NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
DAVID LEWIS TAYLOR,	:	
Appellant	:	No. 1381 WDA 2011

Appeal from the Judgment of Sentence entered on July 7, 2011
in the Court of Common Pleas of Erie County,
Criminal Division, No. CP-25-CR-00000243-2010

BEFORE: MUSMANNO, WECHT and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 18, 2013

David Lewis Taylor ("Taylor") appeals from the judgment of sentence entered following his conviction of one count each of rape by forcible compulsion, sexual assault, aggravated indecent assault without consent, and corruption of minors; and three counts of indecent assault without consent.[1] We reverse and remand for a new trial.

The trial court summarized the history underlying the instant appeal as follows:

> On September 5, 2009, [S.B.] received a text message from [A.J.] to babysit [A.J.'s] child. [S.B.'s] father, [D.B.], drove [S.B.] to [A.J.'s] house where [A.J.] resided with her child and her boyfriend, … Taylor.
>
> When [S.B.] went inside the house, she discovered that [Taylor] was there with the baby in the bassinette. The house was dark with no lights on. [S.B.] sat on a couch near the door

[1] ***See*** 18 Pa.C.S.A. §§ 3121, 3124, 3125, 6301, 3126.

*Retired Senior Judge assigned to the Superior Court.

> and played with a puppy. [Taylor] got up, locked the front door, and sat on the couch with [S.B.] [S.B.] testified that [Taylor] tried to kiss her neck and ear[,] but she pulled away. [Taylor] then pinned [S.B.] down with his arm, removed her pants, and forcibly raped her. Immediately afterward, [S.B.] grabbed her clothes and cell phone, unlocked the door and left the house.
>
> [S.B.] texted her friend, [B.A.], who was also babysitting nearby, and asked to come over. [B.A.] obtained permission from the mother of her babysitting charge, Heather Seamans ["Seamans"]. When she arrived at the Seamans' residence, [S.B.] appeared to be upset, crying, and disheveled. [S.B.] told [B.A.] that she had been raped.
>
> When Seamans and her friend, Kerry Chase, returned to the house, they both observed [S.B.] crying. [S.B. and B.A.] stayed the night at the Seamans' home. [S.B.] returned to her home the next morning. She did not disclose the rape to anyone else, including her parents.
>
> [S.B.] eventually told her mother, [I.B.], about the rape on November 17, 2009. [I.B.] called her husband and he agreed to meet them at the Corry police station.

Trial Court Opinion, 11/29/11, at 1-2. Thereafter, Taylor was arrested.

Following a jury trial, Taylor was convicted of the above-described charges, after which the trial court sentenced Taylor to an aggregate prison term of 8-16 years. Taylor timely filed a Notice of appeal, followed by a court-ordered Concise Statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Taylor now presents the following claims for our review:

> I. [Whether the trial court erred or abused its discretion by] granting the Commonwealth's Motion for Permission to Use Evidence of Prior Bad Acts under Rule 404(b) of the Pennsylvania Rules of Evidence and denying [Taylor's] Motion to Reconsider the Trial Court's Order of July 12, 2010[,] and allowing the Commonwealth to admit evidence regarding a prior bad act

> arising from an incident on January 3, 2009[,] when the evidence clearly was not evidence of a "common scheme and/or plan" since clearly the evidence between the incident on January 3, 2009[,] and the case *sub judice* was not "so distinctive and so nearly identical as to become the signature of the same perpetrator[,]" and the prejudicial value of the evidence clearly outweighed its probative value, therefore the evidence was inadmissible under Pennsylvania Evidence Rule 404(b)[?]
>
> II. Whether or not the trial judge usurped the jury's function in determining the credibility of [Taylor's] alibi witness, Shelly Pollaro ["Pollaro"], when the judge on two different occasions, without prompting from the Commonwealth, cautioned the witness about telling the truth when the witness testified as a Commonwealth witness regarding the facts surrounding the incident of January 3, 2009 (the prior bad act erroneously admitted by the court), knowing full well that the witness was also being called by [Taylor] as an alibi witness?

Brief for Appellant at 5.

