J-S16016-14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
JERMEEL OMAR TYSON,	:	
	:	
Appellee	:	No. 1292 MDA 2013

Appeal from the Order June 18, 2013,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0005578-2012

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED APRIL 21, 2014**

The Commonwealth of Pennsylvania ("the Commonwealth") appeals from the order dated June 18, 2013 by the Court of Common Pleas of Berks County denying the Commonwealth's motion *in limine* to introduce evidence of defendant's prior crime and granting Jermeel Omar Tyson's ("Tyson") corresponding motion *in limine*. We affirm.

The trial court summarized the facts of this case as follows:

> It is alleged that on July 31, 2010 Gwendolyn Burris left work because she was feeling sick after donating plasma. Ms. Burris asked the Defendant to bring food over to her home. The Defendant arrived at her home and allegedly spent the evening there. In the early morning hours of August 1, 2010, Ms. Burris claims that she awoke to find the Defendant having non-consensual sexual intercourse with her. Ms. Burris alleges that she told the Defendant to stop having intercourse with her and she fell back asleep in her bed. Ms. Burris claims that she awoke again that night to find the Defendant having non-

*Retired Senior Judge assigned to the Superior Court.

> consensual sexual intercourse with her. Ms. Burris claims she told the Defendant to leave and he left her apartment soon thereafter. Ms. Burris then proceeded to St. Joseph's Hospital for treatment. A rape kit was subsequently completed at Reading Hospital and results were received from the Pennsylvania State Police Bureau of Forensic Services on August 27, 2012, matching Defendant's DNA to the evidence contained in the kit.

Trial Court Opinion, 9/18/13, at 1-2 (record citations omitted).

On November 13, 2012, police charged Tyson with two counts of rape, two counts of sexual assault, four counts of aggravated indecent assault, and four counts of indecent assault.[1] On November 30, 2012, at Tyson's preliminary hearing, the Commonwealth added two counts of rape and withdrew two counts of indecent assault. Tyson waived formal arraignment on the charges and entered a plea of "not guilty."

On May 16, 2013, the Commonwealth filed a notice, pursuant to Pennsylvania Rule of Evidence 404(b)(3), advising Tyson of its intention to introduce evidence of a prior conviction for rape. On May 31, 2013, the Commonwealth filed a motion *in limine* seeking to introduce evidence of Tyson's prior crime. On June 3, 2013, Tyson filed a motion *in limine* to prevent the Commonwealth from introducing the evidence of his prior conviction.

[1] 18 Pa.C.S.A. § 3121(a)(3); 18 Pa.C.S.A. § 3124.1; 18 Pa.C.S.A. § 3125(a)(1), (4); and 18 Pa.C.S.A. § 3126(a)(1), (4), respectively.

On June 6, 2013, the trial court held a hearing regarding these motions *in limine*. The trial court summarized the Commonwealth's proposed Pa.R.E. 404(b) evidence as follows:

> The Commonwealth's Motion to Introduce Evidence of Defendant's Prior Crime, filed on June 25, 2013, stems directly from an incident between Defendant and another female, Ms. Tiffani Barneman. On July 16, 2000, the Defendant attended a party at Ms. Barneman's home in Wilmington, Delaware. That evening, Ms. Barneman fell asleep at around five o'clock after drinking alcohol and awoke to find Defendant having nonconsensual, sexual intercourse with her. On June 11, 2001, the Defendant pleaded guilty to rape in the Superior Court of the State of Delaware.

Trial Court Opinion, 9/18/13, at 2 (record citations omitted). On June 18, 2013, the trial court denied the Commonwealth's motion *in limine* and granted Tyson's motion *in limine* thereby excluding the evidence. On July 17, 2013, the Commonwealth filed a motion for reconsideration of the order granting Tyson's motion *in limine* and denying its motion *in limine* seeking to introduce evidence of Tyson's prior crime. On July 18, 2013, the Commonwealth filed this appeal certifying, pursuant to Pennsylvania Rule of Appellate Procedure 311(d), that the order terminated or substantially handicapped the prosecution.[2]

[2] Pa.R.A.P. 311(d) states: "[i]n a criminal case . . . the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution." Pa.R.A.P. 311(d).

On appeal, the Commonwealth presents the following issue for our review:

> A. DID THE LOWER COURT ABUSE ITS DISCRETION WHEN IT DENIED THE COMMONWEALTH'S MOTION *IN LIMINE* TO INTRODUCE EVIDENCE OF DEFENDANT'S PRIOR CRIME AND GRANTED THE DEFENDANT'S MOTION *IN LIMINE*, WHERE SAID EVIDENCE IS ADMISSIBLE PURSUANT TO Pa.R.E. 404(b)?

