FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **ANTHONY PETER RIOS,** **Defendant.**	**CRIMINAL CASE NO. 12-0110** **PRETRIAL ORDER REGARDING RULE 413 EVIDENCE**

I. INTRODUCTION

THIS MATTER came before the Court January 30, 2013 on the Commonwealth's motion. The Commonwealth was represented by Assistant Attorney General Chemere McField. The Defendant appeared with his attorney, Joaquin Torres. Based on the filings, facts of the case and applicable law, the Court now renders its decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is charged with two counts of Sexual Assault in the Second Degree and related charges arising from two incidents with the alleged victim, M.X.S. In relation to those two incidents, the Commonwealth intends to prove that: (1) in December of 2011 Defendant gave a seventeen year old girl, M.X.S. the daughter of his friend, a "swimming lesson," where he unlawfully touched her breasts and vagina;[1] and (2) on or about June 11, 2012 when M.X.S was no longer a minor, Defendant, while living in the same house as

[1] Counts I, II and III of the First Amended Information relate to the swimming lesson.

M.X.S. entered her bedroom while she was sleeping and touched her vagina without her consent.[2] A jury trial is set for March 18, 2013.

On January 3, 2013 the Commonwealth timely filed a notice of its intent to introduce evidence of similar crimes in a sexual assault case pursuant to Rule 413. On January 22, 2013 Defendant opposed the introduction of the evidence, and on January 28, 2013 the Commonwealth filed a response to the opposition.

III. LEGAL STANDARD

The Commonwealth seeks to introduce evidence of three prior sexual acts in this case pursuant to NMI. R. Evid. 413 and 6 CMC § 1320. Either rule may provide a basis for admission. Generally, under the NMI Rules of Evidence, evidence of prior bad acts is not admissible to show propensity. NMI. R. Evid. 404(b). Rule 413**(**a), however, allows the admission of evidence of other sexual assaults for any relevant purpose. NMI. R. Evid. 413(a). Thus, Rule 413 supersedes the ban on propensity evidence in sexual assault cases. *United States v. Guidry*, 456 F.3d 493, 503 (5th Cir. 2006)[3]; *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998).

Rule 413 provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." NMI. R. Evid. 413(a). Under this rule an offense of sexual assault includes; (1) conduct proscribed by chapter 109A of title 18 of the United States Code; and (2) conduct which is a crime in the Commonwealth involving "contact, without consent,

[2] Counts IV, V, and VI of the First Amended Information relate to the sleeping incident.

[3] Because the Commonwealth rules are modeled after the Federal rules we look to interpretations of the federal counterpart for guidance, in the absence of Commonwealth law. *Commonwealth v. Lucas*, 2003 MP 9 ¶ 9.

between any part of the defendant's body or an object and the genitals or anus of another person" NMI. R. Evid. 413(d)(1),(2).

Under Rule 413 evidence of other sexual offenses is presumptively admissible. *United States v. Sioux*, 362 F.3d 1241, 1244 (9th Cir. 2004). Evidence which is otherwise admissible under Rule 413 is subject to the Rule 403 balancing test, and it may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . ." NMI. R. Evid. 403; *see also United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997).

6 CMC § 1320(a) provides:

> In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if the prior conduct
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> (i) occurred within the 10 years preceding the date of the offense charged;
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> (ii) is similar to the offense charged; and
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> (iii) was committed upon persons similar to the prosecuting witness.

This section addresses evidence admissible in a case involving a minor, where the other act evidence also involves a minor. *Id.* To be admissible the evidence must also be less than 10 years old, relate to a similar offense, and a similar victim. *Id.* For purposes of the statute the prior conduct "need not have resulted in any criminal charge or conviction in order to be admissible." *Id.* § 1320(c). With these principles in mind the Court turns to the issues in the case.

III. DISCUSSION

In connection with the swimming lesson in December of 2011 Defendant is charged with Count I: sexual assault in the second degree. "A person commits the crime of sexual

assault in the second degree if the offender engages in sexual contact with another person without consent of that person." 6 CMC 1302(a)(1). Defendant is also charged in Count II with assault and battery requiring the Commonwealth to prove that defendant had unlawful sexual contact with M.X.S. without her consent. *See* 6 CMC § 1202(a). Count III charges Defendant with disturbing the peace. "A person commits the offense of disturbing the peace if he or she unlawfully and willfully does any act which unreasonably annoys or disturbs another person so that the other person is deprived of his or her right to peace and quiet, or which provokes a breach of the peace." 6 CMC § 3101(a).

