Franklin County Legal Journal

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COMMONWEALTH OF PENNSYLVANIA
v. DOUGLAS PAUL WINGERT, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1272 of 2003

Miranda; Voluntariness of confession; Common scheme or plan; Relevant evidence

1. A law enforcement officer must administer Miranda warnings prior to custodial interrogation.

2. Police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest.

3. The factors the court utilizes to determine if a detention has become custodial include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions.

4. The ultimate test as to whether a confession was made voluntarily is whether the confession is the product of an essentially free and unconstrained choice by its maker.

5. In determining whether a confession was made voluntarily, the court must consider the totality of the circumstances, including the accused's mental and physical condition.

6. In general, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Pa.R.E. 404(b)(1).

7. Pa.R.E. 404(b)(2) carves out the following exceptions to the general rule: Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

8. Pa.R.E. 404(b)(3) allows proffered evidence of other crimes, wrongs, or acts to be admitted only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

9. Relevant evidence is evidence having any tendency to make the existence of fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence. Pa.R.E. 401.

Appearances:

Nancy H. Meyers, Esq., Assistant District Attorney

Justin McShane, Esq., Counsel for Defendant

OPINION

Van Horn, J., April 28, 2004

Factual Background

1. By way of criminal complaint filed on June 11, 2003, by Trooper Joseph S. Davidson of the Pennsylvania State Police (hereinafter "Trooper Davidson"), Douglas Paul Wingert (hereinafter

"Defendant"), was charged with criminal attempt to commit rape, indecent assault, terroristic threats, unlawful restraint and simple assault for events alleged to have occurred on May 22, 2003, in Antrim Township, Franklin County.

2. Esther Horst, the victim, provided the police with information that her attacker was driving a white box truck with "New Jersey" written on its side. Ms. Horst also told the police that her attacker asked for directions to Keystone Ford.

3. Ms. Horst also provided the police with a description of her attacker. She described him as a white male, 5'9" to 5'10", thin build, well-spoken, clean hygiene, normal posture, straight blonde hair which was not long but not extremely short, possibly a mustache, wearing a jacket and long pants.

4. On May 27, 2003, without any specific suspect in mind, Trooper Darren W. Hockenberry of the Pennsylvania State Police (hereinafter "Trooper Hockenberry") went to Keystone Ford to investigate a lead.

5. An employee at Keystone Ford had given Trooper Hockenberry information regarding the companies who delivered to Keystone Ford in white box trucks. One such company was Paul McHenry and Company and a delivery truck from said company was to be arriving at Keystone Ford on May 27, 2003.

6. Trooper Hockenberry, who was in plain clothes and who had arrived in an unmarked vehicle approached said delivery truck, identified himself as a police officer and spoke with the driver, Defendant, regarding his investigation. He told Defendant he was investigating an assault and that the assault victim mentioned that her attacker drove a white box truck with "New Jersey" written on the side door. Furthermore, the victim said the attacker had mentioned Keystone Ford.

7. Defendant testified that Trooper Hockenberry said that Defendant should admit his involvement in the crime at that time as it was only a pushing and shoving incident but if he denied his involvement and the Trooper found out later that he was involved, he would make it worse.

8. Trooper Hockenberry testified that he obtained Defendant's identification information and asked questions regarding Defendant's daily routine on the day of the assault. The Trooper also obtained Defendant's license plate number and the name and contact information of Defendant's employer. Trooper Hockenberry testified that these were routine questions he would have asked any driver in his investigation.

9. Trooper Hockenberry testified that because Defendant fit the general parameters of the description given by the victim he believed he could be the person involved in the assault he was investigating.

10. Defendant said he knew that he was being targeted because of his past record but the Trooper assured him that he did not know of his past record as this was the Trooper's first encounter with him and he did not even know his name before this point.

11. Trooper Hockenberry and Defendant both testified that the encounter lasted approximately fifteen (15) minutes and at the end of their conversation each went his separate way.

12. Trooper Hockenberry returned within the next day or two to Keystone Ford to take pictures of the truck, which was in the parking lot, as he had forgotten his camera the first time he talked to Defendant. The extent of the conversation between the Trooper and Defendant that day was the Trooper informing Defendant about what he was doing.

13. Trooper Hockenberry testified that in regards to both of the above encounters with Defendant, he never told Defendant he could not leave nor did he tell Defendant he could leave or that he was not required to answer questions.

14. On June 11, 2003, Trooper Davidson and Trooper Hockenberry arrested Defendant at Keystone Ford. Both Troopers were in plain clothes and had arrived in unmarked police cars.

