

# PITTSBURGH LEGAL JOURNAL

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## OPINIONS

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## COMMONWEALTH OF PENNSYLVANIA vs. COREY BREWER

### *Criminal Trials–Evidence–Motion in Limine–Prior Bad Acts*

*In a domestic violence case, the Commonwealth tried to admit three prior ex-girlfriends of Defendant that would testify to abusive acts that Defendant committed on them. The Court excluded this evidence because the probative value is substantially outweighed by its prejudicial effect; the jury would certainly view the evidence as propensity evidence, and the evidence would confuse the jury because it would put the jury in a position to deliberate four different cases. The evidence was excluded.*

Case No.: CP-02-CR-07039-2021. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Mariani, J.

### Opinion

This is a Commonwealth appeal of this Court's denial of the Commonwealth's motion in limine seeking to admit certain evidence in this case. The defendant is charged with three counts of Strangulation, two counts of Sexual Assault, one count of Aggravated Assault, one count of Unlawful Restraint, one count of Terroristic Threats and three counts of Simple Assault. In its motion in limine, the Commonwealth sought to introduce testimony from three women with whom the defendant had been in consensual, romantic relationships and none of whom were the alleged victim in this case, that the defendant had been physically violent toward them and had physically prohibited them from leaving his residence. This Court denied the Commonwealth's motion for the reasons set forth herein.

The Commonwealth asserts that the evidence it sought to admit was admissible under Rule 404(b) of the Pennsylvania Rules of Evidence. "The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." *Commonwealth v. Cunningham*, 805 A.2d 566, 572 (Pa.Super. 2002), appeal denied, 573 Pa. 663, 573 Pa. 663, 820 A.2d 703 (2003). As a result, rulings regarding the admissibility of evidence will not be disturbed for an abuse of discretion "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.'" *Commonwealth v. Einhorn*, 911 A.2d 960, 972 (Pa. Super. 2006).

It is axiomatic that evidence that is not relevant is not admissible. Pa.R.E. 402; *Commonwealth v. Robinson*, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998) ("The threshold inquiry with admission of evidence is whether the evidence is relevant."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. See also *Commonwealth v. Edwards*, 588 Pa. 151, 181, 903 A.2d 1139, 1156 (2006) (evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact).

In *Commonwealth v. Broaster*, 863 A.2d 588, 592 (Pa. Super. 2004), the Superior Court explained that "[r]elevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" See also *Commonwealth v. Dejesus*, 584 Pa. 29, 880 A.2d 608, 614-615 (Pa. Super. 2005).

As set forth in *Commonwealth v. Owens*, 929 A.2d 1187, 1191 (Pa. Super.2007) quoting *Broaster*, 863 A.2d at 592,

Because all relevant Commonwealth evidence is meant to prejudice a defendant, [however] 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. As this Court has noted, a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged.

Generally, evidence that a defendant committed other crimes, wrongs, or acts is inadmissible to prove that a defendant acted in conformity therewith. Pa. R. Evid. 404(b)(1). This type of evidence may be admissible, however, when it is offered for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident so long as the trial court concludes the probative value of the evidence outweighs its potential for prejudice. Pa. R. Evid. 404(b)(2), (3). See *Commonwealth v. Henkel*, 938 A.2d 433, 444 (Pa.Super. 2007). As the Pennsylvania Supreme Court has specifically noted, "because the impact of admitting bad acts evidence against a defendant is significant and may be highly prejudicial, . . . Rule 404(b) expressly provides that the evidence is admissible 'only if the probative value of the evidence outweighs its potential for unfair prejudice.'" Pa.R.E. 404(b)(2). *Commonwealth v. Yale*, 249 A.3d 1001, 1015 (Pa. 2021). Furthermore, the Yale Court has expressed "Pa.R.E. 404(b) embodies our pre-codification jurisprudence acknowledging the inadmissibility of propensity evidence." *Id.* at 1018.

This Court denied the Commonwealth's motion in limine because it believes that the prejudicial value of the evidence is substantially outweighed by the probative value of the evidence. In this case, the charges filed against the defendant essentially involve allegations that between May 1, 2021 and July 11, 2021 the defendant violently sexually assaulted the victim, with whom he had been having a consensual romantic relationship. The defendant is accused of preventing the victim from leaving his residence, strangling her and threatening her with a knife. The defendant is accused of taking the victim's cell phone to prevent her from communicating with others. He's also accused of threatening her that he would kill her children and her father if she did not do what the defendant wanted.

In its Statement of Errors Complained of on Appeal, the Commonwealth recites the evidence it seeks to admit. The Commonwealth seeks to present testimony from a witness that in 2008, the witness had a consensual romantic relationship with the defendant and during that relationship the defendant would regularly lose his temper, scream at her, strangle her and force her to have sexual intercourse. According to this witness, the defendant would threaten her with a deadly weapon and prevent her from leaving his residence. The Commonwealth also seeks to present testimony from another female witness who had a consensual romantic relationship with the defendant. The witness would testify that the defendant would regularly lose his temper, scream at her, assault her by strangling her. According to this witness, the defendant would prevent her from leaving his residence, he would drag her back into the residence and he would monitor her cell phone calls. Finally, the Commonwealth seeks to present testimony from a female with whom the defendant has a consensual romantic relationship in 2018. According to this witness, the defendant saw photographs of the witness' husband on her computer and he became enraged and strangled her until she lost consciousness. She claims the defendant prevented her from leaving the residence and she had to escape from his residence.