Counts IV, V, VI, relate to the sleeping incident in June of 2012 when M.X.S. was no longer a minor. In connection with the June incident Defendant is charged with the same three offenses, respectively Counts IV, V and VI.

A. OCTOBER 2011 PRIOR ACT

The Court must determine whether the Commonwealth will be permitted to introduce evidence of prior sexual conduct in October of 2011 to prove the current charges. On October 29, 2011, while Defendant was on release in another case, he snuck into the women's restroom at World Resort and watched as an unsuspecting employee showered. This conduct resulted in a conviction for disturbing the peace. *See Commonwealth v. Anthony Rios*, Crim. No.12-0007 (NMI Super. Ct. February 1, 2013) (Judgment of Conviction and Sentencing Order at 1). Other sexual acts evidence may be admissible under NMI R. Evid. 413 or 6 CMC § 1320(a).

The public shower incident is inadmissible to prove the current charges. To be admissible under Rule 413 the prior conduct must constitute an "offense of sexual assault" under the rule. An offence of sexual assault includes conduct proscribed by chapter 109A of

title 18 of the United States Code. NMI. R. Evid. 413(a). The prohibited conduct under this chapter includes "sexual contact," which is defined as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246 2(D). Here, no touching was involved. Because the conduct does not qualify as an offense of sexual assault the shower incident is not admissible under Rule 413(a).

The prior act may still be admissible pursuant to 6 CMC § 1320(a) which allows the introduction of evidence of conduct toward a minor in a case which also involves a minor. Here, charges related to the swimming lesson involved a minor, however, the victim in the previous case was not a minor; therefore Section 1320(a) does not apply.

B. 2003 PLEA AND UNDERLYING FACTS

The Commonwealth intends to introduce evidence that on December 16, 2003 Defendant plead guilty to sexual assault in the second degree as a lesser included offense of sexual assault in the first degree. In his plea Defendant admitted that on February 10, 2003 he had sexual intercourse, with A.C.C.A. without her consent. The victim in that case was the girlfriend of his half-brother, who was three months pregnant at the time. The victim reported to the police that while she was sleeping, she heard a knock at the door, and it was the Defendant. He began touching her breasts and begging to have sex with her. Then the defendant had sexual intercourse with her without her consent.

1. Swimming Lesson – (Counts I, II, III)

The 2003 case may be admissible to prove charges related to the swimming incident in this case. In a sexual assault case, the commission of another sexual assault is admissible

for any relevant purpose. NMI. R. 413(a). The previous offense is a crime in the Commonwealth involving contact, without consent, between the defendant's body and the victim's genitals. NMI. R. Evid. 413(d)(1),(2). The evidence of the previous plea and related facts are relevant to show Defendant's propensity to sexually assault women in close proximity to him. Evidence of the prior offense is also relevant to prove the element of lack of consent. Admission of the evidence is subject to Rule 403 balancing.

2. Rule 403 Balancing

Relevant sexual assault 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. . ." NMI. R. Evid. 403. The Ninth Circuit has articulated several non-exclusive factors which should be evaluated to determine whether to admit evidence of a defendant's prior acts of sexual misconduct. *United States v. LeMay*, 260 F.3d 1018, 1027-1028 (9th Cir. 2001) (applying factors under Rule 414). Courts consider

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. (citations and quotation marks omitted). In making the 403 determination, courts accord substantial weight to the relative similarity of the acts. *See*, *e.g.*, *Id*. at 1028 (affirming admission of evidence of prior molestation that occurred eleven years earlier where "[e]ach case involved forced oral copulation. In each case the victims were young relatives of [the defendant], and each instance occurred while [defendant] was babysitting them.")

i. Plea and Conviction

The 2003 plea and conviction are admissible under Rule 413. Prior convictions are generally admissible under the rule. *See United States v. Davis*, 624 F.3d 508, 512 (2d Cir. N.Y. 2010) (citing *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997).

