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

JEFFREY UTZ	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-0437
	:	
ERIC JOHNSON	:	

SURRICK, J. **DECEMBER 9, 2004**

MEMORANDUM & ORDER

Presently before this Court is Plaintiff's Motion *In Limine* To Preclude Reference To Alcohol Consumption and Intoxication (Doc. No. 21). For the following reasons, Plaintiff's Motion will be granted in part and denied in part.

I. BACKGROUND

The opening paragraph in Defendant's Memorandum in opposition to the instant Motion states:

> Based on the understandable, but nonetheless self-serving, refusal of Jeffrey Utz, Monte Taylor Densley and Eric Johnson – the three principal witnesses in this case whose depositions have been taken – to admit that they were intoxicated, plaintiff ignores the overwhelming evidence that these three people were drinking a mixture of beer and grain alcohol for over seven hours without any substantial food, and moves to exclude any and all reference to alcohol on the theory that because none of the principals admitted to being drunk, there is no basis for reference to alcohol in this case. To the contrary, this case is all about alcohol.

Defendant's Memorandum goes on to say:

> [D]espite the reticence of three Ivy League, law school graduates to admit their intoxication, the evidence that alcohol was being

> consumed at a prodigious rate during Utz's party is overwhelming, and the evidence that all concerned were "feeling the effects" is clear.

Notwithstanding the fact that Plaintiff, Defendant, and other witnesses in this case have testified that Plaintiff and Defendant were not intoxicated when this incident occurred, Defendant wants to inject the use of alcohol into this case. The law does not permit this.

II. FACTS

Plaintiff Jeffrey Utz, a student at the University of Pennsylvania Law School, hosted a party at his house at the end of the Spring 2002 semester. The party began at 10:00 p.m. and continued for seven and one-half hours until approximately 5:30 a.m. (Utz Dep. at 132.) It is not disputed that alcohol flowed freely at the party. Between 60 and 100 people attended the party (*id.* at 121) and "everyone . . . seemed to be drinking" alcohol. (Taylor-Densley Dep. at 32.) Some guests brought their own alcohol, such as beer and wine. (Utz Dep. at 123-24.) There were also three kegs of beer at the party, as well as three bottles of Everclear, which consists of grain alcohol. (Taylor-Densley Dep. at 31-32; Utz Dep. at 123-25.) The grain alcohol was mixed with a non-alcoholic beverage to make a punch which was dispensed from a cooler. (Taylor-Densley Dep. at 31, 33; Utz Dep. at 125.) By the end of the night, the beer had been consumed. (Taylor-Densley Dep. at 58-59.)

The Defendant, Monte Taylor-Densley, and Marcus Dyer were guests at Plaintiff's party. They began to drink beer and liquor at Defendant's house before they went to the party. (Johnson Dep. at 70; Taylor-Densley Dep. at 23; Dyer Dep. at 29.) Defendant probably had two gin and tonics before arriving at Plaintiff's party. (Johnson Dep. at 70.) Taylor-Densley also had

two or three drinks prior to the party. (Taylor-Densley Dep. at 24.) Dyer may have had a beer. (Dyer Dep. at 29.)

The testimony reveals that during the party, Plaintiff had between six and eight drinks, which included both grain alcohol and beer. (Utz Dep. at 132.) The testimony also reveals that Plaintiff did not appear to be drunk. (Taylor-Densley Dep. at 61; Johnson Dep. at 103.)

Defendant may have had between five and ten beers at the party (Johnson Dep. at 72-73), and seemed to be "feeling the effects" because he was more talkative than normal. (Utz Dep. at 130.) However, this testimony does not reveal that Defendant was drunk either. (*Id.* at 130.)

Taylor-Densley had "[a] lot of drinks" throughout the night. (Taylor-Densley Dep. at 28-31.) He appeared to be "feeling the effects" of drinking because he was "more outgoing" than usual. (Utz Dep. at 130-31.) However, he was not drunk. (*Id.* at 130-31.)