15. Trooper Davidson testified that he identified himself and told Defendant he was under arrest.

16. Defendant testified that at this point he called his boss to tell him he needed an attorney and Defendant said both arresting officers, Trooper Davidson and Trooper Hockenberry, were present.

17. Trooper Hockenberry and Trooper Davidson transported Defendant to the Pennsylvania State Police barracks. The distance between Keystone Ford and the barracks is approximately eleven (11) to twelve (12) miles.

18. Trooper Davidson testified that Defendant started a conversation while in the vehicle being transported. The Trooper read him his Miranda warnings, within a few minutes of placing Defendant in the vehicle, although he had not planned to do so until they got to the barracks.

19. Trooper Davidson testified that although he does not remember the exact words with which Defendant acknowledged the Miranda warnings, Defendant did indeed acknowledge the warnings and did so with more than simply a "yes." In fact there was a discussion which ensued, that lasted anywhere from more than one minute to five minutes in which Trooper Davidson made sure Defendant understood his rights.

20. Defendant admits he was read his Miranda rights in the vehicle and that before he was read his rights he and Trooper Davidson had talked about what specific charges were being brought against him and what was going to transpire as far as procedure - fingerprinting, questioning and such.

21. Defendant testified that he acknowledged the Miranda warnings.

22. Trooper Hockenberry, who was in the car with Trooper Davidson, verified that Miranda warnings were given during the transport.

23. Defendant testified that after being Mirandized, Trooper Davidson told him the police had his fingerprints on the phone book from the scene of the crime and that he knew Defendant was the perpetrator. He said if Defendant confessed he would "go to bat" for him.

24. Trooper Hockenberry testified that Defendant may have made a statement regarding his presence at the scene of the crime and that he touched the victim's breast while in the car or those statements may have been made during the interrogation at the barracks. He was unsure as to where they were when Defendant made those statements.

25. Trooper Davidson testified that no inculpatory statements were made in the car even after the Miranda warnings were given.

26. Once at the barracks, Defendant was taken to an interview room. The room was approximately 20' by 20', contained a table, chairs and a bench against one of the walls. The room was used to talk to victims and suspects alike.

27. At this point only about fifteen (15) minutes had passed since Defendant was Mirandized.

28. Trooper Davidson testified that upon beginning the interrogation at the barracks, Defendant initially denied any knowledge of the incident. Trooper Davidson then told him the following: (1) Ms. Horst picked him out of a photo line-up, (2) his work logs put him in the area at the time of the crime, and (3) that the police were collecting the phone book and telephone with the intention of fingerprinting them.

29. Trooper Davidson testified that after being provided with this information, Defendant changed his story and said he was at the scene of the crime. He said he had asked Ms. Horst to use the phone and there was an argument between them because she would not let him use the phone. Trooper Davidson said this made no sense as Ms. Horst had offered him a phonebook so why would she not let him use the phone.

30. Defendant then said the argument occurred because he grabbed Ms. Horst's breast.

31. Trooper Davidson testified that when asked why he grabbed Ms. Horst's breast, Defendant got emotional, cried, and said sometimes he blacked out and could not control himself when the demons come. He went on to talk about his use of marijuana and cocaine on the day in question and about the rape in 1985 for which he served fifteen (15) years in prison. He also talked about being raped as a child and in prison.

32. Defendant eventually said he did not wish to speak any more after which no one questioned him.

33. The interview lasted anywhere from forty-five (45) to ninety (90) minutes.

34. Trooper Davidson testified that Defendant never asked for an attorney at any time before the interrogation ended at the barracks but may have asked for one when he said he wished to stop speaking.

35. Trooper Davidson testified that he never promised Defendant anything to induce him to speak and never said he would make it harder for Defendant if he did not speak.

36. Defendant testified that at the beginning of the interrogation Trooper Hockenberry said that Defendant had already told them that he was at the scene of the crime and that the Trooper now wanted to know why he was there. When Defendant said he was looking for his grandparents' gravesite and got lost, Trooper Hockenberry said that Defendant was a liar, that all sex offenders are liars. Defendant testified that he said the interview was over at that point.

37. Defendant then said the Troopers kept asking him questions. Defendant testified that Trooper Davidson said that if you plead guilty, I will go to bat for you. Defendant testified that before this perceived promise was made by Trooper Davidson, Defendant told the Troopers of being at the scene and touching the victim. He said this was the last statement Trooper Davidson made to him. On the other hand, he testified that admissions were made based on Trooper Davidson's promises. He also felt that Trooper Davidson, through his promise to go to bat for him, implied that if he did not plead guilty things would be hard for him.

38. Defendant claims that he made no reference to demons in the interrogation room but rather made a statement about demons in a telephone conversation with his mother on the way to his arraignment after the interrogation. Both Troopers testified to there being a demon conversation in the interrogation room and Trooper Davidson testified there was another demon conversation during the car ride to the arraignment.

