

THE PEOPLE OF THE STATE OF
NEW YORK

v.

AFFIRMATION

IND [REDACTED]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

[REDACTED], ESQ., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel for the defendant, [REDACTED], who is charged in this indictment with assault in the first degree (Penal Law § 120.10[1]). The indictment arose from an [REDACTED], 2022 incident in which Mr. [REDACTED] stabbed [REDACTED] after she menaced him with what appeared to be a firearm.
2. I make this affirmation (a) in response to the prosecution's motions *in limine* dated [REDACTED], 2023 and (b) in support of the defendant's motion for the relief described below. Unless otherwise stated, the factual part of this affirmation is made upon information and belief, the source of which is my review of the case file, motion papers, and discovery.

a. The Prosecution's Motions.

3. First, the prosecution seeks to preclude any cross-examination concerning law enforcement disciplinary records (i.e., 50-a materials) that were adjudicated "not sustained," "unfounded," or "exonerated."
4. The defense does not intend to ask the police officers about any of these matters.

5. Second, the prosecution seeks to preclude any evidence concerning an [REDACTED], 2023 incident in which [REDACTED] and her boyfriend [REDACTED], allegedly confronted Mr. [REDACTED]
6. The defense opposes this motion, as I do intend to question Ms. [REDACTED] about the incident, as well as Mr. [REDACTED], should he testify.
7. Whether [REDACTED] was present for the confrontation is a question of fact for the jury. She denies it, but her boyfriend was present, a white female was driving [REDACTED] car, and Mr. [REDACTED] identified her as the driver.
8. “The credibility of a witness may be impeached by asking the witness on cross-examination about the witness’s bias, hostility, or interest for or against any party to the proceeding and by extrinsic evidence of such bias, hostility, or interest” (Guide to NY Evid rule 6.13, Impeachment by Bias, Hostility, Interest).
9. As Ms. [REDACTED]’s alleged conduct demonstrates hostility toward [REDACTED], the defense may attempt to prove it, both through impeachment and as evidence-in-chief.
10. Third, the prosecution seeks to offer evidence of the altercation between Mr. [REDACTED] and Ms. [REDACTED] and Mr. [REDACTED] earlier on the day of the incident. The evidence will be offered in support of the claim that Mr. [REDACTED] was the initial aggressor, thus undermining his justification defense.
11. The prior altercation has no bearing on the justification defense. Even where a person acts as the initial aggressor, “physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person[,] but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force” (Penal Law § 35.15[2][a]). There is video evidence that this was the situation here, as Mr. Swaggard withdrew from the encounter and drove away.

12. The prosecution cites authority that uncharged conduct is admissible to show motive, intent, and absence of mistake. But there is no claim that the stabbing was a mistake, and Mr. [REDACTED] motive and intent are not in question – he was defending himself against a person who was coming at him with a gun. It may shed light on [REDACTED]’s motive for menacing Mr. [REDACTED], but that is not a valid reason for the admission of uncharged conduct.
13. Fourth, the prosecution seeks to cross-examine [REDACTED], should he testify, on his two prior criminal convictions. One is a state conviction for attempted assault in the third degree (Penal Law §§ 110.00, 120.10[1]) from 1996, and the other is a federal conviction for conspiracy to commit wire fraud (18 USC §§ 371, 1343) from 1997.
14. The Court should not allow cross-examination on either conviction. Both are more than 25 years in the past, and “remoteness is a factor to be considered in the balancing process required under *Sandoval*” (*People v. Cole*, 177 AD3d 1096, 1100 [3rd Dept. 2019]) [REDACTED] is 52 years old; crimes he committed in his mid-20s are no longer material to his credibility.

b. The Defendant’s Motion.

15. First, the defense seeks admission of the 911 call that [REDACTED] made immediately after the stabbing.
16. “A statement about a startling or exciting event made by a participant in ... the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication” (Guide to NY Evid rule 8.17, Excited Utterance).

17. The timing of the call, its subject matter, and [REDACTED] tone of voice, demonstrates that he was still under the stress of the startling event. The contents of the call are thus admissible under this exception to the rule against hearsay.
18. Second, the defense seeks admission of [REDACTED] original statement to the police while she was at the emergency room, both through impeachment and, if necessary, extrinsic evidence. In this narrative of events, [REDACTED] omitted the crucial fact that she menaced [REDACTED] with a BB gun before he stabbed her.
19. “The credibility of a witness may be impeached by showing that the witness omitted to state a relevant fact ... [where] the circumstances surrounding the omission made it most unnatural for the witness to have omitted the information” (Guide to NY Evid rule 6.15[5], Impeachment by Prior Inconsistent Statement).
20. I intend to confront [REDACTED] with the prior statement, but if she “denies making the prior inconsistent statement or is unable to recall making the statement, extrinsic evidence of the statement is admissible” (Guide to NY Evid rule 6.15[3]).
21. Finally, the defense seeks admission of all of the relevant body worn camera footage.

For the reasons stated, the prosecution's motions should be denied, except as specifically consented to, and the defendant's motion should be granted in all respects.

[REDACTED]

[REDACTED]

TO:

Hon. Debra Givens

Erie County District Attorney
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