Defendant pled guilty in that case to sexual assault in the second degree, which is identical to two of the charges in this case.[4] The prior conviction was between eight and nine years ago, not particularly remote in time. The previous case arose about five months after the Defendant's release from a 1997 case. Defendant was released from the 2003 case in 2008 and picked up two more cases related to sexual conduct in 2012, including the present case. The frequency of the acts favors admission of the prior offense. On balance the plea and conviction's probative value are not outweighed by unfair prejudice, confusion of the issues, or misleading the jury. NMI. R. Evid. 403. The plea of guilty to the charge of sexual assault in the second degree in 2003 is admissible under Rule 413 for any relevant purpose. Reference to sexual intercourse and pregnancy, however, would be highly inflammatory, and therefore inadmissible under Rule 403. Any documents must be accordingly redacted.

ii. Underlying Facts

The underlying facts are not substantially more prejudicial than probative. The victim in the present case is the daughter of a friend of the Defendant's wife. The victims are similar in that the Defendant has access to them because they were akin to familial relationships. In the previous case the Defendant touched the victim's breasts without her consent, which he is accused of doing in the present case. However, the present acts

[4] Count I which relates to the swimming lesson and Count IV which relates to the sleeping incident.

occurred in a public place, a beach, rather than in the victim's home. The victim in this case is a seventeen year old girl, whereas there is no indication that the previous victim was a similar age. There are some similarities between the two victims, rendering the evidence probative.

The previous acts occurred in 2003, which is not particularly remote in time. The previous incident occurred shortly after the Defendant was released from incarceration on multiple sexual offenses for acts against the Defendant's several sisters. The frequency of this Defendant's sexual violations demonstrates a persistent predatory pattern toward women and girls which the defendant had access to. Although the 2003 case never went to trial the police also had evidence in connection with that case that the defendant had previously committed similar acts on another one of his brother's girlfriends.

The usefulness of the evidence weighs in the Commonwealth's favor. The evidence need not be absolutely necessary, but rather "must simply be helpful or practically necessary." *LeMay*, 260 F.3d 1018, 1029 (9th Cir. 2001). The prosecution's case relies principally on the victim's testimony. This evidence goes to M.X.S.'s credibility and the element of lack of consent. On balance the evidence's probative value is not outweighed by prejudice. Therefore, the underlying facts in the October 2011 case are admissible under Rule 413, for any relevant purpose, in connection with Counts I, II, and III.

The Court limits the introduction of this evidence as follows. There is no allegation of sexual intercourse in the present case, and the victim was not pregnant therefore any evidence about sexual intercourse and the prior victim's pregnancy are prohibited as unduly prejudicial and misleading. NMI. R. Evid. 403.

3. Sleeping Incident – (Counts IV, V, VI)

The plea of guilty and the conviction in 2003 are admissible in relation to the charges related to the sleeping incident for the same reasons articulated in Section III(B)(2)(i) above, and with the same articulated restrictions.

The facts underlying the 2003 are also highly relevant to the charges related to the sleeping incident and the value of the evidence is not outweighed by prejudice. In 2003 Defendant knocked on his brother's girlfriend's door while she slept, entered her bedroom and touched her breasts without consent. In this case Defendant is accused of entering the victim's bedroom while she slept and touching her vagina without her consent. The alleged victim M.X.S. is the daughter of his wife's friend, who was living in the same house with the Defendant at the time. The conduct is similar because both victims sleeping when the Defendant entered their respective bedrooms. Both victims were also akin to family. Although the respective victims do not share other characteristics, the Court finds the acts sufficiently similar to be highly probative. Further, the frequency of Defendant's sexual violations and the lack of intervening circumstances favor the Commonwealth. The evidence has practical value in the case because is shows the Defendant's propensity to take advantage of sleeping female victims. It is also practically valuable because it relates to lack of consent and the credibility of the victim, which will likely be major issues in the case. On balance, the probative value is not substantially outweighed by unfair prejudice. Accordingly, the underlying facts in the October 2011 case are admissible under Rule 413, for any relevant purpose, to prove Counts IV, V, and VI.

Any evidence about sexual intercourse and the victim's pregnancy are prohibited as unduly prejudicial and misleading for the same reasons articulated in Section III(B)(2)(ii) above. NMI. R. Evid. 403.

