IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-843-2023**
	:	
vs.	:	**Opinion and Order Re Defendant's**
	:	**Motion to Preclude Expert Testimony**
DANNY BREWER,	:	**& Motion in Limine Re 404(b) Evidence**
Defendant	:	

OPINION AND ORDER

This matter came before the court for an argument on November 25, 2024 on Defendant's motion to preclude expert testimony and his motion in *limine* to preclude the Commonwealth from introducing prior bad acts evidence.

By way of background, Defendant is charged with hundreds of counts of aggravated indecent assault, unlawful contact with a minor, and indecent assault arising from his alleged digital penetration of the victim's vagina when she was seven to ten years old between October 6, 2008 and October 6, 2012. Jury selection was scheduled for September 9, 2024, and the trial was scheduled for September 19-20, 2024.

On August 22, 2024, the Commonwealth filed a notice pursuant to 42 Pa. C.S. §5920 to introduce testimony from Denise Feger, Ph.D. regarding the "dynamics of childhood sexual abuse and victim responses resulting from abuse. Dr. Feger will testify about specific types of victim responses and behaviors consistent with childhood sexual trauma."

On September 4, 2024, Defendant filed a motion in *limine* to preclude the Commonwealth from presenting Dr. Feger testifying at trial due to the late notice and the failure to provide any expert materials such as an expert report or any references Dr. Feger would rely on in her testimony.

On September 5, 2024, the trial was continued to due a death in the affiant's

immediate family and the funeral being held out-of-state during the time scheduled for trial.

On October 10, 2024, jury selection and trial in this case were scheduled for December 2, 2024 and December 12-13, 2024, respectively.

The court held an argument on Defendant's motion in *limine* on October 14, 2024. At the argument, the Commonwealth requested an additional 14 days within which to provide an expert report to defense counsel. The Commonwealth represented that it did not have an expert report but it would provide one within 14 days and if it did not, the court could issue an order precluding the expert from testifying. The Commonwealth also agreed that it would not object to a continuance if a report were submitted and the time attributable to any such continuance would be attributable to the Commonwealth. Over defense counsel's objection, the court gave the Commonwealth the requested 14-day period to provide an expert report to the defense and specifically incorporated the terms of the Commonwealth's agreement regarding preclusion of the expert if a report were not provided and if the defense requested a continuance the delay would be attributable to the Commonwealth.

On October 28, 2024, at 5:44 p.m., defense counsel emailed the court and asked the court to issue an order precluding the Commonwealth from presenting expert testimony as the Commonwealth had not provided any expert report. At 6:13 p.m., the Commonwealth emailed to defense counsel a two-page letter dated May 16, 2023 authored by Dr. Feger.

On November 4, 2024, defense counsel filed a motion to preclude expert testimony in which he asserted that the Commonwealth's email was untimely as it did not submit the letter until after 5:00 p.m. on the fourteenth day and the letter was not an expert report as that term is used in Rule 573 of the Rules of Criminal Procedure. Argument on the defense motion was scheduled for November 25, 2024.

On November 19, 2024, the Commonwealth filed a notice of intent to introduce "bad acts" evidence pursuant to Pa. R. E. 404(b). The Commonwealth seeks to introduce evidence that Defendant allegedly fondled his daughter when she was between the ages of six and eleven years old.

Shortly before noon on November 25, 2024 (which was about 1 ½ hours before the argument on the motion to preclude expert testimony), defense counsel filed a motion in *limine* to preclude the Commonwealth from presenting the proposed Rule 404(b) evidence. The court heard arguments on this motion as well.

At the hearing, defense counsel succinctly argued that the prosecutor's email containing the letter from Dr. Feger was late and the letter did not constitute a report. Moreover, it was not even generated for the case at hand. It was generated for a different case with a different victim and the letter was dated three weeks prior to Defendant being arrested and charged.

The prosecutor admitted the letter from Dr. Feger as Commonwealth Exhibit #1. He acknowledged that the letter provided was from a previous case but noted that the letter would have been identical in this case except for the name of the victim. Dr. Feger testified in that case without objection and the prosecutor was surprised that defense counsel was objecting in this case. He also argued that the due to the Superior Court's decision in *Cramer*[1]the testimony must be generic and not focused on the facts of any particular case. He noted that Dr. Feger had no contact with the victim in this case. He also indicated that he had a phone conversation with Dr. Feger during which she expanded on the letter and he brought Dr. Feger to the argument so she could speak to the issue. The prosecutor provided an

"offer" or examples of what Dr. Feger would testify about such as the rapport that needs to be established before children disclose; the barriers to disclosure such as living with the accuser, not feeling safe, a fear of not being believed or not understanding that the acts being committed against them are wrong; acceptance where there is grooming; working through feelings or getting past feelings of shame, guilt or embarrassment; issues with memory or processing trauma such as difficulty with details if the abuse was chronic or occurred over a long period of time; and conflicting emotions when the abuser is a loved one or mentor; and the stages of the recovery process.