Taylor first claims that the trial court improperly admitted evidence regarding a crime Taylor committed on January 3, 2009. ***Id.*** at 21. As a result of the prior incident, Taylor acknowledges, he pled guilty to simple assault, recklessly endangering another person, criminal attempt (indecent assault), possession of a controlled substance and harassment. ***Id.*** at 22-23. However, Taylor argues that the prior bad acts evidence was inadmissible, as there was "nothing distinctive" in either of the two incidents such that the incidents were "so identical as to become the signature of the same perpetrator." ***Id.***

In support, Taylor directs our attention to factual differences between the January 2009 incident and the September 2009 incident at issue in the present case. ***See id.*** at 23, 25 (wherein Taylor points out that the January

2009 incident was a spur of the moment reaction fueled by alcohol and possibly drugs), 24 (wherein Taylor argues that the January 2009 incident was "was an incredibly violent incident leaving the victim, [A.J.], bloodied, bruised and battered."). Comparing the two incidents, Taylor points out that the acts of violence that occurred during the January 2009 incident were absent during the September 2009 incident. ***Id.*** at 25. Taylor further argues that the September 2009 incident was not an act of domestic violence; did not include allegations of drug or alcohol use; and did not involve other people. ***Id.*** at 25-26. Thus, Taylor argues, the January 2009 incident and the September 2009 incidents are not "so nearly identical as to become the signature of the same perpetrator." ***Id.*** at 26. Because the crimes were dissimilar, Taylor contends, the trial court abused its discretion in allowing the Commonwealth to present evidence regarding the January 2009 incident. ***Id.***

"A trial court's decision to allow the admission of evidence is a matter within its sound discretion, and we will reverse that decision only when it has been shown that the trial court abused that discretion." ***Commonwealth v. Briggs***, 12 A.3d 291, 336 (Pa. 2011).

In its Opinion, the trial court determined that the facts underlying the two incidents were so similar as to warrant admission of the prior bad acts evidence. ***See*** Trial Court Opinion, 11/29/11, at 5 (wherein the trial court stated that "[t]he similarities between the two crimes was striking.") Upon

review, however, we are constrained to disagree with the trial court's assessment.

Pennsylvania Rule of Evidence 404(b) governs the admission of "prior bad acts" evidence, and provides, in relevant part, as follows:

> (b) Other crimes, wrongs, or acts.
>
> (1) 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*.
>
> (2) *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.*
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Pa.R.E. 404(b)(1)-(3) (emphasis added).

The Pennsylvania Supreme Court has explained that the common plan or preparation exception, or *modus operandi,* requires "such a high correlation in the details of the crimes that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others." ***Commonwealth v. Morris***, 425 A.2d 715, 721 (Pa. 1981) (emphases omitted). The existence of a common scheme is relevant to establish any element of a crime, "so long as it does not merely indicate the defendant's propensity to commit similar crimes." ***Commonwealth v. Bronshtein***, 691 A.2d 907, 915-16 (Pa. 1997). A comparison of the crimes

must establish a logical connection between them. ***Commonwealth v. Hughes***, 555 A.2d 1264, 1283 (Pa. 1989).

At trial, the Commonwealth presented three witnesses to testify regarding the prior January 2009 incident: Pollaro, Toni Marie Huffman ("Huffman"), and Taylor's girlfriend, A.J. After declaring Pollaro a "hostile witness," the Commonwealth elicited the following testimony regarding the January 2009 incident from Pollaro:

> [Pollaro]: … [A.J. and Taylor] were wrestling. They started in the bedroom, and then they ended up in the baby's room, but the baby wasn't born at the time. [A.J.] was eight months pregnant.
>
> …
>
> They were just wrestling and [Taylor] hit her in the stomach in the bedroom, and that's when [A.J.] was like, my baby, my baby. As [Taylor] was hitting [A.J.], he was yelling bitch and whore. And then they ended up in the bedroom, and he had her – took—had her pants and underwear off.
>
> Q. [The Commonwealth]: How did he take her pants and underwear off?
>
> A. [Pollaro]: Ripped them.

N.T., 11/16/10, at 142-43. The Commonwealth then cross-examined Pollaro regarding her prior written statement describing the January 2009 incident:

> Q. [The Commonwealth]: Miss Pollaro, isn't it true that … on the statement you wrote for Officer Arnink[,] you stated that [Taylor] ripped [A.J.'s] clothes off and tried raping her?
>
> A. [Pollaro]: It is what I said. There was no –
>
> Q. Then isn't it true that you said it led to punching and holding her down. Isn't it true that's what you wrote in your statement?