39. Defendant testified that he is familiar with the criminal process, knew he was entitled to have an attorney present through interrogation and knew he could remain silent.

Procedural Background

1. On October 8, 2003, Defendant filed an Omnibus Pretrial Motion which contained two Motions to Suppress.

2. On November 10, 2003, Defendant filed an Amended Omnibus Pretrial Motion.

3. On February 27, 2004, the Commonwealth filed a Motion in Limine to Admit Evidence of Defendant's Prior Bad Acts and/or Crimes.

4. On March 29, 2004, Defendant filed an Answer to the Commonwealth's Motion in Limine. Defendant also filed New Matter in the form of a Motion in Limine to Exclude Certain Evidence to wit: Partial Statement Attributed to the Defendant.

5. A hearing on Defendant's Omnibus Motion was held on March 29, 2004.

6. At the hearing the Commonwealth presented an Offer of Proof in Support of its Motion in Limine.

7. After the hearing, counsel was given a chance to present briefs in support of their Motions in Limine. Counsel did so. Counsel also filed briefs in opposition of the other's motion.

Discussion

The three Motions before the Court are as follows: (1) Defendant's Omnibus Motion, (2) the Commonwealth's Motion in Limine and (3) Defendant's Motion in Limine.

Defendant's Omnibus Motion

In Defendant's Omnibus Motion, he presents two motions to suppress. First, he wishes to have suppressed "inculpatory statements allegedly made by the defendant during custodial interrogation to members of the Pennsylvania State Police that were obtained by the employ of undue influence, promises of leniency or other forms of coercion." Second, he wishes to have suppressed, "inculpatory statements allegedly made by the defendant during custodial interrogation by members of the Pennsylvania state police after the defendant invoked his right to silence and declared his intention to cease all questioning."

While not very specific in either of these motions, the general issues seemed clear from their reading. However, at the hearing, testimony on numerous issues not addressed in the motion was offered. Because the Commonwealth did not object to this testimony, the Court will address all issues raised. Rather than trying to address all issues within the confines of the motions, the Court will address them chronologically.

Defendant claims that the encounters between Defendant and the Troopers, which took place on May 27, 2003, and May 28 or May 29, 2003, were custodial interrogations, therefore, Miranda warnings were required, and any evidence obtained during these encounters and any evidence obtained after

should be suppressed.

A law enforcement officer must administer Miranda warnings prior to custodial interrogation. Commonwealth v. Mannion, 725 A.2d 196, 200 (Pa. Super. 1999) (citation omitted). The standard for determining whether an encounter with the police is deemed "custodial" or police have initiated a custodial interrogation is "an objective one based on a totality of the circumstances, with due consideration given to the reasonable impression conveyed to the person interrogated." Id. Custodial interrogation has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." Id. quoting Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706 (1966).

Police detentions become custodial when, "under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest." Id. The factors the court utilizes to determine if a detention has become custodial include: "the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions." Id.

The Court will examine each of these factors in turn in regards to the two incidents which occurred on May 27, 2003 and May 28 or May 29, 2003.

In regards to the May 27, 2003, encounter, Ms. Horst provided the police with identifying information regarding her attacker and the vehicle her attacker was driving. She further told the police that her attacker had asked for directions to Keystone Ford. This information prompted Trooper Hockenberry to talk to an employee of Keystone Ford to try to identify delivery trucks consistent with that described by the victim and Defendant's truck matched said description so Trooper Hockenberry went to investigate. The encounter between the Defendant and Trooper Hockenberry involved questions by the Trooper as to the Defendant's identification and whereabouts on the day in question as his vehicle fit the description of the vehicle given police by the victim and once the Trooper approached Defendant, he could see Defendant matched the victim's description of her attacker.

Both Trooper Hockenberry and Defendant testified that the encounter lasted for approximately fifteen (15) minutes. The encounter occurred in the parking lot of Keystone Ford. Defendant was not transported anywhere and no restraints were used.

No evidence was presented indicating that the law enforcement officer showed, threatened or used force. While Defendant said Trooper Hockenberry threatened to make things hard for him if he did not admit to his involvement, there is nothing in the surrounding circumstances that indicate such an event occurred. Trooper Hockenberry had no prior meetings with Defendant and at this point was only collecting information Trooper Hockenberry no reason to threaten him. Therefore, the Court finds Defendant's testimony on this issue not credible[1].

As to the investigative methods employed to confirm or dispel suspicions, it seems that from both the testimony of the Trooper and Defendant, Trooper Hockenberry was clear about why he was there and simply conducted a preliminary investigation.