With respect to the 404(b) evidence, defense counsel argued that the evidence was uncharged crime in a different state several decades ago. The Commonwealth was aware of this information since the police interviewed the witness who could provide the 404(b) evidence in June 2023 and there was an order requiring the Commonwealth to file its 404(b) notice by the pretrial conference, which in this case was held in September of 2023. He also contended that the Commonwealth had not established a common plan or scheme, the evidence was unduly prejudicial, and the fact that it deals with uncharged allegations has to weigh heavily against admitting this evidence. He noted that the 404(b) evidence related to matters that allegedly occurred between 1971 and 1976 and that there are no other instances in the 30-40 years until the alleged conduct of this case. He argued that the only similarity is the age of the alleged victims and that the alleged conduct is not similar enough to overcome the remoteness and the great prejudice to Defendant.

The prosecutor argued that the notice was provided 24 days prior to trial and the defense was aware of this information as a police report of the interview with the witness was

[1] *Commonwealth v. Cramer*, 195 A.3d 594 (Pa. Super. 2018).

provided in discovery. To show the common plan or scheme, the prosecutor admitted the police reports of the interview of the victim and the interview of the witness as Commonwealth Exhibits 2 and 3, respectively. He argued that there were significant similarities in that both victims are white, biological relatives of Defendant who were the same approximate ages when the abuse occurred, the abuse occurred in Defendant's home, there were instances where Defendant was alone with the children under circumstances such that Defendant's spouse inquired but Defendant made excuses which the spouse accepted; and Defendant lost interest in the victims once they entered puberty. He relied on cases such as *O'Brien*,[2] *Gordon*,[3] and *Luktisch*.[4] He noted that although remoteness is a factor, it is inversely proportional to the similarities of the crimes. Further, he argued that the Commonwealth had a need for the evidence in cases such as this where there are not other witnesses to the abuse. He also argued that to deprive the Commonwealth of this evidence would put it in a difficult position. He also noted that there is no requirement that the 404(b) evidence result in a conviction.

DISCUSSION

1. Motion to Preclude Expert Testimony of Dr. Feger

The Commonwealth seeks to present expert testimony from Dr. Feger pursuant to section 5920 of the Judicial Code which permits either party to present expert testimony in certain criminal proceedings, including but not limited to proceedings for offenses under Chapter 31 of the Crimes Code (relating to sexual offenses) or unlawful contact with a minor, or criminal proceedings related to sexual violence or domestic

[2] *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa. Super. 2003).
[3] *Commonwealth v. Gordon*, 673 A.2d 866 (Pa. 1996).

violence. *See* 42 Pa. C.S. §5920(a). Regarding the use of experts, section 5920 states:

> (b) Qualifications and use of experts.--
> (1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence or domestic violence, that will assist the trier of fact in understanding the dynamics of sexual violence or domestic violence, victim responses to sexual violence or domestic violence and the impact of sexual violence or domestic violence on victims during and after being assaulted.
> (2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.
> (3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.
> (4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.

42 Pa. C.S. §5920(b). The dispute in this case concerns the timeliness of the Commonwealth's sending of the letter from Dr. Feger and whether the letter complies with the expert report requirements of Rule 573 of the Rules of Criminal Procedure. The interplay between section 5920 and Rule 573 is an evolving area of the law. This issue was discussed in *Commonwealth v. Dunn*, 300 A.3d 324 (Pa. 2023)(plurality).

