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Commonwealth v. Eckenrode

COMMONWEALTH OF PENNSYLVNIA v. MARLIN F. ECKENRODE, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action — Law, No. 81 of 2009

Criminal Law; Rules of Evidence; Prior Bad Acts; Generally Inadmissible to Prove Conduct. Criminal Law; Rules of Evidence; Prior Bad Acts; Proof of Facts to Show Common Scheme, Plan, or Design.

Criminal Law; Rules of Evidence; Prior Bad Acts; Common Plan. Scheme or Design; Commonality of Actions, Roles and Situs; Similar Victims, Times, Locations, and Acts. Rules of Evidence; Prior Bad Acts; Probative Value; Remoteness in Time. Rules of Evidence; Probative Value; Prejudice.

1. Under the Rules of Evidence, the prior bad acts or unrelated criminal activity of a defendant are generally inadmissible to show action in conformity, or to show criminal responsibility.

2. Prior acts evidence may be admissible to prove another relevant fact, such as motive, opportunity, intent, preparation, plan, design, knowledge, identity, or absence of mistake or accident.

3. The exception allowing admission of evidence demonstrating a common plan, scheme or design provides that prior bad acts, charged or uncharged, may be admissible where such acts demonstrate a common design embracing commission of two crimes so related to each other that proof of one tends to prove the other.

4. To establish a common scheme, the details of the crimes must be examined for shared similarities. If the shared details the crime charged and the prior acts reveal a commonality of actions, roles and situs, the habits or patterns of action necessary for a common design are established.

5. In considering whether such a pattern of conduct has been demonstrated, the Court must examine the details of the incidents in their entirety, including similarity of victims, the times and locations where the crimes occurred, actions by the perpetrator, and relationships between the perpetrator and the victims.

6. Defendant's conduct in committing the acts alleged against both members of his family are so similar they indeed demonstrate a pattern of action or practice, so as to constitute a common scheme or design. The abuses alleged are not, as argued by the Defendant, isolated acts of abuse in either case. Both C.S. and his daughter allege the Defendant engaged in a recurring sequence of acts over a continuous period of time, testifying to acts so alike in character the recantation of each complainant mirrors that of the other.

7. The remoteness in time of prior bad acts should be considered in determining the probative value of other crimes evidence.

8. The importance of the time period in determining the admissibility of prior acts is inversely proportional to the similarity of the crimes in question. Matching characteristics of the prior acts and the crimes charged may serve to elevate the incidents into a unique pattern, so that remoteness in time is insufficient to significantly lessen the probative value of the testimony.

9. In the instant case while the lapse in time is indeed lengthy, the prior acts may be admitted because of the strikingly identical nature of acts and patterns of conduct to which each minor relative was subjected. The Defendant's prior bad acts against his daughter and those alleged against C.S. are strikingly similar, especially in their allegations as to the Defendant's sexual preferences. The details of the acts, coupled with their ongoing nature and pattern of repetition, occurring at any time the Defendant was alone with his victims, are sufficiently similar in the view of the Court to lessen the impact of the time lapse on the probative value of the evidence. The charged conduct here is distinguishable from

those uncharged prior acts only by reason that the victim herein reported the abuse and prevented the conduct from progressing.

10. The relevancy and the evidentiary need for the evidence of distinct crimes should be balanced against the potential such evidence will tend to suggest decision on an improper basis, or to divert the jury's attention away from its duty of weighing the evidence impartially.

11. Pennsylvania precedent is clear that mere harm is insufficient to prevent the admission of evidence, and there is no requirement that a trial be sanitized to eliminate all unpleasant facts from the jury's consideration.

12. Part of the consideration of whether relevant evidence is unduly prejudicial must include an examination of the degree to which such evidence is necessary to prove the case of the opposing party.

13. On the facts of the case, taking into account all the factors the Court is required to consider, the evidence of Defendant's prior uncharged acts is not unduly prejudicial. The Commonwealth is not required to silence the Defendant's daughter and prevent her from recounting the strikingly similar acts of abuse he forced upon her during her youth which demonstrate a common scheme to victimize his minor family members.

Appearances:

Lauren E. Sulcove, Esquire, *Assistant District Attorney*

Shawn Dorward, Esquire, *Counsel for Defendant*

OPINION

Van Horn, J., April 6, 2010

Statement of the Case

The Defendant is charged with committing multiple crimes against his granddaughter, C.S., such conduct allegedly ongoing from December 2006 until June 2008.[1] After his arrest on October 15, 2008, the Defendant's daughter, April Eckenrode, went to the police alleging similar conduct committed by her father against her from approximately December 1984 until December 1990. The Defendant was charged with these crimes as well, in a separately captioned case. A preliminary hearing in both cases was conducted January 13, 2009, resulting in the charges being bound over for disposition by this Court. Following the waiver of formal arraignment, the Defendant filed Omnibus Pre-Trial Motions in both cases, with hearing on the same held July 20, 2009. By Order dated July 29, 2009, the Court denied Defendant's motions.