Appellant's Brief at 4.

When reviewing a motion *in limine*, as well as any other evidentiary matter, we apply the following standard:

> The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

Commonwealth v. Page, 965 A.2d 1212, 1219 (Pa. Super. 2009).

The Commonwealth argues that the trial court erred in denying its motion *in limine* to introduce evidence of Tyson's prior rape conviction based on Pa.R.E. 404(b)(1)'s preclusion of evidence of prior bad acts. Appellant's Brief at 9. First, the Commonwealth asserts that the circumstances in each

incident demonstrate the common plan or scheme exception of Pa.R.E. 404(b)(2) and that the trial court erred in relying on the lapse of time that occurred between Tyson's prior rape conviction and the current matter in its decision. ***Id.*** at 10-12, 13-14. Second, the Commonwealth contends that the prior rape conviction shows the absence of mistake, another exception in Pa.R.E. 404(b)(2), on the part of Tyson. ***Id.*** at 12-13. Finally, the Commonwealth asserts that the introduction of the prior rape conviction has more probative value for the Commonwealth's case than a prejudicial effect on Tyson's case. ***Id.*** at 14-17.

The Pennsylvania Rules of Evidence prohibit the use of other crimes, wrongs, or acts to show that the defendant acted in conformity when committing the instant crime. Pa.R.E. 404(b)(1). Such evidence may be admissible, however, for other purposes, including but not limited to, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.E. 404(b)(2). When a party offers such evidence for those permissible reasons, the trial court may admit this evidence if it determines the probative value outweighs its potential prejudicial effect. ***Id.***

A prior bad act is admissible under the common plan, scheme, or design exception "when there are shared similarities in the details of each crime." ***Commonwealth v. Judd***, 897 A.2d 1224, 1231 (Pa. Super. 2006). The trial court should only admit evidence of prior bad acts where evidence

exposes criminal behavior that is so distinctive "or so nearly identical to each other to demonstrate the signature of the same perpetrator." ***Commonwealth v. Strong***, 825 A.2d 658, 666 (Pa. Super. 2003). Evidence of prior bad acts is admissible to prove a common plan or scheme "where the two crimes are so related that proof of one tends to prove the others." ***Commonwealth v. Ross***, 57 A.3d 85, 103 (Pa. Super. 2012) (citation omitted). This requires us to examine: (1) the time that elapsed between the commission of the crimes, (2) the geographical proximity between the location of the crimes, and (3) the manner in which the defendant committed the crimes. ***Judd***, 897 A.2d at 1231-32. Regarding the time elapsed between the commission of crimes, this Court has held that,

> while remoteness in time is a factor to be considered in determining the probative value of other crimes evidence under the theory of common scheme, plan or design, the importance of the time period is inversely proportional to the similarity of the crimes in question.

Commonwealth v. Aikens, 990 A.2d 1181, 1185 (Pa. Super. 2010) (quotations and citations omitted).

We cannot conclude that the trial court abused its discretion in finding that the evidence of Tyson's prior conviction for rape did not fit within the common plan or scheme exception of Pa.R.E. 404(b)(2). After reviewing the certified record, we find that Tyson's prior rape conviction and the current

matter produced the following similarities: both incidents involved non-consensual, sexual intercourse with the victims while they were sleeping; both victims were female; both incidents occurred in the early morning hours; and in both incidents, Tyson had been invited into the victims' homes. Thus, the primary similarity between Tyson's prior rape conviction and the current matter is non-consensual, sexual intercourse. Repeating an act that would constitute the crime of rape is insufficient to allow the admission of evidence of the original act, when the remaining similarities between the incidents are "insignificant details that would likely be common elements regardless of who committed the crimes." ***Aikens***, 990 A.2d at 1186 (citing ***Commonwealth v. Hughes***, 521 Pa. 423, 459, 555 A.2d 1264, 1283 (1989)). Because most of the similarities from Tyson's prior rape conviction and the current matter do not amount to more than insignificant details common to many instances of sexual assaults, the facts of these two incidents lack the required specificity to render the evidence of Tyson's past rape conviction admissible. ***See id.***

Furthermore, a major distinction between the Tyson's prior rape conviction and the current matter is the fact Ms. Burris allegedly awoke to find Tyson engaging in unwanted sexual contact with her only to soon thereafter fall back asleep and have Tyson sexually assault her again. Thus, there is insufficient evidence to conclude that the criminal behavior was so

distinctive "or so nearly identical to each other to demonstrate the signature of the same perpetrator." ***See Strong***, 825 A.2d at 666 (Pa. Super. 2003).

