

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CRIMINAL NO. ST-12-CR-421
Plaintiff,	)	
v.	)	V.I. Code Ann. tit. 14, § 297(2), §§ 1700a(a);
	)	§ 1700a(a), 331, 1708(2); 1709
KELVIN PICKERING,	)	
(D.O.B: 09-07-1979)	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on the People's Motion to Use Evidence of Similar Crimes Pursuant to Rule 413 or in the Alternative Rule 404(b) of the Federal Rules of Evidence, filed February 6, 2014.¹ The parties appeared for an in camera hearing on February 6, 2014, regarding another pending motion, and the Court discussed the present Motion with them at that time. Because the Court finds that the evidence the People intend to offer fits the requirements of Federal Rule of Evidence 413, and because the Court finds good cause for not complying with Rule 413's two-week prior to trial filing requirement, the Court will grant the Motion.

BACKGROUND

Counsel for the People alleges that he received a phone call from the case agent, Police Sergeant Celeste Potter ("Sgt. Potter"), on Wednesday, February 5, 2014. Sgt. Potter informed Counsel that she had received a call from Eve Dorsey, a resident of Tampa, Florida, who was trying to contact Counsel regarding this case. Counsel spoke with Ms. Dorsey who explained that she was in a relationship with the Defendant and has a son with him. Ms. Dorsey also has a minor daughter, N.D., who is not the child of the Defendant; however, the Defendant helped raise N.D. while Ms. Dorsey and the Defendant were together.

According to Ms. Dorsey, she and the Defendant broke up in 2001, but she and the Defendant continued to maintain an amicable relationship and he assisted with the care of the children. Ms. Dorsey informed Counsel that sometime roughly three years ago, when N.D. was 10 or 11 years old, N.D. complained to Ms. Dorsey that the Defendant had her take a bath and when she got out the Defendant had her sit on his lap and tried to kiss her on the lips and have her kiss him on the lips. N.D. purportedly told the Defendant no and ran into another room where her younger brother was.

Counsel had a brief opportunity to speak with N.D. on the telephone. Counsel explained that N.D. was emotional, and she recounted that the Defendant had her sit on his lap, he placed

¹ The People are represented by Assistant Attorney General Douglas Dick, Esquire. The Defendant Kelvin Pickering is represented by Vonetta Norman, Esquire, and Carl Williams, Esquire.

his hands on her hips, and he had her rock back and forth on his lap. He also got her to sit on the sink in the bathroom and he put her tongue in her mouth and tried to get her to kiss him. Finally, N.D. stated her told her not to tell anyone.

Ms. Dorsey stated she never went to the police because she wanted to handle the matter herself. Sometime later, Ms. Dorsey saw the incident was still bothering N.D. and so she and N.D. began counseling with Pastor Andre Shaw of Ms. Dorsey's church. Counsel had never met nor spoken to Ms. Dorsey or N.D. before this time. Counsel has not had the opportunity to speak to Pastor Shaw.

Counsel intends to introduce the foregoing events as evidence at trial. Ms. Dorsey indicated that N.D. is willing to testify. Ms. Dorsey stated that she became aware of the present case against the Defendant when a friend sent her a newspaper clipping on the matter. She came forward with this evidence because she ran into some friends of the Defendant and during the ensuing conversation the friends were bragging about how the Defendant was going to go free. This galvanized Ms. Dorsey to contact the Virgin Islands Police, where she spoke with Sgt. Potter who put her into contact with Counsel for the People.

DISCUSSION

I. THE CONTENT OF THE PEOPLE'S INTENDED EVIDENCE IS PROPER UNDER FRE 413.

Federal Rule of Evidence 413 allows a court to admit evidence of prior sexual assaults by a defendant to be used against that defendant in other cases stemming from sexual assault.² Subsection (d)(1) notes that any conduct proscribed by Chapter 109A of Title 18 of the United States Code falls under the umbrella of sexual assault if the behavior proscribed under Chapter 109A is also a crime under state law. In the Virgin Islands, any sexual contact with person under the age of 16 is a crime, regardless of consent.³ Section 2246(D)(3) of Title 18 of the U.S. Code defines "sexual contact" as the "intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."⁴

The conduct described to People's Counsel above fits the definitions and constraints articulated by Rule 413. The intended testimony is an accusation of a prior sexual assault, as required. Although not expressly articulated in N.D.'s recollection of the events, the Court agrees with the People that a common sense interpretation of the situation is that the Defendant put N.D.'s buttocks on his lap and had her move back and forth with the intent to become sexually aroused by having her buttocks in contact with his genitalia through his clothing. This is against state law as required by the Rule, because under Virgin Islands law, these actions would constitute the crime of unlawful sexual contact in the first degree.⁵

² FED. R. EVID. 413. "The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the . . . Federal Rules of Evidence." SUPER. CT. R. 7.

³ V.I. CODE ANN. tit. 14 §§ 1708(2), 1709 (2012).

⁴ 18 U.S.C. § 2246(D)(3) (2006).

⁵ 14 V.I.C. § 1708(2).

