NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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

Appeal from the Order Entered July 30, 2014
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0005596-2013

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

Appeal from the Order Entered August 8, 2014
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0005596-2013

BEFORE: BOWES, DONOHUE AND ALLEN, JJ.

MEMORANDUM BY BOWES J.: **FILED JULY 31, 2015**

The Commonwealth appeals from the July 30, 2014 and August 8, 2014 orders entered by the trial court granting Timothy Scott Smith's motion

in limine to preclude the introduction of prior bad acts evidence. After careful review, we affirm in part and reverse in part.

The underlying facts of this matter are gleaned from the affidavit of probable cause for Appellee's arrest. The victim, twenty-one year old J.K., was invited by his father and stepmother to join them at Appellee's home on September 20, 2009. Appellee and the victim's father were close friends. When J.K. arrived, his father and stepmother were having dinner and drinks with Appellee. The victim also began to consume alcohol with the other adults in Appellee's basement, which contains a bar, pool table, television, and a semi-private bed. Due to his consumption of alcohol, the victim did not feel comfortable driving. His father and step-mother did not offer to drive him, but encouraged him to sleep at Appellee's home. After the victim's parents left, he fell asleep in Appellee's basement bed. He later was awakened by Appellee. Appellee had entered the bed, licked his neck, and began to grope him. In addition, Appellee placed his hands inside the victim's pants, touched the victim's penis, and penetrated the victim's anus with his fingers. The victim fled to the bathroom and twice opened the door only to see that Appellee remained seated on the bed. When the victim peered out a third time, Appellee was no longer in the basement and the victim fled the house on foot, leaving his car keys and other personal belongings behind.

The Commonwealth charged Appellee with one count each of aggravated indecent assault and indecent assault. It subsequently provided Appellee with notice under Pa.R.E 404(b) that it intended to introduce evidence of prior bad acts. Specifically, the Commonwealth proffered that it would seek to introduce evidence regarding a 2007 alleged incident with Appellee, C.H., and A.J. A.J. was nineteen or twenty years old at the time and C.H. was twenty-three. The Commonwealth proffered that the two were walking home when A.J. decided he needed to use a restroom.[1] The two friends entered a bar and encountered Appellee. Appellee purchased the pair alcohol and offered to give them a ride home. After Appellee drove the pair to their residence, A.J. and C.H. were locked out and unable to enter. Appellee then invited them to his home. During the drive, it is alleged that Appellee placed his hand on the leg or lap of both A.J. and C.H., who both sat in the front seat at different times. Once at Appellee's home, they went to the basement, where Appellee attempted to unzip C.H.'s pants and asked to perform oral sex. C.H. resisted, and he and A.J. then left the house.

Appellee filed a motion *in limine* to preclude this evidence. Thereafter, the Commonwealth filed a supplemental Rule 404(b) notice, regarding a different incident. According to the Commonwealth, in 1985 or 1986,

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[1] The Commonwealth has attached a police report made by A.J. and C.H. regarding the incident that was ultimately listed as unfounded. That report, however, is not part of the certified record. Therefore, we do not rely on it.

Appellant sexually assaulted a fourteen or fifteen year old male in his home. During that incident, Appellee allegedly gave the youth alcohol and directed him to sleep in his home. The boy later awoke to find Appellee performing oral sex on him. Appellee also filed a motion *in limine* to bar the Commonwealth's introduction of that evidence.

The court conducted a hearing on the motions and heard argument from both parties. Subsequently, it granted Appellee's motions *in limine*, denying the Commonwealth's request to present the prior bad acts evidence. The Commonwealth timely appealed. The court directed the Commonwealth to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The Commonwealth complied, and the trial court authored its Rule 1925(a) decision. The matter is now ready for this Court's review. The Commonwealth presents one issue for our consideration.

> A. Did the trial court abuse its discretion by barring evidence that Smith engaged in strikingly similar sexual assaults against young men as he is alleged to have committed against the young man in the instant case?

Commonwealth's brief at 4.

When ruling on a trial court's decision to grant a motion *in limine,* we employ an abuse of discretion standard. ***Commonwealth v. Moser***, 999 A.2d 602, 605 (Pa.Super. 2010). Accordingly, we will not disturb a trial court's evidentiary ruling "unless that ruling reflects manifest

unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." ***Id***.