Because this was Trooper Hockenberry's first encounter with Defendant, he had no reason to do more than a preliminary investigation and thus was surprised when Defendant admitted to having a criminal past and accused the Trooper of talking to him because of his past. The Trooper again explained to Defendant what had led him to Defendant and said that he did not even know Defendant's name before speaking to him on this day and certainly did not know his criminal history.

Based on a totality of the circumstances, an objective person would not have felt that he was taken into custody or otherwise deprived of his freedom of action in any significant way. While Defendant claimed that he did not feel free to go due to the fact that he had work still to do at Keystone Ford, the fact that he felt he could not leave the premises due to his work obligations is not the equivalent of not feeling free to leave because of something the police were doing.

He also said he did not feel free to go because of the show of police authority. However, again, besides the alleged threat that Trooper Hockenberry made, which the Court finds not credible, there was no testimony that the police used their authority to intimidate him and looking at it objectively a reasonable person would have felt free to go in this situation.

The Court finds there was no custodial interrogation on May 27, 2003, and therefore no information gotten from this encounter shall be suppressed as Miranda warnings were not necessary.

As to the May 28 or May 29, 2003, encounter when Trooper Hockenberry returned to take pictures of the truck, Defendant claims this was a custodial interrogation. Defendant again claims he did not feel free to go because of work, and he claims he was not given the chance to refuse the pictures. First, the issue of feeling free to go due to a work obligation was addressed and dismissed above. Second, the pictures were taken in a public place, and Defendant does not have a right to refuse such pictures being taken.

Again, taking all the above factors into consideration, the Court finds there was no custodial interrogation this date, either May 28 or May 29, 2003, and therefore Miranda warnings were not necessary and no information obtained from this encounter shall be suppressed.

Defendant claims that any statements made on June 11, 2003, should be suppressed for several reasons. First, he asked for an attorney at the time of his arrest so even though he was Mirandized later and chose to speak subsequent to the Miranda warnings, all statements should be suppressed due to his request. Second, the statements made after he was Mirandized were not made voluntarily, but rather coerced. Third, he invoked his right to remain silent once at the police barracks but questioning persisted.

Defendant claims, and points to his cell phone bill (Exhibit 3) as evidence, that he called his boss when the Troopers told him they were arresting him on June 11, 2003. He said he requested that his boss get him an attorney and that the Troopers were within hearing range when he made such a request. That the Troopers heard this conversation is an assumption on the part of Defendant. Neither of the Troopers testified that they heard such a request. Even if they were within hearing range when Defendant asked his boss to provide him with an attorney, because the request was not made of them directly, the Troopers had no obligation to wait to proceed with any questioning until Defendant obtained an attorney.

As to the encounters between Defendant and the police on June 11, 2003, that took place after he was Mirandized, Defendant claims that inculpatory statements made by him during the custodial interrogations should be suppressed because the statements were not voluntary but rather coerced.

While there is conflicting testimony among Trooper Hockenberry, Trooper Davidson, and Defendant as to parts of the chronology of the day, all are clear that Miranda warnings were given in the car on the way to the State Police Barracks after Defendant was arrested and before anything of substance was discussed. Defendant claims that his voluntary waiver of his Miranda rights was overcome by the Troopers undue influence, promises of leniency or other forms of coercion on two occasions. First, when he was in the car on the way to the barracks and then at the barracks.

"The ultimate test of voluntariness is whether the confession is the product of an essentially free and unconstrained choice by its maker." Commonwealth v. Watson, 360 A.2d 710, 712 (1976)(citations omitted). In making this determination, the Court must consider the "totality of the circumstances, including the accused's mental and physical condition." Id. There is no evidence that Defendant was physically coerced. In seeking to determine whether the confession is involuntary because of psychological coercion, we must "consider those elements impinging upon a defendant's will such as: the duration, and the methods of interrogation; the conditions of detention, the manifest attitude of the police toward the defendant, the defendant's physical and psychological state and all other conditions present which may serve to drain one's power of resistance to suggestion and undermine his self-determination." Id. at 713 quoting Commonwealth v. Alston, 317 A.2d 241, 244 (Pa. 1974).

Defendant claims that in the car on the way to the interrogation, while Trooper Davidson was telling him what to expect procedurally when they got to the barracks, Trooper Davidson also told him that the police had his fingerprints from the phone book. Trooper Davidson went on to say he knew Defendant was the perpetrator of the crime and that he would help Defendant out if Defendant admitted to what he had done.