At 5:30 a.m., when the physical altercation between Plaintiff and Defendant occurred, Dyer was intoxicated. (Utz Dep. at 132; Dyer Dep. at 16, 28; Taylor-Densley Dep. at 65; Johnson Dep. at 75.) He was having difficulty keeping his balance, was not making a lot of sense when he spoke, and "was just out of it." (Johnson Dep. at 75.) As a result, Dyer has only a vague recollection of what happened that night. (Dyer Dep. at 16, 28.)

The fight between the Plaintiff and the Defendant began at approximately 5:30 a.m. Sometime earlier in the evening, Defendant had a conversation with Plaintiff's girlfriend, Stephanie Merhar, about the fact that Merhar's hand appeared to be red. (Johnson Dep. at 80-84.) Merhar indicated that she had burned her hand years ago. Defendant then kissed her hand. At around 5:30 a.m., Defendant was telling Plaintiff and others at the party about his conversation with Merhar. Plaintiff advised Defendant that Merhar had burned her hand when

she was a child. (Utz Dep at 158). When Defendant continued to talk about Plaintiff's girlfriend, Plaintiff called Defendant a "dildo" several times. (Taylor-Densley Dep. at 80-81; Johnson Dep. at 56-57, 85.) There was a short verbal exchange between the two, with Defendant saying to Plaintiff, "Fuck you, Jeff." (Johnson Dep. at 64). As Defendant made this statement, he threw beer on Plaintiff. Plaintiff stepped forward and raised his hands. (Utz. Dep. at 170; Johnson Dep. at 93). Defendant then threw two punches, striking Plaintiff in the left side of his head. Plaintiff fell to the ground. (Johnson Dep. 97-100).

Plaintiff seeks to exclude the following evidence: (1) alcohol consumption by guests at Plaintiff's residence prior to the altercation between Plaintiff and Defendant; (2) Plaintiff's alcohol consumption prior to the altercation; (3) Defendant's alcohol consumption prior to the altercation; and (4) the relationship between intoxication and the general incidence of injury. Defendant contends that this evidence is admissible.

III. ANALYSIS

In determining whether to admit evidence, a court must make the threshold determination that the proffered evidence is relevant. Evidence that is not relevant is not admissible. Fed. R. Evid. 402; Pa. R. Evid. 402. Both the Federal Rules of Evidence and the Pennsylvania Rules of Evidence define relevant evidence as "evidence having 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." Fed. R. Evid. 401; Pa. R. Evid. 401.

Defendant argues that evidence of the overall atmosphere of the party, including evidence of Plaintiff's alcohol consumption, is critical to his claim that Plaintiff provoked or otherwise caused the altercation with Defendant and the harm that befell him. Defendant argues that this

provocation not only acts as a bar to punitive charges, it also serves to mitigate Plaintiff's compensatory damages.[1] In cases of assault and battery, if a defendant establishes that he was provoked by the plaintiff, a jury may reduce the plaintiff's compensatory damages. *Mawhinney v. Holtzhauer*, 77 A.2d 734, 735 (Pa. Super. Ct. 1951). Moreover, if the plaintiff provoked the defendant, then punitive damages are not recoverable. *Id.* (quoting *Robinson v. Rupert*, 23 Pa. 523, 525 (1854)). In determining whether a plaintiff provokes a defendant, it is critical to focus on the interaction between the parties immediately before the altercation begins. *Id.*

Evidence of general alcohol consumption by guests at Plaintiff's party is not relevant on the issue of the provocation defense because it obviously had nothing to do with the altercation. Neither the Plaintiff nor the Defendant alleges that other guests were involved in starting or continuing the altercation. Similarly, evidence of Plaintiff's alcohol consumption fails the relevancy test. There is no evidence that Plaintiff was intoxicated. The fact that he was drinking alcohol does not tend to make the existence of a critical fact regarding the alleged provocation more probable or less probable. More importantly, Plaintiff admits the conduct that constitutes the provocation of which Defendant complains. Plaintiff admits that he called Defendant a "dildo." (Utz Dep. at 164-69.) There is no dispute that this term was used in the verbal exchange between Plaintiff and Defendant. There is also no dispute that immediately after being called this name, Defendant threw beer on Plaintiff and struck him.

