must consider the time that elapsed between the commission of the crimes; the geographical proximity between the location of the crimes; and the manner in which the defendant

committed the crimes. ***Commonwealth v. Judd***, 897 A.2d 1224, 1231-32 (Pa. Super. 2006).

My review of the record reveals the following facts related to the incident that occurred between Appellee and C.H. and that which occurred between Smith and the alleged victim in the case at bar, with the similarities in bold[1]:

Prior Act	This Act
The assault occurred in 2007;	**The assault occurred in 2009;**
Appellee was previously unacquainted with victim;	The victim was the son of Appellee's friend;
The victim was in his early twenties;	**The victim was in his early twenties;**
Appellee met the victim in a bar;	The victim was a guest at Appellee's party;
The victim went back to Appellee's house at Appellee's invitation;	The victim decided to sleep at Appellee's house without input by Appellee;
Appellee showed the victim pornographic movies;	No pornographic movies played for the victim;
Appellee provided alcohol to the victim;	The victim helped himself to alcohol in Appellee's basement;
Appellee made sexual advances towards the victim prior to the assault;	No evidence of any sexual advances made by Appellee to the victim prior to the assault;
The assault occurred in Appellee's basement bedroom;	**The assault occurred in Appellee's basement bedroom;**

[1] For brevity, I refer to each of the alleged victims as "the victim" and the conduct alleged as "assaults."

The victim was awake at the time of the assault;	The victim was asleep at the time of the assault;
The assault involved Appellee attempting to perform sexual acts upon the victim; specifically, Appellee requested and attempted to perform oral sex on the victim.	The assault involved Appellee performing sexual acts upon the victim; specifically, Appellee touched the victim's penis and digitally penetrated his anus.

Thus, although the timing of the incidents and geographical location of their occurrences are similar, the manner in which each incident occurred bears little to no relation to one another. ***See Judd***, 897 A.2d at 1231-32. The relationship between Appellee and the alleged victim, how the encounter commenced, the state of consciousness of the alleged victim, the events leading up to the alleged assault and the specifics of the assault itself all differ. It certainly cannot be said that the two incidents are "so related that proof of one tends to prove the other[]." ***Elliott***, 700 A.2d at 1249.

> The purpose of Rule 404(b)(1) is to prohibit the admission of evidence of prior bad acts to prove "the character of a person in order to show action in conformity therewith." While Rule 404(b)(1) gives way to recognized exceptions, the exceptions cannot be stretched in ways that effectively eradicate the rule. With a modicum of effort, in most cases it is possible to note some similarities between the accused's prior bad conduct and that alleged in a current case. To preserve the purpose of Rule 404(b)(1), more must be required to establish an exception to the rule – namely a close factual nexus sufficient to demonstrate the connective relevance of the prior bad acts to the crime in question.

Commonwealth v. Ross, 57 A.3d 85, 104 (Pa. Super. 2012) (en banc) (internal citation omitted). In my view, the factual similarities between the two incidents are insufficient to satisfy the common plan or scheme exception to the prohibition against the admission of prior bad acts evidence. Reviewing all of the information contained in the record, I can only conclude that Appellee arguably committed the "same general class of crimes" – sexual assaults. ***Bryant***, 611 A.2d at 705.

Moreover, "[t]he admission of evidence of prior bad acts is solely within the discretion of the trial court, and the court's decision will not be disturbed absent an abuse of discretion." ***Commonwealth v. Patterson***, 91 A.3d 55, 68 (Pa. 2014), *cert. denied sub nom.* ***Patterson v. Pennsylvania***, 135 S. Ct. 1400 (U.S. 2015). "The trial court abuses its discretion only if the court's ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." ***Commonwealth v. Orie***, 88 A.3d 983, 1000 (Pa. Super. 2014), *appeal denied,* 99 A.3d 925 (Pa. 2014). As the record supports the trial court's decision, I would affirm.