The Court finds that the substance of the evidence the People intend to offer through N.D. fits Rule 413's framework for admissibility. Having decided that the content of the proposed evidence is proper under the rule, the Court must now determine whether the notice of the evidence was procedurally deficient and whether the prejudicial nature of the evidence outweighs the probative value.

II. THE PEOPLE HAVE SHOWN GOOD CAUSE FOR NOT COMPLYING WITH FED. R. EVID. 413'S NOTICE REQUIREMENT.

The Defendant argues that the evidence is inadmissible because it is unfairly prejudicial under FRE 403 and because the People have failed to comply with FRE 413's notice requirement. Rule 413 requires the People to give the Defendant notice of any evidence they seek to introduce under the Rule at least fifteen days before the date of trial "or at such later time as the court may allow for good cause."⁶ The People notified the Defendant that it intends to introduce the testimony of N.D. three and a half days before the start of the trial. The Defendant claims this presents unfair surprise.

The People argue that the Motion is brought in good faith. The People explain that the evidence at issue was not previously available to them, and it only came to their attention when Ms. Dorsey contacted counsel for the People on Wednesday, February 5, 2014. The People filed their Motion In Limine on February 6, 2014, and trial is scheduled to begin on Monday, February 10, 2014.

Given the timing and circumstances of the People learning of this evidence, the Court finds that the People have shown good cause for not complying with the fifteen-day pretrial requirement. Counsel for the People spoke with Ms. Dorsey on February 5, 2014, and filed the instant motion almost immediately the following day. Although notice to the Defendant came on the eve of trial, it appears that the People notified the Defendant and the Court as quickly as possible given when the People learned of this evidence. Therefore, the Court finds there is good cause to allow the evidence despite the People notice coming less than the fifteen days prior to trial as contemplated by the Rule.

III. THE PROBATIVE VALUE IS NOT OUTWEIGHED BY THE POTENTIAL FOR PREJUDICE.

The Defendant first argues that he will be unfairly prejudiced because the People have failed to disclose an adequate summary or statement of N.D.'s expected testimony. The Defendant argues that the short section of the People's Motion where counsel describes his conversation with N.D. does not rise to the level of specificity required by Rule 413. Finally, the Defendant argues that the evidence generally inadmissible because the probative value is outweighed by the danger of unfair prejudice under Fed. R. Evid. 403.

The Defendant further offers *Johnson v. Elk Lake School District* for the factors in

⁶ FED. R. EVID. 413(b).

evaluating the probativeness of evidence under 413. *Johnson* explains that the Court must consider two elements in deciding Rule 413 admissibility: (1) the degree of similarity to the prior act, and (2) whether the act can be shown with "sufficient specificity."⁷

As to the first consideration, the Defendant argues that the acts alleged by N.D. are not sufficiently similar to the acts in the present case to allow N.D.'s testimony. The Court disagrees. N.D. was four or five years younger than K.S. (the victim in the present case) at the time of the alleged incident with N.D. Further, the Defendant was not accused of touching N.D.'s genitals or attempting to penetrate her, unlike what allegedly occurred with K.S.

Although these differences do exist, the Court finds that there are enough similarities to warrant admissibility. Both incidents involve sexual contact with a minor female. Although the circumstances differ, both incidents indicate that the Defendant was seeking sexual gratification from his alleged acts. The Court finds that the proposed testimony of N.D. is probative, and its value is not outweighed by unfair prejudice.

On the second prong, the Defendant goes on to argue that the past acts as described by N.D. cannot be shown with reasonable certainty. The Defendant cites the child's age (nine or ten years old at the time of the incident) and the fact that the People have not produced any corroborating evidence of the incident. The Defendant is correct that, at present, the People have not offered corroborating evidence. However, Rule 413 does not require corroborating evidence.⁸ Corroboration is simply something that the Court considers in allowing evidence that may be prejudicial.⁹ In this case, the lack of corroborating evidence is an issue of weight, not admissibility. The Defendant will not be prejudiced as Rule 413 clearly allows this type of evidence and the Defendant will have the opportunity to cross-examine N.D., where her credibility and reliability in remembering the above events can be called into question. Therefore, the Court finds that the sufficient specificity requirement is met.

⁷ *Johnson v. Elk Lake School District*, 283 F.3d 138, 156 (3d Cir. 2002).

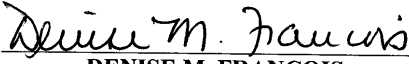
⁸ See generally FED. R. EVID. 413.

⁹ *Johnson*, 283 F.3d at 156.

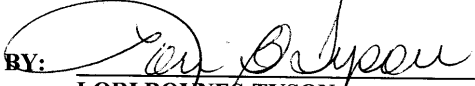
CONCLUSION

After examining the Motion, the Court finds that N.D.'s testimony of her encounter with Pickering is of the exact nature of evidence contemplated by Rule 413. Further, the People have shown good cause for their failure to comply with the notice requirement, and they have shown that the probative value of the evidence is not outweighed by the possibility of unfair prejudice. For the reasons stated above, the Court will grant the People's Motion.

DATED: February 13, 2014
Nunc pro tunc February 7, 2014


DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES-TYSON
Court Clerk Supervisor 2/13/2014