In *Dunn*, the Commonwealth provided notice of its intent to present expert testimony pursuant to section 5920 on the eve of trial. The defense objected to the timeliness of the notice and its lack of compliance with Rule 573. The trial court found that Rule 573 did not apply. The Superior Court affirmed the trial court and held that no notice was required because section 5920 contained neither a notice requirement nor the production of an expert

---

[4] *Commonwealth v. Luktisch*, 680 A.2d 877 (1996).

report. Further, the Superior Court held that the appellant was not entitled to a new trial because he failed to show prejudice. 170 WDA 2020, 2020 WL 7682502, *4-*6 (Pa. Super., Dec. 23, 2020)(unpublished memorandum). Although the denial of a new trial was affirmed by an evenly divided Pennsylvania Supreme Court,[5] a majority of Justices concluded that Section 5920 is subject to the procedural requirements for pretrial discovery and inspection in criminal proceedings under Rule 573, and that the Commonwealth failed to comply with its duty of prompt disclosure under that Rule. *Dunn*, 300 A.3d at 335 (OISA); *id*. at 341 (OISR) ("I wholeheartedly agree with the OISA that Rule 573 of the Pennsylvania Rules of Criminal Procedure applies to Section 5920") (quotation marks omitted). Unfortunately, the agreement ends there.

The OISA found that experts under section 5920 are not like other experts and it declined to address whether an expert report would be required in all cases. *Id*. at 335. It noted that the purpose of procedural rules such as Rule 573 is to "permit parties to prepare for trial" and that "trial by ambush is contrary to the spirit and the letter of those rules and will not be condoned." *Id.* Therefore, Rule 573 required the Commonwealth to disclose its intent to call an expert under section 5920 and to disclose any expert reports within its possession. *Id*. While the OISA concluded that the Commonwealth failed to comply with its duty of prompt disclosure, it declined to proscribe a specific time for such notice or disclosure; rather, it referred this issue to the Criminal Rules Committee. With regard to a remedy, the OISA noted that Dunn could have requested and the trial court could have

[5] Justice Mundy wrote an Opinion in Support of Affirmance (OISA) which was joined by Justice Brobson. Chief Justice Todd wrote an OISA that agreed with all but part IV(b) of Justice Mundy's OISA. Justice Donahue wrote an OISR which was joined by Justices Dougherty and Wecht. Justice Wecht wrote a separate OISR to supplement Justice Donahue's Opinion with additional views or criticisms regarding the expert report

simply ordered a continuance but the fact that did not occur did not entitle Dunn to a new trial absent a showing of prejudice.

The Opinion In Support of Reversal (OISR) would go farther and hold that the expert's letter lacked the specificity required for admissible Section 5920 testimony to the extent that the trial court abused its discretion by failing to grant Dunn's motion for a more detailed expert report in compliance with Rule 573(B)(2)(b). *Id.* at 344. The OISR would also grant Dunn a new trial because he was prejudiced by the Commonwealth's unremedied discovery violations.

The expert letter provided to Dunn which was deficient in the eyes of the OISR is more detailed than the letter that the Commonwealth provided in this case but the timing of the notice in this case was better than in *Dunn*.

In *Dunn*, the expert letter stated the following:

> As per our recent conversation, I am available to provide information and testimony that may assist a judge and/or jury in understanding the dynamics of child sexual abuse victims, their responses to child sexual abuse and the impact of child sexual abuse on the victims. As an expert witness in the area of child sexual abuse, I would be prepared to discuss, in general, the typical ways children disclose abuse, how they react to child sexual abuse and coping mechanisms they may use. This report is limited to three areas of relevance for the requested testimony: Disclosure of abuse and children's behaviors regarding disclosure (gradual, delayed and recanted disclosures), victim behavior at the time of the abuse and victim behavior after the disclosure.
>
> My testimony will be based on my almost twenty years of experience in child welfare, which includes interviews and interactions of alleged and confirmed child sexual abuse victims, my education as a master's level social worker with a certificate in child welfare and professional training I have received over the course of my employment. I have provided citations of relevant research articles which will further my testimony (although my testimony will not be limited to this information)

---

and the OISA, particularly the lack of remedy provided to Dunn and the prejudice he suffered due to the late disclosure and the insufficiency of the expert's letter.