A. They were –

Q. Yes or no?

A. Yes.

Id. at 148-49. During questioning by defense counsel, Pollaro explained the contradictions between her written statement and her trial testimony:

> [Pollaro]: … [T]here was no intercourse. [Taylor] just took her pants off. Like they ripped off and her underwear, but there was no intercourse at all.
>
> Q. [Defense counsel]: Was he fully dressed at that time?
>
> A. [Pollaro]: Yes.
>
> Q. And your description of raping, was that because he pulled her pants off and her underwear off?
>
> A. Yeah, but—yes.
>
> Q. You never saw him attempt to insert his penis into her vagina?
>
> A. No, he was fully dressed.
>
> Q. You never saw any overt sexual act perpetrated by him that night; is that correct?
>
> A. That's correct.

Id. at 155-56.

The Commonwealth next presented the testimony of Huffman. Huffman testified that during the evening of January 2, 2009, Taylor became angry that other people were present in A.J.'s house. ***Id.*** at 164. Taylor left the house and went to a bar. ***Id.*** at 165. According to Huffman, Taylor was

still angry upon his return to the house. ***Id.*** Huffman testified that she followed Taylor into the kitchen. ***Id.*** While the two talked, Taylor "started to kind of touch me and grab on me. I walked away, and he followed me into the living room." ***Id.*** Taylor then asked Huffman if she "wanted to fuck[,]" and then attempted to pull down Huffman's pants. ***Id.*** at 166.

Huffman further testified that A.J. attempted to stop Taylor, at which point Taylor became irate. ***Id.*** at 171. As Taylor tried to remove Huffman's pants, A.J. went into the bedroom. ***Id.*** Huffman stated that Taylor grabbed A.J. and proceeded to drag A.J. through the house. ***Id.*** at 171-72. After pushing A.J. up against the wall, the two fell to the floor at which time Taylor tried to rip off A.J.'s clothing. ***Id.*** Huffman testified that when A.J. screamed "my baby[,]" Taylor responded that "he didn't give a fuck if she was pregnant or not. He could still beat her ass for what she was doing." ***Id.*** at 173. Further, Taylor threatened Huffman that if she came anywhere near him, he would "beat my ass." ***Id.***

Finally, regarding the January 2009 incident, the Commonwealth presented the testimony of A.J. ***Id.*** at 180. A.J. testified that on January 3, 2009, in the early morning hours, Taylor became upset that "a lot of people were in my house." ***Id.*** at 181. A.J., who was pregnant at the time, confirmed that the two argued, after which Taylor left to go to a bar. ***Id***. Before leaving, Taylor threatened that "everybody had to be gone by the time he came back." ***Id.*** A.J. testified that when Taylor returned, he tried

to rip off Huffman's clothes. ***Id.*** at 182. According to A.J., when she shoved Taylor away from Huffman, Taylor punched her, then turned back to Huffman. ***Id.*** Subsequently, Huffman and Pollaro ran from the house, at which time Taylor dragged A.J. through the house by her hair and punched her. ***Id.*** at 184-85. When A.J. expressed concern about her baby, Taylor stated "you deserve this, and just kept hitting me." ***Id.*** at 185. During this time, Taylor had ripped off A.J.'s shorts and underwear and threatened that he was going to rape "every girl in the house." ***Id.*** at 185-86. However, Taylor did not remove any of his own clothing. ***Id.*** at 191.

By contrast, the assault in the instant case did not involve the same level of violence that took place in the January 2009 incident. The victim, S.B., testified that at 8:00 p.m. on September 5, 2009, Taylor received a text purportedly from A.J. asking if S.B. would be willing to babysit from 8:30 p.m. to 11:00 p.m. N.T., 11/15/10, at 69-70. Upon her arrival at A.J.'s residence, S.B. observed that the kitchen light was lit, and that the baby was in a bassinet in the living area. ***Id.*** at 76. Taylor then entered the living area and, when asked, indicated that A.J. was in Union City getting shoes with her grandmother. ***Id.*** at 76-77. Taylor handed S.B. a bottle, who then gave the bottle to the baby. ***Id.*** at 77-78. As the baby began to fall asleep, S.B. sat on the couch. ***Id.*** at 78. S.B. testified that Taylor then locked the front door and sat on the couch next to S.B. ***Id.*** S.B. noticed

that there was a black sheet on the couch, which had not been present during her prior visits to the house. ***Id.*** at 78-79.