Even if one were to determine that evidence of alcohol consumption had some relevance

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[1]We have already concluded that the Defendant may not rely on the affirmative defense of self-defense to avoid the imposition of liability, regardless of whether there was provocation. *Utz v. Johnson*, No. 04-CV-0437, memo. op. at 3, 6 (E.D. Pa. Dec. 7, 2004) (explaining that "[a] defendant is not free from fault if he commits an assault or battery in response to a verbal provocation").

to the incident, it would not be admissible under Federal Rule of Evidence 403 because of its potential to be unduly prejudicial.[2] Defendant asserts that "there is no way that a jury could meaningfully assess the level of Utz's fault in instigating the altercation without understanding the kind of party Utz hosted and the role that alcohol played in it." (Doc. No. 35 at 6.) This is exactly the problem. Defendant's attempt to paint a picture of the Plaintiff throwing a wild "seven hour drinking bash" (*id.*) would certainly be prejudicial to Plaintiff while having only limited probative value on the issues of provocation and mitigation of damages. Allowing the jury to hear evidence that Plaintiff hosted a party where alcohol flowed freely for seven and one-half hours may cause the jury to base a decision on its perception of the propriety of such an affair rather than the facts related to the incident that gave rise to Plaintiff's harm.

It is, of course, true that cross-examination is a critical tool in assessing the credibility of witnesses. *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1081 (Pa. 2001). Witnesses may be cross-examined regarding "his or her ability to observe and accurately recall the event in question." *Id.* Specifically, "'intoxication on the part of a witness at the time of an occurrence about which he has testified is a proper matter for the jury's consideration.'" *Commonwealth v. Small*, 741 A.2d 666, 677 (Pa. 1999) (quoting *Commonwealth v. Drew*, 459 A.2d 318, 321 (Pa. 1983)). However, "there must be, at a minimum, some factual basis upon which to conclude or to suspect that the witness was intoxicated before questions regarding alcohol consumption are permissible." *In the Interest of: M.M.*, 690 A.2d 175, 178 (Pa. 1997); *see id.* ("While evidence of intoxication may be

[2]Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially 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." Fed. R. Evid. 403. Pennsylvania Rules of Evidence provide a similar mechanism for courts to exclude certain relevant evidence. Pa. R. Evid. 403.

admissible to challenge a witness' ability to perceive the events to which he is testifying, evidence that the witness was simply drinking prior to the observations is not."). Plaintiff and Defendant will rely on their own testimony at trial as well as the testimony of Dyer and Taylor-Densley. (Doc. No. 37; Doc. No. 28, Ex. B.)

As discussed above, there is insufficient evidence to demonstrate that Plaintiff was intoxicated at the time of his confrontation with Defendant. During the course of the seven and one-half hour party, Plaintiff had between six and eight drinks. (Utz Dep. at 132.) While the testimony indicated that Plaintiff and the other guests may have been glassy-eyed (Taylor-Densley Dep. at 132), the testimony also indicated that Plaintiff was not intoxicated. (Johnson Dep. at 103.)[3] There is no testimony, expert or otherwise, in this record to support the conclusion that intoxication caused this incident. There is nothing in the record to suggest that alcohol in any way affected Plaintiff's ability to perceive the events as they unfolded that night. The fact that Plaintiff had six or eight drinks over a seven and one-half hour period does not justify the injection of alcohol into this case in the face of direct testimony that Plaintiff was not intoxicated and in the face of Plaintiff's admission that he called Defendant a name before Defendant struck him. Under the circumstances, Defendant may not offer evidence of Plaintiff's alcohol consumption at the party.