Trooper Davidson testified that the only conversation about fingerprints took place at the barracks and that he never, at any point, made promises to induce Defendant to speak. Even if promises were made, "many states ... agree that a promise to bring a suspect's cooperation to the attention of the authorities (when accompanied by no other coercive tactics) does not render his confession involuntary." Commonwealth v. Purnell, 603 A.2d 1028 (Pa.Super. 1992)(citations omitted). Defendant did not claim there was coercion, other than the promises, during his eleven (11) to twelve (12) mile car ride to the barracks.

Trooper Davidson testified that while Defendant was certainly in custody at this point, no kind of interrogation was taking place. There was no testimony from Defendant that he made any incriminating statements during the car ride. However, Trooper Hockenberry testified that questioning did begin after the Miranda warnings were given, and that Defendant may have admitted to being present at the scene of the crime and touching the victim's breast during the car ride. The Court finds that any statement made by

Defendant while in the car was voluntary and with full knowledge of its consequences pursuant to the Miranda warnings.

As to the encounter that took place at the Pennsylvania State Police barracks, there is no question it was a custodial interrogation after the Miranda warnings had been given. Again, in seeking to determine if the confession is involuntary because of psychological coercion, we look at a number of factors. The duration of the interview was only forty-five (45) to ninety (90) minutes and took place in a room in which victims and suspects alike talk with the police.

The Court notes that there was testimony about Defendant breaking down and getting emotional but this occurred after he made the statement that he was at the scene of the crime and touched Ms. Horst's breast. He broke down after being asked why he did what he did. Therefore, there was no evidence of Defendant being psychologically fragile until after his inculpatory statement so his breakdown is not a consideration in whether he was coerced into making the statement.

The main issue is whether Defendant was psychologically coerced by way of the Troopers methods of interrogation. Defendant testified that the cops used a good cop, bad cop approach with Trooper Hockenberry being the bad cop and Trooper Davidson being the good cop who promised to "go to bat" for Defendant if he cooperated and confessed. Defendant's only evidence as to Trooper Hockenberry's bad cop persona was that on May 27, 2003, the Trooper had said if he did not cooperate he would make it hard for him. As to Trooper Davidson's use of coercion, Defendant said it was implied to him that if he did not cooperate things would be harder, but he could not articulate how such an implication was made.

As to Trooper Hockenberry's statement of May 27, 2003, the Court already determined Defendant's rendition of the statement was not credible. As to the "go to bat" statement Defendant said Trooper Davidson made, neither of the Troopers remember such a statement being made. The Court finds Defendant's assertions not credible on this point. Furthermore, as already stated, even if such a statement had been made, "many states ... agree that a promise to bring a suspect's cooperation to the attention of the authorities (when accompanied by no other coercive tactics) does not render his confession involuntary." Commonwealth v. Purnell, 603 A.2d 1028 (Pa.Super. 1992)(citations omitted). Because Defendant could not articulate how Trooper Davidson's implied threat was relayed to him, the Court also finds this accusation to be not credible.

The Court has a problem with finding any of Defendant's accusations that he was coerced to be credible as he himself cannot keep straight what happened first, the "coercion" or his statements. Such is evidenced as follows:

Q: What did you specifically say to [Trooper Davidson]?

A: I told him I was at the scene, that I actually touched this woman. I touched her breast is what I told him.

Q: That was after that entire chronology that I just --

A: It was before him saying that he would go to bat for me with the D.A. As far as pleading guilty, that was the last thing the man said to me.

Q: It was after the going to bat statement that you made further admissions, correct?

A: I made that one admission, yes.

Transcript at p.75 - p.76.

The Court determines that the inculpatory statement which Defendant made sometime after being Mirandized and before completing the interrogation at the barracks was made voluntarily and free of coercion and therefore will not be suppressed.

Defendant's last claim is that he asserted his right to remain silent at the police barracks soon after the interrogation began and that the interrogation continued. Trooper Davidson specifically testified that he never heard Defendant request to stop the interview until after inculpatory statements were made. When Defendant did request to stop, all questioning stopped and Trooper Davidson testified that Defendant may have asked for an attorney at this point.

The Court finds Defendant's version of events not credible. There is no factual nor legal basis to support Defendant's Motions to Suppress.

Commonwealth's Motion in Limine

Before the Court is the Commonwealth's motion in limine to introduce evidence of prior bad acts and/or crimes.

The Commonwealth alleges that on May 22, 2003, Defendant attempted to rape the victim, Esther Horst. The Commonwealth set forth the following alleged facts in its motion and in its offer of proof.