As S.B. played with a puppy, Taylor "scooches down, and he pushes the dog off." ***Id.*** at 79. At that time, S.B. testified, Taylor "put his hand over like this, and he puts his hand down my shirt and touches my right breast." ***Id.*** at 80. S.B. testified that she pulled away and told Taylor "what are you doing? I don't like this." ***Id.*** As S.B. tried to "scooch" away down the couch, Taylor grabbed her feet, swinging them up onto the couch. ***Id.*** at 80-81. S.B. stated that Taylor then positioned himself between S.B.'s knees, unbuttoning her pants. ***Id.*** at 81. As Taylor held S.B. down with his left arm across her chest, S.B. testified, he removed her pants and then his own. ***Id.*** at 82. Although S.B. continued to ask Taylor to stop, Taylor placed his penis in her vagina. ***Id.*** at 82-83. S.B. testified that she cried as Taylor continued kissing S.B. on the lips, cheek and breast. ***Id.*** at 85. Finally, S.B. stated, Taylor stopped when the baby began crying. ***Id.*** at 86. At that point, S.B. retrieved her clothing, dressed and ran outside. ***Id.***

In summary, the evidence regarding the January 2009 incident established that Taylor was angry, violent and repeatedly threatened all of those present. The evidence further established that Taylor violently assaulted and attempted to rape A.J., after punching her and dragging her through the house. By contrast, S.B. testified that although Taylor forcibly raped her, he was not angry or violent during the assault.

At best, the prior bad acts evidence improperly established Taylor's propensity to commit crimes of the same class. ***See Miles***, 846 A.2d at 136 (stating that "much more is demanded than the mere repeated commission of crimes of the same class"). This is best demonstrated by the cautionary instruction issued by the trial court following Pollaro's testimony:

> [THE COURT]: Ladies and gentlemen, request of counsel. You have heard evidence tending to prove that [Taylor] was guilty of an offense for which he's not on trial now, and I am speaking of the testimony of this past witness. And you've heard what she said and was required to read from her statement that she gave to the police on the night this incident happened on or about January 2nd, 2009. **This evidence is before you for the limited purpose to show you—tending to show his actions in dealing with women, specifically as to what happened.**
>
> This evidence must not be considered by you in any other way or for any other purpose than what I just stated. You must not regard this evidence as showing [that Taylor] is a person of bad character or criminal tendencies from which you might be inclined to find guilt in this case. The reason for it was to determine on your part whether there are any similarities before the complained of action you are dealing with and what occurred approximately nine months earlier.

N.T., 11/16/10, at 156-57 (emphasis added). Further, Taylor's actions were not so unusual and distinctive as to overcome the extreme prejudice resulting from such evidence's admission. ***See Rush***, 646 A.2d at 561 (requiring that the device used in both the prior bad act and the incident at issue be "so unusual and distinctive as to be like a *signature.*") (emphasis in original). Accordingly, we conclude that the trial court's improper admission of such prejudicial evidence warrants the grant of a new trial.

Taylor next claims that the trial court improperly commented on Pollaro's credibility on two occasions. Brief for Appellant at 27. Taylor directs our attention to two instances, during Pollaro's testimony about the January 2009 incident, in which the trial court admonished her to testify truthfully regarding her written statement regarding the January 2009 incident. ***Id.***

Based upon our resolution of the first issue, we conclude that this claim is now moot. ***See Commonwealth v. Nava***, 966 A.2d 630, 632 (Pa. Super. 2009) (recognizing that a case is "moot" when "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."). The trial court's admonitions pertained to Pollaro's testimony regarding the prior incident, and Pollaro's written statement to police about that incident. ***See, e.g.***, N.T., 11/16/10, at 149-50 (wherein the trial court admonished Pollaro not to elaborate on her answers to questions regarding her written statement describing the January 2009 incident). As such testimony will be inadmissible in the new trial, the claim is now moot.

Judgment of sentence reversed; case remanded for a new trial consistent with this Memorandum; Superior Court jurisdiction relinquished.