The Commonwealth first argues that the court erred because the bad acts evidence establishes a common scheme. It recognizes that the "past and current acts should be similar so as to create a signature by the defendant." Commonwealth's brief at 14 (citing ***Commonwealth v. Rush***, 646 A.2d 557, 560-561 (Pa. 1994)). However, it submits that a defendant does not "have to engage in the same exact sexual misconduct for which he is charged in order for testimony about prior sexual misconduct to be admissible." ***Id***. The Commonwealth adds, with respect to the 1985 or 1986 allegations, that this Court in ***Commonwealth v. Luktisch***, 680 A.2d 877 (Pa.Super. 1996), and ***Commonwealth v. Aikens***, 990 A.2d 1181 (Pa.Super. 2010), upheld admission of prior sexual abuse that occurred in the significant past.

The Commonwealth contends that Appellee's acts against J.K. are parallel to the actions he took with respect to C.J., A.J., and the minor victim, S.T., in the mid-1980s. According to the Commonwealth, Appellee was not a stranger to the victims, provided alcohol to them, and assaulted or attempted to assault them in the basement of his home. It asserts that this evidence decreases the likelihood that the victims are lying and rebuts Appellee's proffered defense that the victim herein fabricated the assault.

The Commonwealth continues by maintaining that the trial court erroneously focused on both the lack of convictions for the prior bad acts and the behavior of C.H. and A.J. It posits that the appropriate inquiry looks to the acts of Appellee rather than his victims. In the Commonwealth's view, the trial court "abused its discretion by essentially requiring an exact duplication of [Appellee's] and the respective victim's [sic] behaviors in each instance[.]" Commonwealth's brief at 20.

Additionally, the Commonwealth argues that the trial court erred in concluding that Appellee's interaction with C.H. and A.J. "was happenstance." ***Id***. at 22. It asserts that Appellee was acquainted with C.H. and that, as in the instant case, he "planned, intended, and was motivated to meet young men, whom [sic] were not strangers, and lure them to his home." ***Id***.[2] Further, the Commonwealth maintains that the court erred in attributing significance to the age difference of J.K., who was twenty-one years old, and S.T., who was fourteen or fifteen.

Next, the Commonwealth submits that the bad acts evidence is admissible to establish both identity and his opportunity to commit the acts charged herein. Since it believes that Appellee's actions were so similar as

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[2] The Commonwealth did not proffer or argue during the hearing that Appellee and C.H. knew one another. Police reports not included in the certified record, ***see*** footnote 1, suggest that Appellee and C.H. had a mutual acquaintance. However, there is no record support for the Commonwealth's assertion in this regard.

to constitute a signature, the Commonwealth posits that the evidence establishes his identity as the assailant. With respect to an opportunity to commit the crimes, the Commonwealth argues that Appellee created the opportunity to assault the victims by inviting them to his home.

In addition, the Commonwealth cursorily contends that the evidence establishes a lack of mistake and proves intent. It highlights that S.T. and C.H. both instructed Appellee to desist. Also, in repetitive fashion, it again sets forth argument that the prior bad acts are not too remote in time to be considered at trial. It notes that the incident with C.H. and A.J. was only two years old and the "striking similarities" between his abuse of S.T. and J.K. outweigh the substantial time lapse of the two assaults. In this respect, the Commonwealth's final position is that due to the similarities, the probative value of the evidence outweighs its potential for causing prejudice. In support, it relies on ***Commonwealth v. Gordon***, 673 A.2d 866 (Pa. 1996), where the Court ruled prior bad acts admissible.

In ***Gordon***, an attorney was charged with indecent assault. The allegations pertained to conduct with a female client during a meeting. He was previously convicted of three counts of indecent assault with three other women with whom he met to discuss legal business. In each instance, Gordon had the women stand to review documents. While the women were reading over the materials, Gordon approached from behind and began to rub his genitalia on their buttocks and thighs. Gordon continued this

behavior even as the women attempted to move away. The assaults occurred while the women were involved either as a client or were the wife or girlfriend of a client. The crime in question had also occurred less than one year before the acts resulting in Gordon's earlier convictions.

Appellee counters that the evidence at issue is not "so nearly identical in method as to earmark them as the handiwork of the accused." Appellee's brief at 6 (quoting ***Commonwealth v. Shively***, 424 A.2d 1257, 1259 (Pa. 1981) (plurality)). Accordingly, he rejoins that the common scheme exception is inapplicable. He contends that "none of the challenged testimony is so 'distinctive as to be like a signature." ***Id***. at 7 (quoting ***Shively***, ***supra***). Appellee acknowledges some similarities between this case and the alleged prior bad acts, but avers that "[m]ere similarities, especially those that are common to a class of case, are not admissible." ***Id***. at 8. In Appellee's view, the bad acts evidence "establishes, at most, that [Appellee] has a propensity for making sexual advances toward men." ***Id***.