C. 1997 PLEA AND UNDERLYING FACTS

The Commonwealth intends to introduce evidence of a 1997 plea agreement and underlying facts. October 23, 1997 Defendant pled guilty to one count of rape, three counts of sexual abuse of a child, and two counts of oral copulation as part of a stipulated plea agreement. Defendant sexually abused his three sisters over a period of approximately four years. During that period of time his sisters' respective ages ranged from approximately ten to seventeen.

Each conviction constitutes a sexual offense under the meaning of Rule 413. *See* NMI. R. 413 (d)(2). The conviction is presumptively admissible and relevant to prove the Defendant's attraction to teenage girls and his propensity to commit sexual assault on girls in close proximity to him. Here, M.X.S, the alleged victim is not actually related to the defendant, but she was a minor who he had access to when the first incident occurred. She was also living in the same house with the defendant when the second incident occurred.

1. Rule 403 Balancing

The 1997 conviction and underlying facts may be excluded if their "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . ." NMI. R. Evid. 403.

i. Plea and Conviction

The plea contains several charges related to children under sixteen, rape, and oral copulation none of which are alleged here. The charges in that case are much more severe

overall than the charges in this case. Although relevant to demonstrate the Defendant's attraction to teenage girls, given the relative seriousness of the previous charges, and their inflammatory nature there is a serious danger of unfair prejudice, and confusion of the issues. NMI. R. Evid. 403. Consequently, the 1997 plea agreement is inadmissible.

ii. Underlying Facts

Here, the underlying acts cover a long period of time, they are against three different victim's of different ages and cover a wide range of conduct. These facts demonstrate a pattern: Defendant began molesting his sisters between the ages of ten and fourteen and continued until he got arrested. In 1997 when he was arrested his sisters were seventeen, fifteen and fourteen respectively. This pattern bears no readily discernable similarity with the present charges because he began molesting his sisters when they were substantially younger than the victim in this case. The sexual acts in the previous case are also more severe and systematic. The acts occurred over a four-year period between fifteen and nineteen years before the present charges. The remoteness in time and the lack of similarity render the prior acts less probative. *See Larson*, 112 F.3d at 605 ("Exclusion of proof of other acts that are too remote in time caters principally to the dual concerns for relevance and reliability. "). Moreover where courts have affirmed the admission of prior sexual acts that are remote in time, the prior acts, unlike this case, are typically very similar. *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997) (affirming admission of evidence of prior sexual acts occurring sixteen to twenty years prior where the defendant gave both the boys alcohol and engaged both in a similar progression of sexual acts); *United States v. Gabe*, 237 F.3d 954, 959-960 (8th Cir. 2001) (affirming admission of evidence of prior molestation that occurred twenty years earlier where both victims were young girls of six or seven, related to

the defendant and the offenses was committed in a very similar manner); *LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (affirming admission of evidence of prior molestation that occurred eleven years earlier where "[e]ach case involved forced oral copulation. In each case the victims were young relatives of [the defendant], and each instance occurred while [defendant] was babysitting them.") Finally, the Commonwealth does not have a practical need to admit the evidence—there is sufficient evidence of propensity to commit sexual offenses, considering the admission of the 2003 conviction. On balance the danger of unfair prejudice and confusion of the issues substantially outweighs the probative value. NMI. R. Evid. 403. Consequently, the facts underlying the 1997 plea are inadmissible.

The prior acts may also be admissible pursuant to 6 CMC § 1320(a) which allows the introduction of evidence of conduct toward a minor in a case which also involves a minor. Here, charges related to the swimming lesson involved a minor as do the charges in 1997. However the previous conduct occurred more than ten years ago and is therefore inadmissible under Section 1320(a).

D. DEFENSE OF CONSENT UNDER 6 CMC 1320(b)

Evidence of the prior sexual acts may be admissible under 6 CMC 1320(b) which provides that "In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assault by the defendant against the same or another person is admissible if the defendant relies on a defence of consent." 6 CMC 1320(b).

Here, it is not clear whether the Defendant intends to argue consent; therefore resolution of this issue is premature.

SO ORDERED this 6th day of March, 2013.

/s/_____
Joseph N. Camacho, Associate Judge