> The charges now pending arise from an incident that occurred on May 22, 2003, at the Antrim Mennonite School in Greencastle, Franklin County, Pennsylvania. On that day, the victim, Esther Horst, who was white, twenty-one year old Mennonite female teacher at the school, was finishing some work in the school at approximately five o'clock in the afternoon. She was completely alone on the school property. From inside the school, she noticed a white box-type truck driving back and forth by the school slowly. She carried some items out to her car and went back into the building. As she was almost inside, she noticed this same truck pull into the school parking lot and stop.
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> The victim went to the porch of the school and saw a man, whom she later identified as the defendant, get out of the truck. She asked if she could help him and he said yes, that he was lost and that he was looking for Keystone Ford. He asked for directions in a friendly manner and said that he was from out of town. The two had some friendly conversation about getting directions, at which time she suggested that he go to one of the neighbors down the street. He said he didn't know what to do and it was suggested that a phone call to Keystone Ford might help. The victim retrieved the phone book from inside the school office for him while he waited on the porch. She suggested that he use his cell phone, which she assumed he had because he was driving a commercial vehicle. The defendant then said that he couldn't use his cell phone because the battery was dead. At this point, the victim offered to let him use the school phone. She led him to the office where the phone was located. He had closed the phone book before getting to the phone and then, when she asked him why, he appeared to look for the number again. The victim left him alone in the office while she returned to her car with some items.
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> When she was finished, the victim went back to the office since the defendant had not come out. He then sprang toward her, clamped his hand over her mouth and said, "Don't make a sound or you're dead." The defendant had a utility knife to her throat. He pushed her into one of the classrooms at the back of the building, forced her up against a wall at knifepoint, and began to fondle her, both over and under her clothing. The defendant tried to get her wrists into plastic handcuffs, unsuccessfully. He then ordered her to remove her jacket at knifepoint and again threatened to kill her if she didn't comply. As she began to remove her jacket, she felt his grip on her loosen and she used the opportunity to run. He caught her, put the knife back to her throat and threw her to the floor. At this point, the defendant was sitting on top of her on the floor. He then ordered her on to her stomach and when he got up to let her do this, the victim ran and got away from him. He grabbed her dress, but she got away.
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> The victim ran out into a field where the defendant chased her for a time, but then returned to his truck and drove away. The victim then flagged down a passing car and sought help.

The Commonwealth seeks to introduce evidence of the 1985 rape of Sandra (Beaudet) Neihart. The Commonwealth set forth the following facts in its motion and in its offer of proof.

> Sandra (Beaudet) Neihart will state that the incident took place on May 5th or 7th, 1985. She was a white, 14 year old living in an apartment in a neighborhood in Harrisburg. On the evening in question, she was at a friend's house in another neighborhood. Her friend's parents weren't home and uninvited people started showing up and eventually everyone was asked to leave. Sandra's curfew was 11 p.m. She left the party and was walking alone down Locust Lane around 11 p.m.
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> She heard someone approaching her quickly from behind. It was Douglas Wingert. He offered to walk her home. She was reluctant, but agreed in light of an earlier assault on another girl in the neighborhood months earlier in the same area. They took the shortcut through a wooded area to ball fields and a pool pavilion. She said she never would have done this had she been alone. The defendant insisted on taking a path through the woods (which was a shortcut within a shortcut). He was polite. The defendant then asked her if she had a "bowl" or a "bong". She knew he meant drug paraphernalia, but she said no, since she did not do drugs. At this point she became very scared because she knew that the other girl's attacker had asked her the same thing.

> They arrived at the area of the pavilion. She was very scared at this point and began to scream. The defendant then put his hand over her mouth and put a knife to her throat and said "This isn't going to take long." He asked her to take her clothes off (at knifepoint). At this point, two men came over and asked if there was a problem since they heard someone screaming. She said it was her and that she needed help. The defendant took them aside and said something to them - she doesn't know what. Then they started laughing and they left despite her asking them for help. She started to run away but the defendant caught her by the neck and spun her around. He still had the knife held to her and said "You're coming with me or it's over now." He took her back to the field area known as "the pits."
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> He began talking to her about all the other girls he has done this to and how nobody has said anything. He made her take her clothes off at knifepoint and he raped her vaginally. He then let her put her clothes back on, but he kept her bra and put it in his pocket. He held the knife to her even during the rape. He then took her to another field and made her perform oral sex on him. He then raped her again vaginally, still at knifepoint. When he finished, she kicked him as hard as she could in the groin (before he had his pants back on) and she began to run. He became very angry, yelling obscenities to her, and ran after her. She did not look back but could hear him following her. She eventually saw her apartment building and saw a police car in the driveway.
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> She ran straight into the police officer, but the defendant had stopped chasing her by this point, presumably because he had also seen the police.
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> Sandra's mother had called the police earlier when she did not come home at her curfew. The entire encounter with the defendant lasted approximately 3 hours.