Additionally, the fact that the evidence indicates that the prior rape conviction and the current matter are not substantially similar causes the time lapse of ten years between the two incidents to become a more determinative factor. ***See Aikens***, 990 A.2d at 1185. This is because "the importance of the time period is inversely proportional to the similarity of the crimes in question." ***Id.*** In this case, the prior rape conviction occurred ten years prior to the current matter. The Commonwealth argues that the past crime is not too remote in time from the current matter because Tyson spent roughly five of those ten years incarcerated. The Commonwealth seeks to apply Pa.R.E. 609 to this case. Rule 609, which involves impeachment by evidence of prior convictions, under certain circumstances, excludes periods of incarceration from its ten-year limitation for admissibility of evidence of prior *crimen falsi*. ***See*** Pa.R.E. 609. However, the Commonwealth does not cite, nor can we find, any case law that applies Rule 609 in the context of Rule 404(b) decisions.

Therefore, based on the ten-year gap, the crimes are not similar enough to overlook their remoteness. To disregard the ten-year lapse in time in this case would not be consistent with other cases from this Court that have overlooked the remoteness of prior bad acts to admit evidence of those acts under the common plan or scheme exception. ***See Aikens***, 990

A.2d at 1186 (allowing the admission of a prior bad act, despite a 15-year time gap between incidents, where the parallels between the incidents were "striking"); ***Commonwealth v. Luktisch***, 680 A.2d 877, 879 (Pa. Super. 1996) (permitting evidence of a prior rape that occurred 18 years prior where the pattern of molestation was "strikingly similar"); ***Commonwealth v. Shively***, 492 Pa. 411, 416, 424 A.2d 1257, 1259 (1981) (excluding evidence of a prior bad act that occurred only seven months prior where the Court failed to "perceive enough similarity between the two episodes to allow admission of the prior activity"). Furthermore, the geographic proximity of the crimes does not weigh heavily in our analysis because the crimes took place in different states. If there is any weight to be given, it benefits Tyson. Accordingly, we cannot conclude that the trial court erred in finding that the evidence of Tyson's prior rape conviction did not fit within the common plan or scheme exception of Pa.R.E. 404(b)(2).

We also cannot conclude that the trial court abused its discretion in finding that the evidence of Tyson's prior rape conviction did not fit within the absence of mistake exception of Pa.R.E. 404(b)(2). The Commonwealth asserts that Tyson will argue that he mistakenly believed that he had Ms. Burris's consent to engage in sexual intercourse. Appellant's Brief at 12-13. As a result, the Commonwealth contends that the evidence of Tyson's prior rape conviction will demonstrate that he did not mistakenly believe he had Ms. Burris's consent to engage in sexual intercourse because of the

opportunistic nature of his actions. ***Id.*** Prior bad act evidence is "highly probative" of whether a defendant committed a crime where "the manner and circumstances surrounding" the two crimes are "remarkably similar." ***See Commonwealth v. Boczkowski***, 577 Pa. 421, 440, 846 A.2d 75, 86 (2004). Based on our analysis of the common plan or scheme exception of Pa.R.E. 404(b)(2), we cannot conclude that Tyson's prior rape conviction is "remarkably similar" to the current matter. Therefore, the evidence in this matter is insufficient to conclude that the trial court erred in finding that the evidence of Tyson's prior rape conviction did not fit within the absence of mistake exception of Pa.R.E. 404(b)(2).

Finally, we note that this is a close case. The trial court heard argument on this matter and made a decision supported by the evidence of record. The trial court found that the evidence of Tyson's prior rape conviction did not fit within the common plan or absence of mistake exceptions to Pa.R.E. 404(b). Trial Court Opinion, 9/18/13, at 2. Although there is a similarity between Tyson's prior rape conviction and the current matter, i.e., a sleeping victim, we are unable to conclude, based on our review of the certified record, that the trial court abused its discretion in refusing to focus solely on this similarity in making its decision. Additionally, the trial court found that the prejudicial effect of Tyson's prior evidence outweighed its probative value. ***Id.*** We agree that the prejudicial impact of this evidence outweighs its probative value because of the lack of exactitude

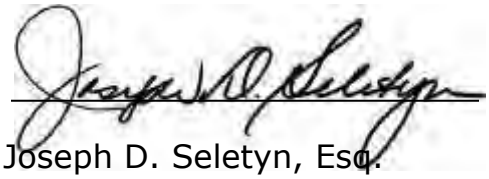
in the situations and the lapse of time. This evidence could lead the fact-finder to believe that Tyson in fact raped Ms. Burris without regard to the distinguishing facts of this case.

Based on the foregoing, the trial court did not abuse its discretion in its determination that the evidence of Tyson's past rape convictions does not fit within any exception to Pa.R.E. 404(b). We therefore affirm.

Order affirmed.

Strassburger, J. files a Dissenting Statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014