On August 19, 2009, the Commonwealth filed a Motion for Consolidation of the two cases, combined with a Motion for Closed Captioned Testimony and a Tender Years Motion. On December 3, 2009, hearing was held upon all three motions, including testimony from the minor complaint in case 81-2009 taken in camera. During the hearing, the Motion for Closed Captioned Testimony was withdrawn, with leave given to re-file at the time of trial if necessary. Upon the close of taking evidence, the Court instructed counsel for the Commonwealth and the Defendant to submit legal memoranda in support of their respective positions on the motions which remained for disposition. By Order dated January 5, 2010, the Court granted the Commonwealth's Motion for consolidation, as well as the Tender Years Motion.

At the pre-trial conference held January 6, 2010, the Commonwealth disclosed to the court and the defense that the charges involving Defendant's daughter were time barred by the statute of limitations, having expired December 26, 1996. The Commonwealth then made oral motion to admit the testimony of April Eckenrode as other crimes evidence. By Order dated January 7 2010, the Court instructed the Commonwealth to submit such motion in writing, no later than January 22, 2010 with a response from the defense due no later than February 5, 2010. Thereafter, trial in the matter was continued, and Application for Noelle Prosequi as to the action involving the Defendant's daughter submitted. The Commonwealth's written motion was submitted January 22, 2010, and the response of the Defendant received February 5, 2010. As the Commonwealth points out, the legal analysis involved in admitting evidence or prior bad acts is similar to that involved in addressing a motion for consolidation. However, in light of the severity of the charges involved, and the nature of the evidence at issue, the Court will analyze the admissibility issue anew. Having heard testimony, read the submissions of the parties and the transcript of the preliminary hearing, and reviewed the applicable law, the Court now

renders its decision in this Opinion and Order.

Facts of the Case

To determine the Commonwealth's motion, the Court is required to consider the facts of the case, and those surrounding Defendant's prior bad acts. In finding such facts, the Court relies upon the testimony given at the December 3, 2009, hearing [hereinafter N.T., 12/3/09] as well as that given the preliminary hearings of case numbers 78 and 81 of 2009 [hereinafter T.P.H 1/13/09], before Magisterial District Judge Kelly L. Rock. The Court has previously set forth such findings in our Opinion and Order dated January 5, 2010. After reviewing these materials anew, the Court is satisfied with its previous discussion of the facts, which we will incorporate herein by reference and attach hereto.

Discussion

Under the Rules of Evidence, the prior bad acts or unrelated criminal activity of a defendant are generally inadmissible to show action in conformity therewith, or to show criminal propensity. See Pa. R.E. 404(b)(1) (2010). However, such evidence may be admissible to prove another relevant fact, such as motive, opportunity, intent, preparation, plan, design, knowledge, identity, or absence of mistake or accident. Id. at 404(b)(2); Commonwealth v. Sherwood, 982 A.2d 483, 497 (Pa. 2009).[2] Evidence is relevant where "it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact." Commonwealth v. Page, 965 A.2d 1212, 1219 (Pa. Super. Ct. 2009). A trial court must balance the probative value of such evidence against its potentially prejudicial impact, allowing admission only where the former outweighs the latter. Sherwood, 982 A.2d at 497; Pa. R.E. 404(b)(3). Admissibility of evidence is a matter within the sound discretion of the trial court, reviewed for an abuse of discretion. See Commonwealth v. Gordon, 673 A.2d 866, 870 (Pa. 1996).

The Commonwealth asserts the prior bad acts committed by the Defendant against his daughter are admissible. Specifically, the prosecution asserts the similarities between the incidents demonstrate a common plan. Scheme or design. This exception provides that prior bad acts, charged or uncharged, may be admissible where such acts demonstrate a common design "embracing commission of two crimes so related to each other that proof of one tends to prove the other." Gordon, 673 A.2d at 869.

To establish a common scheme, the details of the crimes must be explained for shared similarities. See Commonwealth v. O'Brien, 836 A.2d 966, 969 (Pa. Super. Ct. 2003). If the shared details the crime charged and the prior acts reveal a commonality of actions, roles and situs, the habits or patterns of action necessary for a common design are established. See O'Brien, 836 A/2d at 970-71; Commonwealth v. Andrulewicz, 911 A.2d 162, 169 (Pa. Super. Ct. 2006). In considering whether such a pattern of conduct has been demonstrated, the Court must examine the details of the incidents in their entirety, including similarity of victims, the times and locations where the crimes occurred, actions by the perpetrator, and relationships between the perpetrator and the victims. See O'Brien, 836 A.2d at 969. (quoting Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super Ct. 1993)).