In general, "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Pa.R.E. 404(b)(1). Pa.R.E. 404(b)(2) carves out the following exceptions to the general rule: "Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.E. 404(b)(3) allows proffered evidence of other crimes, wrongs, or acts to be admitted only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

The Commonwealth claims that the evidence of the 1985 rape is admissible as evidence of a common scheme or plan.

In order to determine whether or not a prior crime is admissible as evidence of a common scheme or plan, the facts of each incident must be examined for similarities. See Commonwealth v. Newman, 598 A.2d 275 (Pa. 1991).

The Commonwealth directs the Court to the following similarities:

> Both the 1985 rape and the current offense involve similar victims. Both Sandra (Beaudet) Neihart and Esther Horst were young, white, innocent females at the time of their attacks. They were both found alone in a public place and approached by the defendant in a friendly manner. In each case, the defendant made polite conversation with them and asked for their assistance with something. In Sandra's case, the defendant asked for drug paraphernalia in a non-threatening way. In Esther's case, he asked for directions and assistance with making a phone call.
>
> Suddenly, in each encounter, the defendant put his hand over the victims' mouth and put a knife to their throats. He threatened to kill them if they didn't comply. The victims were instructed, at knifepoint, to remove articles of clothing. In each case, the victim was forced to a more private location. If they tried to run, he chased after them. A knife was constantly held to each victim's throat. In both cases, the defendant fled the scene after each victim successfully ran away from him.

This Court determines that the Commonwealth's proffered evidence regarding the allegations of Ms. Neihart is sufficiently similar to the allegations which form the basis of Defendant's charges[2]. Therefore, the allegations constitute a common plan. Therefore, the evidence of Ms. Neihart's rape is admissible if the probative value outweighs the potential for prejudice.

In determining the probative value of the prior rape, whether the 1985 rape is too remote in time to be admissible in a trial for an offense that occurred in 2003 is a factor to be considered. See Commonwealth v. O'Brien, 836 A.2d 966, 971 quoting Commonwealth v. Miller, 664 A.2d 1310, 1319 (Pa.

1995)(citations omitted).

In O'Brien, the defendant committed crimes from 1982-1985 and then again in 1996. Instead of considering a time lapse of eleven (11) to fourteen (14) years, the Superior Court determined that time spent in jail is excluded from calculating time elapsed between offenses and thus considered only five years to have passed. See also Commonwealth v. Rush, 646 A.2d 557 (1994). In the present case, while the past crime occurred in 1985, Defendant was in prison for seventeen years, being released in May 2002. Therefore, the Commonwealth asserts that only one year can be said to have passed since Defendant's prior crime. The Court agrees with the Commonwealth and determines that with only a one-year lapse in crime, the 1985 rape was not too remote in time to be probative.

There is no question that the testimony offered by the Commonwealth is intended to be prejudicial to the defendant. By design, all evidence offered by the Commonwealth is intended to be prejudicial to the defendant. However, the Court agrees with the Commonwealth's assertion that the probative value of Ms. Neihart's testimony in the instant case is far greater than the prejudice it will bring the defendant.

"Whether relevant evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party." Commonwealth v. Gordon, 673 A.2d 866, 870 (Pa. 1996). In Gordon, the defendant was charged with indecent assault, thereby requiring the Commonwealth to prove that there was non-consensual touching for the purpose of sexual gratification. Id. Since the victim was the only witness, evidence of the defendant's other crimes was necessary since the jury could have reasonable doubt without corroboration of the victim's testimony. Id.

Similarly, in the present case, the Commonwealth directs the Court's attention to the following facts. The only witness to the attack in the Antrim Mennonite School is Esther Horst herself. There is no forensic evidence to corroborate the details of the attack. There are no eyewitnesses. Ms. Horst has no discernable physical injuries. Defendant's version is very different from Ms. Horst's in that he maintains that the only touching that occurred was of the victim's breast. Therefore, a jury could conclude that there is reasonable doubt that the attack progressed beyond an indecent assault.

The charges in the present case pertain to a criminal attempt to rape and the Commonwealth must prove, beyond a reasonable doubt that the defendant, "with intent to commit a specific crime (rape), ... [did] any act which constitute[d] a substantial step toward the commission of that crime." Pa.C.S.A. §901(a). The Commonwealth will be able to show evidence of Defendant's intent to commit rape by the steps he took during the attack on the present victim.

However, the Court agrees with the Commonwealth's claim that evidence of the prior rape is highly probative of the defendant's intent and plan to commit rape at the time of this attack. Again, Defendant may claim that his actions on May 22, 2003, merely constituted an indecent assault. This may be a reasonable conclusion for the jury to come to. Therefore, the testimony of Ms. Neihart is necessary to prove an attempt to rape in the present situation. As the facts of the incidents show, Ms. Neihart was subjected to a strikingly similar chain of events as Esther Horst. The result of each attack is different only because Ms. Horst successfully freed herself from the defendant's grasp.