Appellee continues that the Commonwealth misapprehends the common scheme exception. He argues that the common plan exception to the prohibition against bad acts evidence applies to prove the identity of the assailant, which is not at issue. Lastly, in cursory fashion, Appellee posits that even if the evidence falls within Rule 404(b), the probative value of the evidence is outweighed by its potential for prejudice.

The trial court reasoned that Appellee's defense is not one of mistaken identity or lack of motive, but premised on credibility. It found that the potential for prejudice relative to both prior bad act proffers outweighed their probative value. In relation to C.H. and A.J., the court noted that Appellee was not charged with a crime and that neither witness was familiar with Appellee before meeting him at a bar. It also highlighted that the allegation in this case involved a victim who had fallen asleep and that neither C.H. or A.J. was asleep.

With respect to S.T., the trial court pointed out the twenty-three year time gap between incidents and found it significant that Appellee was not charged with a crime nor did the victim report the incident until recently. It acknowledged that victims of sexual abuse may be hesitant to report an assault, but also found the difference between the age of the alleged victims, six or seven years, to be important.

Preliminarily, we agree that the trial court did not abuse its discretion in finding that the twenty-three or twenty-four year old allegation that Appellee assaulted a minor victim in his basement was more prejudicial than probative. Here, the significant time lapse between incidents is but one critical factor. In addition, unlike the Commonwealth, we view a seven-year age gap between the victims as significant herein. The difference between a fourteen-year-old male and a twenty-one-year-old male in appearance and development is far greater than a similar age gap between older individuals.

Further, although the Commonwealth has pointed to case law permitting introduction of prior bad acts that involved a lengthy gap between incidents, it has not cited to any case law supporting allegations that were over two decades old. Moreover, in one of the cases relied on by the Commonwealth, ***Luktisch***, ***supra***, the actual period between the beginning of the sexual abuse of the one victim and the end of the abuse of the other victim was only six years. The victims therein also were closer in age. Specifically, the bad act victim maintained that the defendant began to touch her when she was five years old and escalated to performing oral sex and vaginal intercourse when she was eight. The victim in the ***Luktisch*** case maintained that the defendant began touching her when she was eight or nine before performing oral sex, and ultimately vaginal intercourse when she was eleven.

In ***Aikens***, ***supra***, also relied on by the Commonwealth, there was an eleven year gap between the actual incidents of abuse. The victims were fourteen and fifteen years old, both were his biological daughters, the abuse began during an overnight stay and started with the defendant showing the victims a pornographic movie. Hence, the age of the victims therein was almost identical. Since the time lapse herein is extraordinarily long and the age difference significant, we find that the trial court did not err in precluding the 1985-1986 evidence.

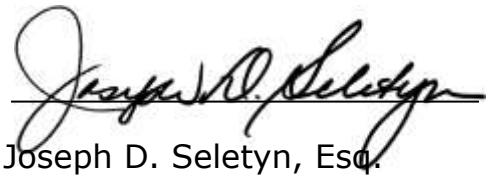
Nonetheless, we hold that the trial court erred in determining that the prejudicial nature of the 2007 allegations outweighed their probative value. There, the incident occurred only two years before the incident in this case. The age of the victims was extremely close: C.H. was twenty-three years of age and J.K. was twenty-one years old. The attempted assault on C.H. occurred in Appellee's basement as did the assault on J.K. While J.K. was asleep at the time and C.H. was awake, we do not require an exact similitude between bad acts to render them admissible. Appellee also provided alcohol to the men. In sum, the actions are sufficiently close in time and similar to one another to establish a common scheme. Further, Appellee argues that the sexual acts with the victim did not occur. "[S]ince the uncorroborated testimony of the alleged victim in this case might reasonably lead a jury to determine that there was a reasonable doubt as to whether [Appellee] committed the crime charged, it is fair to conclude that the other crimes evidence is necessary for the prosecution of the case." ***Gordon***, ***supra*** at 870.

Orders affirmed in part and reversed in part. Case remanded. Jurisdiction relinquished.

Judge Allen joins the Memorandum.

Judge Donohue files a Concurring Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015