The court finds the descriptions of the Defendant's conduct in committing the acts alleged against both members of his family are so similar they indeed demonstrate a pattern of action or practice, so as to constitute a common scheme or design. The abuses alleged are not, as argued by the defendant, isolated acts of abuse in either case. Both C.S. and his daughter allege the Defendant engaged in a "recurring sequence of acts over a continuous period of time" so alike in character the testimony of each complainant mirrors the other. Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super. Ct. 1993). The acts of abuse were not discrete, random or remote, but rather repeated incidents occurring at almost any time the Defendant had unfettered access to the victim. The acts against C.S. may not have occurred daily, but they did occur, as did those against Ms. Eckenrode, at any time the Defendant and the victim were unsupervised. Defendant had the opportunity to abuse his daughter daily because she lived in his home, but similarly abused C.S. whenever he had unsupervised access to the child. The majority of the abuses also occurred in the Defendant's home, in almost every room, although both victims remembered and testified to incidents occurring on the Defendant's living room couch.

Each was a child under twelve (12) when the victimization began, such abuse being possible due to the close familial proximity between the victims and the Defendant. And as the Court has stated and the findings of fact reveal, the Defendant subjected both his daughter, and later C.S., to repeated and consistent acts of sexual abuse. His daughter testified to such abuse bring an expected part of her daily life from her earliest memory, casing only when she attained majority. C.S. has also testified to continuous acts of abuse from the time she was seven (7) years old. Defendant points to the ages of the victims as reason the prior acts are dissimilar to those alleged. However, given the repeated and escalating acts to which C.S. has already testified, there is no reason to believe that if the child had not disclosed the abuse to her mother, the Defendant's conduct would not have continued. Both cases are also similar in that the alleged

repeated abuse only ceased when the Defendant no longer had access to the victims, rather than due to any remorse or choice by him to stop his actions.

In addition, the prior acts themselves allegedly committed by the Defendant against his daughter are strikingly similar to the acts of abuse to which C.S. was subjected. Both victims were forced to perform oral sex on the Defendant while he was positioned above them. Both were stroked by the Defendant outside their clothes on their breasts and vaginas. The testimony of both C.S. and Ms. Eckenrode reveals the defendant preferred to conduct his acts of abuse upon them while their backs were turned toward him. As the Court noted in its prior Opinion, there is no reason to believe that Defendant would not have continued his escalating course of conduct with C.S. as he did with his daughter, proceeding from anal or vaginal rape. The fact that C.S. has not yet attained the age at which Ms. Eckenrode testified her father began his acts of vaginal rape upon her is not sufficient to differentiate such similar courses of conduct with each victim. Cf. Commonwealth v. Andrulewicz, 911 A.2d at 168 (similar conduct in initiating abuse and similar location sufficient despite carrying degree of impropriety with each victim).

Defendant maintains the assaults upon hi daughter are too remote in time to be considered probative of those alleged against C.S., occurring sixteen (16) years prior. Indeed, the lapse in time prevented prosecution of the acts by reason of the statute of limitations. The remoteness in time of prior bad acts should be considered in determining the probative value of other crimes evidence. See Commonwealth v. Aikens, ----- A. 2d -----, 2010 Westlaw 737642, at *3-4 (Pa. Super. Ct. 2010); Smith, 635 A.2d at 1098. Our superior court has stated that "the importance of the time period is inversely proportional to the similarity of the crimes in question." Commonwealth v. Luktisch, 680 A.2d 877, 879 (Pa. Super. Ct. 1996).

The Defendant's prior bad acts against his daughter and those alleged against C.S. are strikingly similar, especially in their allegations as to the Defendant's sexual preferences. The details of the acts, coupled with their ongoing nature and pattern of repetition, occurring at any time the Defendant was alone with his victims, are sufficiently similar in the view of the Court to lesson the impact of the time lapse on the probative value of the evidence. This conclusion is consistent with that in Luktisch, a seminal case addressing admission of prior crimes evidence in instances of child sexual abuse. See Luktisch, 680 A.2d at 879. In that case, the Defendant's adult daughter was permitted to testify as to abuse that ended nineteen (19) years prior to trial, and began twenty four (24) years previous. Id. In a more recent case, the Defendant's then thirty two (32) year old daughter testified to abuse which occurred when she was fifteen (15), seventeen (17) years prior. See Aikens, supra, at *2.

The Superior Court found that the "matching characteristics" of the acts served to "elevate the incidents into a unique pattern" so that the remoteness in time was insufficient to significantly lesson the probative value of the testimony. Id at *4. In the instant case, while the lapse in time is likewise lengthy, the prior acts may be admitted because of the strikingly identical nature of acts and patterns of conduct to which each minor relative was subjected. Cf. Aikens. The Defendant points out that Ms. Eckenrode testified to vaginal rape, whereas C.S. testified that although the Defendant touched his penis to her vagina, there was no vaginal penetration. Yet Ms. Eckenrode testified vaginal rape began when she attained the age of thirteen (13), an age C.S. has not reached. As in Aikens, the conduct here is distinguishable only by reason that the victim herein reported the abuse and prevented the conduct from progressing. Id. at *4.