Additionally, since Ms. Neihart will testify herself about the 1985 rape, Defendant's counsel will be able to cross-examine her about the incident. Also, the jury in the present case will be afforded the opportunity to weigh the credibility of her testimony. These factors will minimize any prejudice to Defendant.

Defendant's Motion in Limine

In his motion in limine, Defendant is seeking to suppress a statement made by Defendant in response to questioning on June 11, 2003. In response to Trooper Hockenberry's questioning as to why Defendant grabbed Ms. Horst's breast, Defendant said he occasionally blacks out and cannot control himself "when the demons come." In Defendant's Brief in support of his motion in limine, Defendant is seeking to suppress his admission of drug use, prior sexual assaults to his person, his incarceration and two different "demon" statements. However, the Court will only deal with the issue raised in the motion, as that is the only issue properly before the Court. The other issues will be addressed at trial if necessary.

Pennsylvania Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." Pa.R.Evi. 401. Defendant claims that the statement he made to Trooper Hockenberry about not being able to control himself "when the demons come" is not relevant to the Commonwealth's case. Defendant claims that the Commonwealth will be presenting this evidence only to cast him in a negative light.

However, the Commonwealth claims that the reason it will present the evidence is to support Ms.

Horst's story in this "he said, she said" situation. While Defendant admitted to touching Ms. Horst and arguing about that, Ms. Horst will testify that he fondled her over and under her clothes in her vaginal area. Without the evidence that Defendant admitted to losing control "when the demons come," the jury could find Defendant's story credible. However, the demon statement has a tendency to corroborate Ms. Horst's testimony and make her version more probable.

Defendant claims that because the statement does not address any of the essential elements of the crimes charged, it is not relevant. However, Defendant misstates the standard for relevancy and because the demon statement tends to make a fact that is of consequence, Ms. Horst's version of events, more probable then it would be without the statement, the Court determines that the statement is relevant.

Defendant claims that even if relevant, evidence of the statement is more prejudicial than probative pursuant to Pennsylvania Rule of Evidence 403 which states: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence." Pa.R.Evi. 403.

Defendant claims that the Commonwealth seeks to introduce this evidence only to present Defendant as someone of bad character with the propensity to commit crimes. The Commonwealth says the evidence "will not be admitted to show why the defendant did what he is accused of, but rather, to show that the victim's version of events is more probable and credible than the defendant's version of events." (Commonwealth's Brief.) The Commonwealth thus claims that any prejudice to Defendant is greatly outweighed by the probative value of the statement. The Court agrees.

Conclusion

Defendant's Omnibus Motion

The Court finds that the encounters between Defendant and the Troopers which took place on May 27, 2003, and May 28 or May 29, 2003, were not custodial interrogations, therefore, Miranda warnings were not required, and any evidence obtained during these encounters and all evidence obtained after shall not be suppressed.

As to the June 11, 2003 incident, the Court finds that Defendant did not ask the Troopers directly for an attorney and thus was not entitled to one before questioning ensued and therefore any evidence obtained after Defendant's alleged request is not suppressed. Statements made by Defendant after he was Mirandized were made voluntarily, were not coerced and are therefore not suppressed. Defendant did not invoke his right to remain silent until after inculpatory statements were made so therefore the statements are not suppressed.

Commonwealth's Motion in Limine

Because the Commonwealth's proffered evidence from the 1985 rape of Ms. Niehart, for which Defendant was convicted, is sufficiently similar to the facts which lead up to the current charges, the Court finds a common plan or scheme. Furthermore, because the Court finds that the probative value of the 1985 crime outweighs its prejudice, the Court determines that evidence of the 1985 crime is admissible in the present case.

Defendant's Motion in Limine

The Court will not suppress the Defendant's statement that he occasionally blacks out and cannot control himself "when the demons come" as it is relevant to the Commonwealth's case and is not more prejudicial than probative.

ORDER OF COURT

And now this 28th day of April, 2004, upon consideration of Defendant's Omnibus Motion, the hearing held on Defendant's Omnibus Motion, Defendant's Motion in Limine, the Commonwealth's Motion in Limine and briefs submitted by the parties on the Motions in Limine, the Court hereby orders:

1. Defendant's Omnibus Motion is denied.

2. Defendant's Motion in Limine is denied.

3. The Commonwealth's Motion in Limine is granted.

[1] Even if such a statement was made, it does not rise to the level of a show, threat or use of force.

[2] Defendant claims "if there is no denial of the incident by the defendant then admission is wholly improper." (Defendant's Brief). However, there is no support for such an assertion in case law.