This Court's overarching concern about the admission of the government's proffered evidence is that it is mirrors precisely the conduct charged against the defendant in this case and it is emotionally charged evidence. The Commonwealth argues that the evidence should be admissible because it qualifies as one of the exceptions to Rule 404(b). In this Court's view, however, this evidence

is severely prejudicial propensity evidence. The real impact this evidence will have is that it virtually implores the jury to convict because the defendant allegedly committed virtually identical acts against prior paramours. A jury will most certainly view this evidence as propensity evidence. The jury will certainly determine that the defendant acted in conformity with that evidence when evaluating the defendant's guilt rather than base its verdict on the direct evidence in this case. One of the incidents occurred approximately 12 years ago. The other incidents are dated as well. Because the conduct of the prior incidents is so graphic and virtually identical to the facts of the instant case, this Court does not believe that a limiting instruction will cure the substantial prejudice that will occur if this evidence is admitted at trial. Accordingly, in this Court's view, the probative value of this evidence is substantially outweighed by the severely prejudicial nature of the evidence.

A second, important, reason that this evidence should not be admitted is the risk of confusion of issues. The jury will, in effect, be put in a position to deliberate on four different cases, with four alleged different victims, concerning what happened in each episode of each of the four relationships. The risk of confusion of issues is substantial.

For the foregoing reasons, the denial of the Commonwealth's motion was proper and should be affirmed.

BY THE COURT:  
/s/Judge Anthony M. Mariani

## COMMONWEALTH OF PENNSYLVANIA vs. KEITH FOSTER

### *Criminal Trials–Fourteenth Amendment–Miranda Rights–Voluntariness–Suppression*

*After obtaining a search warrant for Defendant's DNA, police officer/detective summoned Defendant to speak with police regarding the pending case. While speaking with detectives, Defendant was specifically told he was not under arrest and not a suspect, and Defendant gave incriminating statements to police. These statements were suppressed as involuntary. The Court found that the detective gave misrepresentations to Defendant designed and induced to get him to speak. The Court found that the statements were not a product of an informed and conscious choice, and as such, they were involuntary. The statements were suppressed.*

Case No.: CP-02-CR 6450-2021. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Mariani, J.

### Opinion

This is a Commonwealth appeal of this Court's grant of a motion to suppress the defendant's statements. During the course of an investigation into a sexual assault, Detective Brian Sellers of the City of Pittsburgh Bureau of Police obtained a search warrant for a buccal swab of the defendant's DNA. In the affidavit of probable cause submitted in support of that search warrant, Detective Sellers represented to a judicial officer that probable cause existed to obtain the defendant's DNA based on the fact that male DNA was recovered from the alleged victim and the defendant was alone with the alleged victim on the evening of the alleged sexual assault. Shortly after obtaining the search warrant, Detective Sellers summoned the defendant to police headquarters and interviewed the defendant. The defendant was not placed in handcuffs or other restraints and he was not provided with Miranda warnings. Detective Sellers specifically informed the defendant that he was not under arrest and he was not a suspect in the sexual assault of the victim. He then interviewed the defendant.

This Court granted suppression because it believed the defendant's statement was not voluntary. "[T]he ultimate test for voluntariness is whether the confession is the product of an essentially free and unconstrained choice by its maker." *Commonwealth v. Fleck*, 471 A.2d 547, 549 (Pa.Super.1984). "[T]he voluntariness of a confession is determined by the totality of the circumstances." *Commonwealth v. Templin*, 795 A.2d 959, 963-964 (Pa. 2002) (citation omitted). In *Templin*, the Pennsylvania Supreme Court has explained as follows:

In determining voluntariness, the question is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. "By the same token, the law does not require the coddling of those accused of crime. One such need not be protected against his own innate desire to unburden himself." *Commonwealth v. Graham*, 408 Pa. 155, 162, 182 A.2d 727, 730-31 (1962). Factors to be considered in assessing the totality of the circumstances include the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion.

Id. at 966 (some internal quotation marks and citations omitted).

It is this court's view that the circumstances of the defendant's interrogation deprived the defendant of making a free and unconstrained choice to undergo an interview relative to the sexual assault of the alleged victim. The defendant was not restrained or informed that he was not permitted to leave and the interview did not appear coercive. However, Detective Sellers misrepresented to the defendant that he was not a suspect in the sexual assault of the victim prior to interviewing him. It is this Court's belief that Detective Sellers' misrepresentations were designed to and did induce the defendant to speak with Detective Sellers. This Court firmly believes that had Detective Sellers been truthful with the defendant, Detective Sellers would have informed the defendant of his Miranda rights and the defendant would have been in a position to knowingly and intelligently make a decision as to his constitutional rights. This Court does not believe that the defendant's decision to speak with Detective Sellers was a product of an informed and conscious choice. On the contrary, his decision to speak with Detective Sellers was borne solely from Detective Sellers' affirmative misrepresentation that the defendant was not a suspect in a sexual assault. This assurance manipulated the defendant to believe that he was exposed to no jeopardy by agreeing to the interview.

For the foregoing reasons, the suppression motion was properly granted.

BY THE COURT:  
/s/Judge Anthony M. Mariani