Finally, the Court must consider whether the probative value of these crimes is outweighed by the potential for undue prejudice to the Defendant. See Commonwealth v. Gordon, 673A.2d 866, 870 (Pa. 1996). Thus, the relevancy and the evidentiary need for the evidence if distinct crimes should be balanced against the potential evidence will tend to suggest decision on an improper basis, or to divert the jury's attention away from its duty of weighing the evidence impartially. See Pa. R.E. 403, cmt. In weighing the possible unfair prejudice to the defendant, the Court must also consider whether a cautionary jury instruction might ameliorate the prejudicial effect of other crimes evidence. See Commonwealth v. Dillon, 925 A.2d 131, 141 (Pa. 2007); Pa. R.E. 404(b), cmt.

The testimony of his daughter in the prosecution for the crimes committed against C.S. will indeed be harmful to the Defendant. Yet our precedent is clear that mere harm is sufficient to prevent the admission of the evidence. See Dillon, 925 A.2d at 141. Rather, "exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." Commonwealth v. Page, 965 A.2d 1212,1220 (Pa. Super Ct. 1009). Our Supreme Court has stated that there is no requirement "to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which they defendant is charged." Dillon, 925 A.2d at 141 (citing Commonwealth v. Lark, 543 A.2d at 501). Evidence regarding the Defendant's election to victimize his daughter and granddaughter in such a repeated, consistent, and depraved fashion does indeed make for unpleasant and damaging testimony. However, the abuse of Ms. Eckenrode completes the story of the case, explaining both the acts of

the Defendant and his common design for both minor children, as well as the actions of his family after the abuse of C.S. was disclosed to her mother. In addition, instructions from the Court can elucidate for the jury the proper purpose of the evidence, instructions which the law presumes they will follow. See Commonwealth v. Brown, 786 A.2d 961, 971 (Pa. 2001).

The Court is also required to consider the Commonwealth's need for the evidence. See Luktish, 680 A.2d at 879. The Superior Court has stated that "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." O'Brien, 836 A.2d at 972 (citing Gordon, 673 A.2d 866, 870 (Pa. 1996)). As in O'Brien, here the Commonwealth must prove the charges on uncorroborated testimony by the minor victim. The Defendant asserts that the allegations of abuse are a mistake, arising from a misunderstanding between himself and C.S.'s mother as to an incident where he was aroused but both he and C.S. were fully clothed.[3] The disparity in the stories, and the age of the complainant, could lead to reasonable doubt as to whether the charged crimes occurred. In addition, evidence of a common scheme involving similarly situated complainants is relevant to bolster the credibility of those complainants, an important consideration in child sexual assault cases. See Commonwealth v. Hacker, 959 A.2d 380, 394 (Pa. Super. Ct. 2008). Given the youth of the child, and the uncorroborated nature of her allegations, absent evidence of the Defendant's common scheme, a jury could conclude the child is not credible. Thus, as in O'Brien, the Court may conclude the evidence is necessary to the Commonwealth's case.

The testimony will be prejudicial to the Defendant, which is "what it is designed to be." Cf. O'Brien, 836 A.2d at 972. However, on the facts of the case, taking into account all the factors the Court is required to consider, it is not unduly prejudicial. The Commonwealth is not required to silence the Defendant's daughter and prevent her from recounting the strikingly similar acts of abuse he forced upon her during her youth which demonstrate a common scheme to victimize his minor family members. The evidence is highly relevant despite the lapse in time, and its admission will not be unduly prejudicial.

ORDER OF COURT

April 6, 2010, upon review of the Commonwealth's Motion to Consolidate and its Tender Years Motion, the Defendant's Answer, the legal memoranda and arguments submitted by the parties, the evidence presented in the form of the stipulated transcript from the preliminary hearings in these matters, and after conducting a review of the applicable law, it is hereby ordered: The Commonwealth's Motion to Admit Evidence of Prior Bad Acts is granted.

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[1] The charges include: rape of a child, involuntary deviate sexual intercourse with a child, and indecent assault on a person less than thirteen years of age. See Pa. C.S. §§ 18 Pa. C.S. 3121, 3123, 3126 (2009).

[2] Such evidence is also admissible "in situations where the bad acts were part of a chain or sequence of events that formed the history of the case and were part of its natural development." See Page, 965 A.2d at 1219.

[3] The Court notes such an assertion, presented at trial, would clearly render the testimony admissible under another prior acts exception, to prove absence of mistake or accident.