> and I have also enclosed a copy of my curriculum vitae.
>
> Disclosure of abuse and children's behaviors regarding disclosure:
>
> • Children who disclose abuse often do not disclose right away and the disclosure may be initially tentative and/or gradual over a period of time.
>
> • Many children who have been victims never disclose their abuse for a wide variety of reasons (threats, fear, relationship to the abuser, unintended consequences of the disclosure, bribes, shame)
>
> • Denial of the abuse or recantation of the allegations are not uncommon
>
> Victim behavior at the time of abuse:
>
> • There is no "normal" response for all victims. Child sexual abuse victims experience a wide range of emotions and responses
>
> • Some victims (especially young victims and those who have experienced multiple incidents of child sexual abuse) may not know they have been a victim of child sexual abuse
>
> • Child sexual abuse victims may feel helpless and show accommodating behaviors.
>
> Victim behavior after disclosure[:]
>
> • There is no "standard" response following a disclosure. Some children display emotional and behavioral changes and others do not. If a child does display an emotional/behavioral change they can vary by intensity and type. Others['] responses to a child's disclosure greatly impacts the short term and long term response of a child sexual abuse victim.
>
> [The] Letter concluded with citations to five articles ostensibly supporting her proposed testimony.

Id. at 342-343. Dunn's trial was scheduled for June 4, 2019. The expert's letter was dated May 31, 2019, and it was provided to Dunn's counsel on the night before trial at 4:25 p.m. *Id.* at 326.

In the case *sub judice*, the Commonwealth filed on August 22, 2024 a notice pursuant to 42 Pa. C.S. §5920 to introduce testimony from Denise Feger, Ph.D. regarding the "dynamics of childhood sexual abuse and victim responses resulting from abuse. Dr. Feger will testify about specific types of victim responses and behaviors consistent with childhood sexual trauma." On September 4, 2024, Defense counsel filed a motion in *limine* to preclude the expert's testimony based on timeliness and the Commonwealth's failure to

produce any expert materials such a report or citations to materials upon which the expert would be relying. At that time, the trial was scheduled for September 12-13, 2024. The trial was continued due to a death in the affiant's family. The argument on the defense motion was held on October 10, 2024. Despite being aware for over a month of the defense position that expert materials were necessary, the Commonwealth requested an additional 14 days to obtain an expert report. Over the objection of defense counsel, the court granted the Commonwealth's request. For whatever reason, the Commonwealth did not obtain a report from Dr. Feger specific to this case. Instead, after defense counsel requested the court to enter an order precluding the expert testimony due to the Commonwealth's failure to provide a report to him, the Commonwealth, for lack of a better term, "recycled" a letter from Dr. Feger from a case that pre-dated the filing of the charges in this case and was little more than an outline of topics. The letter stated (with references to the other victim omitted):

> This communication is regarding the material I can provide information about in reference to abuse exposures, trauma therapy, and the disclosure process. […]
> I hold a PhD in Philosophy, Human Services along with certifications in Trauma Focused Individual Therapy, Trauma Focused Family Therapy, Co-Occurring Disorder, and Addictions. I am also trained in Attachment Focused Therapy and several other trauma specific interventions to include play therapy, EMDR, CBT, and seeking safety. As you are aware, my work in the field of trauma and working with survivors' dates to 2007 when I began working with youth who were placed into foster care through dependency through PA Treatment and Healing in the capacity of Clinical Supervisor and then Clinical Director as well as direct service clinician. I am currently employed as the Chief Operating Officer at
> Crossroads Counseling Inc. and have been for the last fourteen years. I also maintain a clinical caseload and conduct trauma assessments in the dependency system as well as in private cases, and by way of court order when appropriate.
>
> As it relates to information that is relevant to the courts in this matter, I am

able to offer information regarding the following information:
-The Disclosure Process
Steps and process of disclosure
Barriers to disclosure
Opportunities for disclosure
Acceptance of the violation vs. the offender victim relationship
-Manifestation of Behavioral Responses
Adverse reactions
Avoidance of Activity or Contact
Mental Health related symptoms and Trauma
-Memory and Processing of Trauma
Safety and responses
Dissociation from abuse
-Family Systems and Abuse
Safety of the Environment
The role of disappointment of a caregiver
Protection of parents or concerned parties
-The Recovery Process
Stages of Trauma resolution
Understanding and acceptance of events
Shifting from victim to survivor
-Therapeutic Interventions
How the therapeutic relationship develops
The steps of establishing therapeutic safety
Relapsing events
Healing from trauma

The events of trauma and processing of these events tend to have trends and common responses, based on my experience and training however globally speaking there are many reasons that survivors of abuse process, disclose, and "show" their struggles which largely is influenced by age, maturity, family stability, and environmental factors.

If you require additional information, please let me know.

Despite the defense motion(s) and the closing line of the letter, the Commonwealth did not obtain a supplemental report from Dr. Feger. Instead, it wanted to call Dr. Feger as a witness at the argument or the opportunity to permit Dr. Feger to provide a more detailed report. There was not time in the court's schedule for the presentation of expert testimony and there are practical problems with presenting such information orally. Typically, experts are bound

by the scope of their expert report. If the court took testimony from Dr. Feger, there would not be a report to reference at trial to address any objection that might be lodged by the defense that Dr. Feger was testifying beyond the scope of her report. While a transcript could be prepared, a transcript would be lengthier and more cumbersome than an expert report which would typically only span a few pages.

The defense filed its original motion in *limine* to preclude expert testimony on September 4, 2024. The hearing and argument on that motion was scheduled for October 14, 2024. Therefore, between the filing of the motion and the hearing on it, the Commonwealth had 40 days within which to speak to Dr. Feger and obtain an expert report. That did not occur. Instead, at the original argument on Defendant's motion to preclude to due the complete lack of any kind of report from any expert witness, the Commonwealth agreed to provide an expert report within 14 days and it agreed that if it failed to do so, the court could preclude the Commonwealth from presenting such expert testimony. When day 14 arrived, the Commonwealth still did not have an expert report for this case. Instead, it tried a "bait and switch" and attempted to pass off a letter outline from Dr. Feger from another case as an expert report in this case. The letter does not constitute an expert report; it is little more than an outline. It discusses topics, but it does not state any opinions or the basis for any opinion. It is insufficient for the defense to prepare or hire an expert to dispute it. The Commonwealth agreed that if it did not provide an expert report within 14 days, the court could preclude it from presenting expert testimony. The Commonwealth knew that the report was deficient; if it did not have concerns about the sufficiency of the report, it would not have had Dr. Feger present at the second hearing and argument to try to flesh out the report through testimony. The Commonwealth failure to timely provide an expert report has

delayed the trial in this case. The Commonwealth had multiple opportunities to provide a report. The court already gave the Commonwealth a "second bite at the apple" when it gave the Commonwealth an additional 14 days to provide a report over defense counsel's objections. This case has been continued to April 23, 2025 for potential jury selection. In light of this continuance, the court will grant the Commonwealth one last opportunity to provide an expert report to defense counsel.

The last thing the court wants is for either the alleged victim or Defendant to have to go through a trial twice in this case. The court wants to be fair to the interests of the victim, the public and Defendant.

Since the Criminal Rules Committee has not yet addressed these issues in response to *Dunn*, the court will endeavor to satisfy both the OISA and the OISR and the issues and concerns expressed therein. As defense counsel has known since late August that the Commonwealth intends to present expert testimony from Dr. Feger, the defense will not suffer prejudice due to surprise. Therefore, the court will not preclude Dr. Feger from testifying at this time.

The court will, however, assess the delay from October 14, 2024 to February 19, 2025 against the Commonwealth for failing to provide an expert report as contemplated when the parties were before the court on October 14, 2024. The court expected the Commonwealth to reach out to Dr. Feger and supply a report that stated opinions and the basis for the opinions. Never in its wildest dreams did the court expect the Commonwealth to submit a letter dated three weeks before Defendant was arrested and charged in this case which constituted little more than a topical outline that was created eighteen months earlier for a different case. If that's all that the Commonwealth was going to do, it could have at least attached that letter to

its notice or provided the letter at the time of the first argument so that all issues could have been litigated on October 14. It would have negated the need for a second motion and a second argument on Dr. Feger's expert testimony and the delay that occurred as a result of the litigation of that motion.

With respect to the sufficiency of the report, Rule 573(B)(2)(b) states:

> If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

Dr. Feger's letter only states the subject matters on which she is expected to testify. It does not give defense counsel sufficient information to know what opinions she will give in her testimony or what he needs to counter if he desires to obtain his own expert. Despite the court's displeasure with the Commonwealth's lack of diligence in providing expert information in this case, the court gives the Commonwealth **until 11:59 p.m. on February 19, 2025 to provide a supplemental expert report to defense counsel**. This is a "drop dead" deadline. If the Commonwealth fails to provide a more detailed expert report by that date, the court will preclude Dr. Feger from testifying in this case.

Given the limits of expert testimony under section 5920 and the OISA that expert under section 5920 are not like other experts, the expert report need not supply or set forth particular facts related to this case so that the testimony does not provide opinions regarding the credibility of the alleged victim in this case. This does not mean that the expert is precluded from referencing opinions regarding young children, abuse by family members or caregivers or the like and the impacts that such factors may have on an individual who has

experienced sexual violence but rather that those opinions must be expressed generally to those types of individuals or circumstances and not the particular alleged victim in this case. The supplemental report, however, shall provide a summary of the expert's opinions and the grounds for each opinion. If the expert intends to rely on articles, treatises, studies, research or the like, those sources must also be disclosed.

2. 404(b) Evidence

Defendant seeks an order from the court precluding the Commonwealth from introducing prior bad acts evidence. Defendant asserts that the proposed evidence is too remote and any probative value is outweighed by its prejudicial effect. The Commonwealth asserts that the evidence is admissible as common plan or scheme.

> The admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Tyson, 119 A.3d 353, 357-358 (Pa. Super. 2015).

Rule 404(b) of the Pennsylvania Rules of Evidence prohibits a party from introducing evidence of any other crime, wrong or act to prove a person's character to show that on a particular occasion the person acted in accordance with the character. Such evidence is admissible, however, for other purposes such motive, intent, plan, knowledge, and lack of mistake but in criminal cases the Commonwealth must give reasonable notice in advance of trial and the evidence is only admissible if its probative value outweighs its potential for unfair prejudice. Pa. R. E. 404(b)(2), (3). "Unfair prejudice" means "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing

the evidence impartially." Pa.R.E. 403, cmt. Relevant evidence may also be excluded if its probative value is outweighed by the danger of "confusing the issues, misleading the jury, undue delay, wasting of time or needlessly presenting cumulative evidence." Pa. R. E. 403. Furthermore,

> when ruling upon the admissibility of evidence under the common scheme exception, the trial court must first examine the details and surrounding circumstances of each incident to assure that the evidence reveals criminal conduct *which is so distinctive and so nearly identical as to become the signature of the same perpetrator. Relevant to such a finding will be the habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator.* Given this initial determination, the court is bound to engage in a careful balancing test to assure that the common plan evidence is not too remote in time to be probative. If the evidence reveals that the details of each criminal incident are nearly identical, the fact that the incidents are separated by a lapse of time will not likely prevent the offer of the evidence **unless the time lapse is excessive**.

Commonwealth v. Semenza, 127 A.3d 1, 8 (Pa. Super. 2015)(italics original; bold added).

The Commonwealth submitted two exhibits, Commonwealth Exhibits 2 and 3, which detailed the police interview of the complainant in this case and the police interview of the other individual, B., who Defendant allegedly molested in the 1970s, respectively.

In Commonwealth Exhibit 2, the current complainant told the interviewing officer that Defendant, her grandfather, "molested" her hundreds of times when she was between the ages of seven and ten years old between the years 2007 and 2011. She indicated that Defendant moved to Pennsylvania in 2007 when she was seven years old and the abuse started shortly after he arrived in Pennsylvania. She told the officer that she was being babysat at Defendant's residence two to three times per week for three years straight, and he molested her about 80% of the time. When asked what she meant by "molested", she stated that Defendant would have her sit on top of him naked and he would "finger" her. When

asked what she meant by "finger", she stated penetration of her vagina with his fingers. She indicated that it occurred all over the house, except the bathroom. She did indicate, however, that Defendant tried to get her in the shower with him once but her grandmother heard the shower running and asked him what they were doing. The officer asked if Defendant ever performed oral sex on her and she said no; he would only finger her and kiss her on the lips and neck. She indicated at one point she told him that she did not believe that what he was doing was right and they should not be doing it. He told her that her grandmother would not mind but they have to keep it between the two of them. She indicated that the abuse stopped when she was ten, when Defendant started giving his attention to another little girl at a bed and breakfast. When asked if they ever had sexual intercourse, she said no. She said she was jealous of the other little girl and she still wanted to be the beautiful one and wanted Defendant to still love her.[6] She tried to move things further between them by grabbing his penis and trying to put it inside her vagina, but Defendant stopped her and told her no. Defendant took her for a ride in his truck and told her that she was getting too old and they couldn't keep doing what they were doing. Shortly after the last incident and after the flood in 2011, Defendant and her grandmother moved to Illinois.

B., who is Defendant's daughter, was also interviewed by the officer. She said that she was aware of the allegations against her father and that he abused her when she was between ages of six and eleven when they were living in Whittier, California. She indicated that there were a couple of incidents where he would stand outside the bathroom window and watch her take a bath. She stated that she started developing breast when she was nine years

[6] She said that her mother would tell her she was ugly and no man would ever love her. Defendant would contradict what her mother said and say how beautiful her blonde hair was and kiss her. He would also say he

old and Defendant would follow her around the house and pinch her breasts. She also recalled an incident where she wanted to jump in the pool after school. Defendant put on his swim trunks, got in the pool with her and started pinching her breasts. She said that it got so bad that she had to cover her breasts anytime she would pass him and it still wouldn't stop him from fighting her to touch her breasts. She said he stopped being attracted to her when she turned eleven years old. When she became fully developed, he backed away. She said it all started when one of her sisters would get sick. Her mother would sleep with the sick child and the other two girls would sleep with her father. When she would sleep with him, he started putting his hands down her pajama pants and underneath her underwear. She initially thought maybe he was sleeping until he did it a second time. The second time she pulled his hand out of her underwear and he fought her and put it back in. At that point, she thought he knew what he was doing and she told her mother about it. Her mother told her she was dreaming. Her mother talked to Defendant about it and he claim he must have been sleeping and thought her mother was sleeping next to him. Her mother never did anything about it. When asked by the officer if he had ever digitally penetrated her vagina, she said she couldn't remember but did know that he touched her vagina. She said she never reported it because she nobody would have believed her when she was younger. When the current complainant filed her police report, B. spoke with an officer in Illinois[7] about what happened to her when she was a child. She hopes that something happens to Defendant because she has been in therapy all her life for it.

---

did not understand why her mother would say the things she did to her.

[7] The current complainant initially reported the offense to law enforcement in Illinois, who referred the matter to the Pennsylvania State Police because the alleged offenses occurred in the Montoursville area of Lycoming County, Pennsylvania.

After reviewing the allegations involved in both incidents and the lapse of time between them, the court will grant Defendant's motion in *limine* and preclude the Commonwealth from introducing evidence regarding the conduct from the early to mid-1970s for several reasons. First, the conduct is too remote. Here, the lapse of time is excessive. The current conduct began approximately 31 years after the prior conduct ended. The prior conduct ended sometime in 1976 and the current conduct allegedly began in 2007. The court has not found any case where the prior bad acts evidence was decades old and it was permitted to be introduced. Second, the conduct is not sufficiently similar given the lapse of time between the conduct. Although the allegations involved sexual misconduct against similarly aged relatives of Defendant, the conduct was not sufficiently similar given the excessive lapse of time. The conduct in from the 1970s involved fondling, primarily of B.'s breasts. There may have been two incidents where Defendant put his hands underneath B.s' pajamas and underwear and touched her vagina, but she did not recall any penetration. In contrast, the current complainant asserts that she was naked and Defendant penetrated her vagina with his fingers. All of the sexual offenses charged against Defendant are based on digital penetration of the complainant's vagina. Unlike the allegations B. made against Defendant, there were no allegations that Defendant ever fondled or attempted to fondle the current complainant's breasts or that he put his hands down her pants. Instead, the complainant was naked and Defendant inserted his fingers into her vagina. Third, the allegations made by B. occurred in California and never resulted in charges being filed against him. Since the offense occurred so long ago in another state located completely across the country, it limits an accused's ability to present evidence to refute or defend against those allegations. Fourth, the admission of the evidence regarding the alleged

incidents in the 1970s would confuse the issues, result in a trial within a trial regarding those incidents, and would divert the jury's attention from weighing the evidence impartially. Other than perhaps the murder of a child, there is no offense that inflames the jury against a defendant than sexual offenses against young children. It is the combination of all of these factors which renders the Commonwealth's proposed evidence unfairly prejudicial and inadmissible.

The Commonwealth asserted that a conviction was not required and the evidence was admissible based on *O'Brien*, *Gordon*¸ and *Luktisch*. The court acknowledges that there are circumstances where uncharged conduct may be admissible as occurred in *Luktisch*. However, all three of these cases are distinguishable in that the conduct was more similar and the delay was significantly less.

In *O'Brien*, the defendant was convicted of sexually assaulting two boys, aged eleven and eight, between 1982 and 1985. He was paroled from his sentences in those cases in 1990 and then was charged with committing similar crimes against another boy in 1996. The boys were all under the age of twelve, the defendant was friends with their parents and the defendant committed crimes of involuntary deviate sexual intercourse against them (i.e., oral and/or anal sex), and showed them pornography. The Superior Court found that when measuring the time lapse between the offenses, the time O'Brien spent incarcerated should be precluded. Therefore, there was only six years between the date O'Brien was paroled and the date the new sexual conduct occurred in 1996. Furthermore, O'Brien waived his right to a jury trial and was being tried in a bench trial before a judge. *See* 836 A.2d at 969-72.

In *Gordon*, the defendant was an attorney. He had been convicted of indecent assault against three female clients and the new charge was an indecent assault of a fourth female

client. In each case, the client was alone in the office with the defendant. He had the clients in a standing position to review legal documents. He would come up behind them and rub his penis against their backside (butt/legs/thighs). Furthermore, there was less than a year between the offenses for which Gordon had already been convicted and the date of the offense for which he was on trial. *See* 673 A.2d at 869.

Luktisch was the only case that involved uncharged conduct. The defendant in that case sexually assaulted his biological daughter, T.L., his stepdaughter C.G., and his stepdaughter, D.G. He was on trial for rape and statutory rape of D.G., who was 11 years old. The trial court permitted T.L. and C.G. to testify about the abuse the defendant committed against them and how it progressed. They indicated that the defendant began touching her at a young age; the conduct progressed to oral sex; and then it escalated to vaginal intercourse. The abuse against T.L. when she moved away and then six years later, the abuse against C.G. began. The abuse against C.G. also ceased when she moved away. The Superior Court affirmed the trial court. It found that the conduct was nearly identical and the six-year gap between the abuse against T.L. and C.G. was not excessive, even though there was a fourteen-year gap between the abuse against T.L. and the abuse against D.G. *See* 680 A.2d at 879.

The Commonwealth seems to argue that if the conduct is similar and it contends that it "needs" the evidence, that the court must admit it no matter how long the delay between the conduct is. This court cannot agree. The Commonwealth is clearly ignoring the language in the case law that such evidence is admissible **unless the time lapse is excessive**. Here, the acts committed against the children are not nearly identical. The acts against B. consisted of fondling; there was no penetration. The acts against the current complainant all involved

digital penetration. Moreover, the time lapse is excessive. The acts against B. ceased in 1976 and the acts against the current complainant did not commence until 2007, which amounts to a time lapse of approximately 31 years. The court has not found any case where the evidence was admissible with such a large lapse. The outer edge seems to be ten to fifteen years, not more than twice that amount.

ORDER

AND NOW, this 10th day of February 2025, for the reasons set forth in the forgoing Opinion, it is ORDERED and DIRECTED as follows:

1. The Court denies Defendant's motion to preclude expert testimony. The Commonwealth is given **until 11:59 p.m. on February 19, 2025 to provide a supplemental expert report to defense counsel**. This is a "drop dead" deadline. If the Commonwealth fails to provide a more detailed expert report by that date, the court will preclude Dr. Feger from testifying in this case. Furthermore, as a sanction, the court directs the **delay from October 14, 2024 through and including February 19, 2025 shall be attributable to the Commonwealth due to its failure to provide an appropriate expert report for this case by October 14, 2024.**

   Given the limits of expert testimony under section 5920 and the OISA that expert under section 5920 are not like other experts, the expert report need not supply or set forth particular facts related to this case so that the testimony does not provide opinions regarding the credibility of the alleged victim in this case. This does not mean that the expert is precluded from referencing opinions

regarding young children, abuse by family members or caregivers or the like and the impacts that such factors may have on an individual who has experienced sexual violence but rather that those opinions must be expressed generally to those types of individuals or circumstances and not the particular alleged victim in this case. The supplemental report, however, shall provide a summary of the expert's opinions and the grounds for each opinion. If the expert intends to rely on articles, treatises, studies, research or the like, those sources must also be disclosed in the report and provided by February 19, 2025.

2. The court **GRANTS** Defendant's motion in *limine* to preclude testimony or evidence regarding sexual acts that Defendant's daughter alleges that he committed against her between 1971 and 1976. The court finds that the time lapse between those acts and the dates that the acts alleged in this case occurred is excessive and not sufficiently similar in that the acts against Defendant's daughter were primarily fondling of her breasts and there was no digital penetration of her vagina whereas the acts against the complainant all involved digital penetration of her vagina.

By The Court,

_____
Nancy L. Butts, President Judge

cc: Martin Wade, Esquire (ADA)
Brian Manchester, Esquire (counsel for Defendant)
Jerri Rook

Gary Weber, Esquire (Lycoming Reporter)
April McDonald

NLB/laf