

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

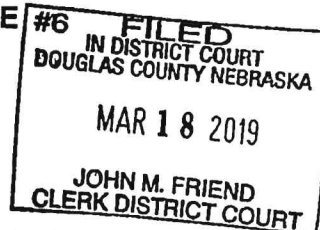
vs.

AUGUSTINE CAVITTE.

Defendant.

Case No. CR 18-1581

ORDER ON MOTIONS IN LIMINE
REGARDING 404 AND 405
EVIDENCE #6



This matter comes before the Court on the Defendant's Motion in Limine filed March 13, 2019, and the State's Motion in Limine filed March 14, 2019. A hearing was held on March 14, 2019. Bethany Stensrud and Abbi Romshek, Assistant Public Defenders, appeared on behalf of and with the defendant, Augustine Cavitte. Desiree Stormont, Deputy County Attorney, appeared on behalf of the State. Arguments were heard and the matter was taken under advisement. Being fully advised in the premises, the Court finds and orders as follows:

Background and Procedural History

On May 4, 2018, the State filed an Information charging the defendant with 2nd Degree Domestic Assault, a class IIIA felony. This matter came for a pretrial conference on March 12, 2019. Prior to the pretrial conference, the parties believed that a plea agreement had been reached. However, at the pretrial conference, it became apparent that no plea agreement had been reached and that an expedited trial date was necessary because of the imminent deadline imposed by the defendant's right to a speedy trial. Trial was set for Monday, March 18, 2019.

Appendix E



On March 13, 2019, the defendant filed a Motion in Limine seeking an order allowing for the introduction of 16 specific incidents of prior bad acts by the victim against the defendant. On March 14, 2019, the State filed a responsive Motion in Limine requesting that the defendant's motion in limine be overruled. Both motions came for hearing on March 15, 2019. At the hearing, the defendant argued through counsel that the evidence contained in the motion in limine would be offered through the testimony of the defendant, and that the defendant was under no obligation to disclose her theory of the case or her prospective testimony before trial. The defendant further argued that all of the instances listed in the motion in limine were relevant to her affirmative defense of self-defense and that sufficient foundation demonstrating the relevance would be laid at trial.

At the hearing, the State argued that the reciprocal discovery statute under Neb. Rev. Stat. § 29-1916 required the defendant to disclose the specific instances of conduct relied on in a more timely matter. The State argued in the alternative that if its timeliness objection were overruled, it would not object to the prospective admissibility of the more recent incidents of assaultive conduct involving items number 10, 11, 12, 14, 15, and 16 on the defendant's motion in limine. However, the State argued that more remote instances of bad conduct may be less probative to the issues in this case and that the State would likely object to the admissibility of those specific instances of conduct under Rule 403.

Legal Standard

A motion in limine is procedural step to prevent prejudicial evidence from reaching the jury. *State v. Savage*, 301 Neb. 873, 883, 920 N.W.2d 692, 702 (2018). It

is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. *Huber v. Rohrig*, 280 Neb. 868, 887, 791 N.W.2d 590, 606 (2010).

Analysis

Reciprocal Discovery Statute

The State first argues that the reciprocal discovery statute, Neb. Rev. Stat. § 29-1916 (Reissue 2016), required the defendant to disclose the information contained in its motion in limine in a more timely manner. Because the proposed evidence is to be adduced through the testimony of the defendant, and the defendant has no obligation to list herself as a witness or disclose her testimony before trial, the Court disagrees. Although the setting of a trial date within a week is a burden on the parties, the reciprocal discovery rules did not entitle the State to additional notice of the proposed evidence of the defendant.

Admissibility of Prior Bad Acts Evidence

The Nebraska Rules of Evidence state, in relevant part, "Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." Neb. Rev. Stat. Ann. § 27-404 (Reissue 2016). In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. Neb. Rev. Stat. § 27-405 (Reissue 2016).

Self-defense is a statutorily affirmative defense in Nebraska. *State v. Heng*, 25 Neb. App. 317, 349, 905 N.W.2d 279, 302 (2017), *review denied* (Feb. 27, 2018). Neb. Rev. Stat. § 28-1409 (Reissue 2016) provides in relevant part, “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. § 28-1409; *State v. Heng*, *supra*. To successfully assert the claim of self-defense, one must have both a reasonable and good faith belief in the necessity of using force. *State v. Kinser*, 252 Neb. 600, 605, 567 N.W.2d 287, 291 (1997).

The Nebraska Supreme Court and Nebraska Court of Appeals have previously held that evidence of a victim's violent character is relevant to the proof of a self-defense claim. See *State v. Matthews*, 289 Neb. 184, 191, 854 N.W.2d 576, 582 (2014); *State v. Lewchuk*, 4 Neb. App. 165, 171, 539 N.W.2d 847, 852 (1995). Thus, Nebraska Appellate Courts have previously allowed evidence in the form of specific instances of conduct to prove a victim's violent character with reference to a defendant's claim of self-defense. See *State v. Lewchuk*, *supra*.

At the hearing in this matter, the State conceded that the 2017 and 2018 instances of assaultive conduct by the victim would be admissible under *State v. Lewchuk*, *supra*. However, the State argued that more remote instances may be objectionable under Rule 403. 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. Neb. Rev. Stat. § 27-403 (Reissue

2016). In analyzing other provisions of § 27-404, the Nebraska Supreme Court has held that "[t]he question of whether evidence of other conduct . . . is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence." *State v. Yager*, 236 Neb. 481, 486, 461 N.W.2d 741, 745 (1990).

The issues raised by an affirmative defense of self-defense in this case are (1) whether the defendant's belief that the use of force was necessary was reasonable and in good faith, and (2) whether the victim was the first aggressor. Instances of assaultive conduct that are more remote in time to the charged incident are likely to be less probative of those questions than more acute instances of assault by the victim. However, other factors such as the similarity in circumstances are also important in determining whether the probative value of a particular piece of evidence is outweighed by its prejudicial or confusing nature. See *State v. Lewchuk*, 4 Neb. App. 165, 177, 539 N.W.2d 847, 855 (1995) ("the similarity in circumstances and the proximity in time of the prior incidents would be highly probative of the issue of whether Warner was the first aggressor and physically attacked Lewchuk on the night in question.").

With these standards in mind, the Court is unable to determine in limine that the instances of conduct from 1999 to 2008 are too remote in time to be admissible under rule 403; at the time of this hearing, the Court has no information about the specific evidence sought to be adduced except for the dates and the fact that the evidence is alleged to be assaultive conduct by the victim against the defendant. Likewise, the


Court is unable to determine in limine the extent to which these instances are probative of the issue raised by a defense of self-defense.

Therefore, the State's motion in limine will be overruled and the defendant's motion in limine sustained at this time. However, it is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. *Huber v. Rohrig, supra*. The Court therefore will entertain the State's Rule 403 objections to items 1-9 and 13 during the course of trial if they are renewed at that time. The Court requests that the defendant be cognizant of the possibility that such evidence will not be ultimately admissible and to proceed accordingly in opening statements and other preliminary contact with the jury.

IT IS THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED that the defendant's motion in limine is sustained with the caveats discussed above, and the State's motion in limine is overruled. Specific objections will be revisited at trial.

DATED this 15 day of March, 2019.

BY THE COURT:



Thomas A. Otepka
District Court Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 19, 2019 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Bethany R Stensrud

bethany.stensrud@douglascounty-ne.gov

Jay W Klimes

jay.klimes@douglascounty-ne.gov

Date: March 19, 2019

BY THE COURT:

John M. Friend
CLERK