With regard to evidence of Defendant's alcohol consumption, we note that Defendant does not appear to oppose Plaintiff's Motion as it relates to his alcohol consumption. In any

[3]A party need not rely on expert testimony to establish intoxication for purposes of impeachment. Rather, lay persons may rely on their observations and offer opinions regarding the extent of an individual's intoxication. *Hannon v. City of Philadelphia*, 587 A.2d 845, 848 n.1 (Pa. Commw. Ct. 1991); *In the Interest of Wright*, 401 A.2d 1209, 1214 (Pa. Super. Ct. 1979).

event, for essentially the reasons discussed relative to Plaintiff's alcohol consumption, we will not permit evidence of Defendant's alcohol consumption to be offered at trial.

The record reveals that after Defendant got to the party, he may have consumed between five and ten beers. (Johnson Dep. at 72-73.) Plaintiff noted that he "kind of figured that he [Defendant] was feeling the effects" of drinking because he was more talkative than usual.[4] (Utz. Dep. at 130.) Plaintiff never came to the conclusion that Defendant was drunk. (*Id.* at 130.) Moreover, there is no testimony, expert or otherwise, that Defendant was intoxicated at the time of the altercation. Because there is insufficient evidence of Defendant's intoxication at the time of the incident, evidence of Defendant's alcohol consumption will not be permitted. The situation with regard to Dyer is different. By the time the fight between Plaintiff and Defendant broke out at approximately 5:30 a.m., Dyer was intoxicated. (Dyer Dep. at 16, 28; Taylor-Densley Dep. at 65; Johnson Dep. at 75.) He was having difficulty keeping his balance, was not making a lot of sense when he spoke, and "was just out of it." (Johnson Dep. at 75.) He only vaguely remembers what happened at the party. (Taylor-Densley Dep. at 16, 28.) If Dyer is called as a witness, evidence of his alcohol consumption is admissible because alcohol clearly affected his ability to perceive events at the time of the altercation between these parties.

Finally, Taylor-Densley had two or three drinks at Johnson's residence prior to the party. (Taylor-Densley Dep. at 24.) He continued to drink as soon as he arrived at the party (*id.* at 28), and had "[a] lot of drinks" throughout the night. (*Id.* at 31.) Plaintiff testified that Taylor-Densley appeared to be "feeling the effects" of drinking because he was "more outgoing than

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[4]Defendant offers no evidence to support an argument that being more talkative is suggestive of intoxication.

normal." (Utz Dep. at 130-31.) However, there is no evidence or testimony that Taylor-Densley was intoxicated or that alcohol affected his ability to perceive the events of that evening. (*Id.*)

Even if there were evidence of intoxication on the part of Plaintiff, Defendant, or Taylor-Densley, Federal Rule of Evidence 403 would require its exclusion. Based on the record as developed in discovery, there are very few disagreements regarding the critical facts. There is differing testimony about the position of Plaintiff's arms immediately before Defendant punched him in the face. There are also differing recollections about whether somebody kicked or punched the Plaintiff once he fell to the ground after Defendant punched him. The evidence of consumption of alcohol has little probative value in the resolution of these outstanding factual issues. However, the danger of unfair prejudice is substantial.

When one looks at this case from a distance, it is easy to see that alcohol was a significant part of the festivities on April 27, 2002. When one closely examines the record that was created by these parties, one finds that there is no evidence to support the conclusion that alcohol caused or provoked the incident in question. The parties and their witnesses have been very careful to paint the picture of sobriety as it relates to their conduct on this evening. Although some might suggest that the picture painted is not entirely consistent with common experience, it is possible to remain sober at a seven and one-half hour party where alcohol is served. It is not for this Court to declare that the record created here is not credible.

An appropriate Order follows.

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ERIC JOHNSON	:	

ORDER

AND NOW, this 9th day of December, 2004, upon consideration of Plaintiff's Motion *In Limine* To Preclude Reference To Alcohol Consumption and Intoxication (Doc. No. 21, No. 04-CV-043), all papers submitted in support thereof, and in opposition thereto, it is ORDERED that the Plaintiff's Motion is GRANTED in part and DENIED in part, in accordance with the Memorandum attached hereto.

IT IS SO ORDERED.

BY THE COURT:

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R. Barclay Surrick, Judge