

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ERIKA EBERHARDINGER,	:	CIVIL ACTION NO. 1:16-CV-2481
	:	
Plaintiff	:	(Chief Judge Conner)
	:	
v.	:	
	:	
CITY OF YORK, et al.,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 26th day of September, 2019, upon consideration of plaintiff's motion (Doc. 99) *in limine*, wherein plaintiff seeks exclusion of “any and all statements or insinuations of Matthew Foster’s guilt as to aggravated assault,” and the court noting that defendant Matthew Foster (“Foster”) pled *nolo contendere* or “no contest” to the charge of aggravated assault—18 PA. CONS. STAT. § 2702(a)(4)—stemming from the car-chase incident underlying this case, (see Doc. 58-6 at 128), which statute provides that a person is guilty of aggravated assault if he “attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon,” 18 PA. CONS. STAT. § 2702(a)(4),¹ and the court noting that when Foster entered his *nolo contendere* plea to aggravated assault, he repeatedly explained that,

¹ Defendants assert that Foster’s aggravated assault was “upon Officer Smith,” and they reference 18 PA. CONS. STAT. § 2702(a)(6) (dealing with assault of an officer by physical menace resulting in “fear of imminent serious bodily injury”), when discussing Foster’s conviction. (See Doc. 124 at 1, 3). The problem with these assertions is twofold: *first*, Foster’s conviction was under Section 2702(a)(4), which is recited *supra*; *second*, there are no facts of record about this offense because Foster pled no contest and the sentencing judge based her acceptance of that plea on the Commonwealth’s proffer, which itself derived entirely from the accounts of officers involved in the incident. (See Doc. 58-6 at 144, 146). The accuracy of those accounts, of course, is a matter of genuine dispute in this case.

due to drug and alcohol ingestion and a head injury sustained from backing into a telephone pole, he does not “remember anything” that occurred after hitting the pole, (see Doc. 58-6 at 139, 143, 144, 146), which lack of memory precipitated Foster’s plea of no contest, (see id.), and the court noting that although a plea of *nolo contendere* results in a conviction, it “is not an admission of guilt and thus the fact that a defendant made such a plea cannot be used to demonstrate that he was guilty of the crime in question,” United States v. Adedoyin, 369 F.3d 337, 343-44 (3d Cir. 2004), and that “a nolo plea does not admit underlying facts or guilt,” Sharif v. Picone, 740 F.3d 263, 270 (3d Cir. 2014), and it appearing that defendants posit that Foster’s “conduct . . . will be a central factor at trial and his credibility will be crucial in this case,” (Doc. 124 at 3), but the court observing that, because Foster did not admit underlying facts or guilt, his *nolo* plea would be irrelevant to assessing his credibility or establishing his conduct on the night in question,² see Sharif, 740 F.3d

² We are cognizant that in our September 18, 2018 memorandum we indicated that evidence of Foster’s convictions “is relevant” to the excessive force claim but not determinative. See Eberhardinger v. City of York, 341 F. Supp. 3d 420, 432 n.5 (M.D. Pa. 2018), aff’d, __ F. App’x __, 2019 WL 3544021 (3d Cir. Aug. 5, 2019). However, this cursory footnote encompassed all of Foster’s convictions, many of which were the result of guilty pleas, not just the aggravated assault charge. Moreover, because we rejected defendants’ argument at the Rule 56 stage insofar as Foster’s convictions would not be dispositive on the excessive force claim, there was no need to isolate and scrutinize the aggravated assault conviction. After undertaking a more fulsome examination, we find little, if any, relevance of this *nolo*-plea conviction. It is clear that Foster pled no contest because he could not remember what happened after hitting the telephone pole and injuring his head. Nothing from this *nolo* plea will make any material fact in the instant case “more or less probable,” see FED. R. EVID. 401, because no facts related to aggravated assault were admitted. See Sharif, 740 F.3d at 270. Even if the *nolo* plea were relevant, it would fail the Rule 403 balancing test because any negligible probative value would be substantially outweighed by danger of unfair prejudice and juror confusion. See FED. R. EVID. 403.

at 270, and the court finding that none of the cases on which defendants rely are applicable to the matter *sub judice* because those cases did not involve convictions resulting from *nolo contendere* pleas, (see Doc. 124 at 4-5 (citations omitted)), it is hereby ORDERED that:

1. Plaintiff's motion (Doc. 99) *in limine* is GRANTED.
2. Defendants are PRECLUDED from discussing or referring to Foster's 2015 conviction for aggravated assault resulting from his plea of *nolo contendere*. Defendants are further PRECLUDED from making or eliciting statements that indicate Foster's guilt as to this offense or that reference related factual allegations or proffers from his 2015 plea and sentencing.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania