

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TYRONE LEWIS, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
THE CITY OF PHILADELPHIA, :
SAMARCO, MERRILL, AND :
MARABLE, :
Defendants : NO. 03-2310

Gene E.K. Pratter, J.

Memorandum Opinion

19 November 2004

Defendants have moved to preclude from trial the introduction of testimony of Police Officer Mary Leach, a non-defendant Philadelphia police officer, arguing that Officer Leach lacked the requisite knowledge of the incident in question for her testimony to be properly placed before the jury. Plaintiff Lewis has filed his opposition to the Motion, and counsel have presented oral argument to the Court. For the reasons that follow, the motion is granted.

FACTUAL BACKGROUND

The motion presently before the Court arises from a complaint filed by Tyrone Lewis. Mr. Lewis alleges that on February 26, 2003, as he was walking toward his home at 33rd Street and Susquehanna Avenue in Philadelphia, he was approached by two Philadelphia police officers, Defendant Officer Merrill and Defendant Officer Marable (“Defendant Merrill,” “Defendant Marable” and, along with Defendant Officer Samarco, the “Defendant Officers” and collectively, along with the City of Philadelphia, the “Defendants”). (Complaint at ¶ 7). The Defendant Officers, who were apparently waiting to serve Mr. Lewis with a restraining order, requested that Mr. Lewis acknowledge and sign the order. (Complaint at ¶¶ 8-9). Mr. Lewis

refused to sign for the order. (Complaint at ¶ 9). The parties dispute what happened after this.

Mr. Lewis contends that after he refused to sign for the order, he began to walk away and Defendant Officer Merrill drew his weapon and pointed it at Mr. Lewis. (Complaint at ¶¶ 10-11). Mr. Lewis asserts that he became frightened when he saw the weapon and began running away from the Defendant Officers. (Complaint at ¶ 11). Defendant Officers Merrill and Marable apparently gave chase, and Mr. Lewis alleges that ultimately Defendant Officer Merrill assaulted Mr. Lewis by punching him in the face, slamming his face into a step and jamming a knee into Mr. Lewis' back. (Complaint at ¶ 13). Mr. Lewis further asserts that as he lay on the ground, Defendant Officer Merrill again pointed his weapon at Mr. Lewis and threatened to kill him. (Complaint at ¶ 14). Mr. Lewis alleges that he was then handcuffed. (Complaint at ¶ 15).

Mr. Lewis asserts that after he was handcuffed, Defendant Officer Merrill again punched him in the face, slammed him into the police vehicle and struck him in the face several times. (Complaint at ¶ 15-16). Mr. Lewis alleges that Defendant Officers Merrill and Marable drove him around the corner and asked him about the location of his daughter. (Complaint at ¶18). Mr. Lewis contends that when he responded that his daughter was with Mr. Lewis' sister, Defendant Officer Marable began to choke Mr. Lewis. (Complaint at ¶ 19.) At this point, Defendant Officer Samarco allegedly arrived at the scene and instructed Defendant Officers Merrill and Marable to say that Mr. Lewis had assaulted them. (Complaint at ¶ 21). Mr. Lewis was subsequently charged with aggravated assault, simple assault, resisting arrest and reckless endangerment of another person. (Complaint at ¶ 22). Mr. Lewis contends that all of the charges against him were later dismissed. (Complaint at ¶ 23).

In preparing for trial, the Mr. Lewis' attorney deposed Officer Mary Leach, a Philadelphia

police officer who is assigned to the same district as the Defendant Officers. In her deposition, Officer Leach testified that she was not at the scene on the day the disputed incident occurred, and that she first learned of the incident as she was coming into work on the afternoon that the incident occurred. Officer Leach also testified in her deposition that she did not know of what happened at the scene, and knew only “what the rumors were in the district” of the incident. Finally, Officer Leach also testified that she was aware of instances of alleged falsification of police documents by Defendant Samarco.

DISCUSSION

The Defendants seek to exclude the testimony of Officer Leach regarding either the incident with Mr. Lewis or any IAD complaints or investigations of Defendant Samarco because (1) Officer Leach has no first-hand knowledge about the Lewis incident or those other complaints and, therefore, her testimony would violate Rule 602 of the Federal Rules of Evidence; and (2) any of Officer Leach’s testimony that is based on rumors constitutes impermissible hearsay pursuant to Rule 802 of the Federal Rules of Evidence.

In the opposition to the Defendants’ Motion in Limine to Exclude Officer Leach’s Testimony and at oral argument, counsel for Mr. Lewis asserted that the evidence is admissible pursuant to either Federal Rule of Evidence 404(b), as evidence pertinent to the issue of Defendant Samarco’s truthfulness, or Federal Rule of Evidence 608, as a prior bad act that may be used to attack the credibility of Defendant Samarco.

Testimony as to the Incident with Mr. Lewis

At least two rules of evidence preclude Officer Leach from testifying about the Lewis incident. Federal Rule of Evidence 602 (“Rule 602”) demands that a witness have “personal

knowledge” of a matter about which they are testifying. FED. R. EVID. 602. Knowledge, as it is required by Rule 602, includes an “awareness of objects or events,” comprised of (1) sensory perception; (2) comprehension of what was perceived; (3) present recollection; and (4) ability to testify based on what was perceived. C. Wright and V. Gold, 27 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §6023 (West 1990). A district court has discretion in determining whether a witness has sufficient personal knowledge to testify about a particular matter. United States v. Lake, 150 F.3d 269, 273 (3d Cir. 1998).

Also germane to the present inquiry, Federal Rule Evidence 801 (“Rule 801”) defines hearsay as a “statement, other than one made by the declarant while testifying, . . . offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801. Evidence that is considered hearsay is not admissible. FED. R. EVID. 802. There are, however, numerous exceptions to the hearsay rule.

In her testimony at the IAD investigation with respect to the incident between the Defendant Officers and Mr. Lewis, Officer Leach twice states that she was not present when the alleged assault took place; she merely reiterated what she heard from other officers at the district office. Indeed, at the deposition that was taken in preparation for this case, Officer Leach testified that she heard about the incident with Mr. Lewis after she arrived at work that day.

After reviewing the testimony and the arguments set forth by Mr. Lewis and the Defendants, the Court concludes that Officer Leach’s testimony with respect to the incident with Mr. Lewis should be excluded. It is clear that Officer Leach was not present at the scene of the incident, and her testimony regarding the matter appears to be based exclusively upon hearsay evidence, which cannot be admitted to prove the facts asserted in the statement.

Testimony as to Sustained Violations of Police Directives

As to her testimony relating to evidence of “sustained” violations of police department directives by Defendant Samarco, the Defendants assert that any such testimony should be excluded because these violations are not of a constitutional nature and are therefore not relevant to the present case. The Defendants further argue that any attempt to introduce evidence about other alleged acts by Defendant Samarco that were the subject of IAD inquiries but which were not sustained amounts to a “blatant attempt to introduce character evidence” which would be forbidden by Federal Rule of Evidence 404(a).

In response, Mr. Lewis argues that Officer Leach does have personal knowledge about at least one incident of Defendant Samarco’s falsification of documents, and that this knowledge is relevant to establish Defendant Samarco’s lack of veracity. Mr. Lewis further asserts that Officer Leach’s testimony is admissible pursuant to Federal Rule of Evidence 609 [sic 608], which allows that the credibility of a witness may be attacked or supported by evidence “in the form of opinion or reputation,” as long as this character evidence is presented only for consideration of truthfulness or untruthfulness.¹

As Defendants argue, evidence of a person’s character or a character trait is generally not admissible to prove an individual had a propensity to commit a particular act. FED. R. EVID. 404(a). In turn, Federal Rule of Evidence 404(b) (“Rule 404(b)”) precludes the introduction of evidence of “other crimes, wrongs or acts” to prove the character of a person, unless such evidence is presented to prove “motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake

¹ The actual evidentiary rule addressing evidence of the character and conduct of witnesses is Federal Rule of Evidence 608, and not Federal Rule of Evidence 609, to which Plaintiff refers, which addresses impeachment of a witness by evidence of conviction of a crime.

or accident.” FED. R. EVID. 404(b). The Court of Appeals for the Third Circuit has adopted a four-prong test to determine the admissibility of evidence pursuant to Rule 404(b): “(1) the evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 402; (3) its probative value must outweigh its prejudicial effect under Rule 403; and (4) the court must charge the jury to consider the evidence only for the limited purpose for which it was admitted.” Becker v. Arco Chemical Co., 207 F.3d 176, 189 (3d Cir. 2000) (citing cases). Thus, the proposed Leach testimony relating to Defendant Samarco’s falsification of police records would have to be offered for one of the purposes allowable under Rule 404(b) in order to be admissible as character evidence.

In her deposition testimony, Officer Leach attests that she does have knowledge that Defendant Samarco had altered or changed police reports in the past. Officer Leach also states that she had no personal knowledge as to whether Defendant Samarco falsified any documents with respect to *Mr. Lewis’ case*, and that she only knew “what the rumors were in the district.” Thus, Officer Leach does appear to have some personal knowledge that Defendant Samarco had falsified records in the past other than as to this alleged incident involving Mr. Lewis.

At oral argument, counsel for Mr. Lewis argued that the information Officer Leach possesses and testified to with respect to the falsification of police records by Defendant Samarco should be admissible pursuant to Rule 404(b), in that the evidence is probative of Defendant Samarco’s “truthfulness or untruthfulness.” This purpose, however, does not fit into any of the exceptions provided under Rule 404(b), in that the evidence would not be submitted to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Officer Leach’s testimony is therefore not admissible pursuant to Rule 404(b).

In the alternative, Mr. Lewis seeks to admit Officer Leach’s testimony with respect to the

falsification of police documents pursuant to Rule 608. Rule 608(b) states that specific instances of conduct for the purpose of attacking or supporting a witness “character for truthfulness” may not be proved by extrinsic evidence. FED. R. EVID. 608(b). Such conduct may, however, “be inquired into on cross-examination of the witness concerning the witness’ character for truthfulness or untruthfulness.” Id. The Court of Appeals for the Third Circuit has held that while questioning a witness about specific instances of conduct may be permissible as long as it is probative of the truthfulness or untruthfulness of a witness, Rule 608(b) would preclude the presentation of other evidence to prove the specific bad acts. U.S. v. Davis, 183 F.3d 231, 257 n.12 (3d Cir. 1999).

In Davis, the court concluded that a prosecutor could rightfully examine a police officer as to his conduct relating to actions such as misappropriating department gasoline for personal use and putting a false name in a gas log. Davis, 183 F.3d at 257. However, the introduction of evidence that the officer was suspended or deemed a liar by IAD was inadmissible extrinsic evidence to establish the officer’s untruthfulness. Id. Where such an attack is engaged, evidence of the truthful character of the witness is allowed to rebut the attack. FED. R. EVID. 608(a)(2); see also Renda v. King, 347 F.3d 550, 554 (3d Cir. 2003).

At oral argument, counsel for Mr. Lewis argued that he intends to present Officer Leach’s testimony with respect to her knowledge of falsification of police documents to attack the veracity of Defendant Samarco. Counsel also argued that specific instances of conduct may be admitted to show “proclivity to engage in whatever the issue is.” It appears, however, that counsel misses the purpose and intent of Rule 608(b), in that extrinsic evidence of such acts are not permitted unless the object of such testimony – the person who committed such acts – denies doing so while being questioned. FED. R. EVID. 608(b)(2). In this case, Defendant Samarco has admitted that he committed the falsification violations in question. Thus, there appears to be no purpose – other than

an impermissible attack on Defendant Samarco's credibility – to allow for Officer Leach's testimony with respect to the falsification of police documents unless, of course, Defendant Samarco suddenly elects to present evidence to the contrary.

CONCLUSION

Because Officer Leach does not have personal knowledge of the event underlying the present dispute, and because her testimony relating to the falsification of police documents by Defendant Samarco would constitute impermissible character evidence, the Defendants' Motion in Limine to exclude Officer Leach's testimony and to preclude Mr. Lewis and his attorney from introducing as an exhibit, or making any reference whatsoever, to the out-of-court statement of Officer Leach is granted. An appropriate Order follows.

/S/ Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge

November 19, 2004

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TYRONE LEWIS,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
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THE CITY OF PHILADELPHIA,	:	
SAMARCO, MERRILL, AND	:	
MARABLE,	:	
Defendants	:	NO. 03-2310

ORDER

And now, this 19th day of November, upon consideration of the City of Philadelphia's Motion in Limine to Preclude the Testimony of Officer Mary Leach [Docket No. 33], the Plaintiff's response thereto [Docket No. 35], and Oral Argument with respect to the Motion for Summary Judgment, which was held on November 2, 2004 [Docket No. 39], it is hereby ORDERED that the Motion in Limine is GRANTED. Plaintiff and his attorney are precluded from calling Officer Leach as a witness at time of trial, and from introducing as an exhibit, or making any reference whatsoever, to the out-of-court statement by Officer Leach. This Order is without prejudice to Plaintiff in the event Defendant Officer Samarco denies on direct examination that he did sign an internal police document on behalf of his supervising officer.

BY THE COURT:

/S/ Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE