

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA - CRIMINAL DIVISION

2017 JUN -9 AM 11:17

COMMONWEALTH OF PENNSYLVANIA, : NO. CP-46-CR-0003932-2016
:
:
v. :
:
WILLIAM H. COSBY, JR. :
:

**DEFENDANT’S MOTION IN LIMINE TO EXCLUDE ALL REFERENCES TO
MS. CONSTAND AND THE 404(b) WITNESS AS “VICTIMS”**

TO THE HONORABLE STEVEN T. O’NEILL, COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY:

Defendant William H. Cosby, Jr., by and through his attorneys, hereby submits the following Motion to Exclude All References to Ms. Constand and the 404(b) Witness as “Victims” for the reasons discussed below.

1. “Victim” is defined in Black's Law Dictionary, 5th Ed. (1979), as “[t]he person who is the object of a crime ...” Accordingly, referring to Ms. Constand and the Commonwealth’s Rule 404(b) witness (hereinafter, the “Accuser”) as “victims” necessarily implies that a crime has occurred, which presupposes Mr. Cosby’s guilt.
2. This term is particularly problematic here, where there is no dispute that there was sexual contact between Ms. Constand and Mr. Cosby, but the defendant’s theory of the case is that the sexual contact was consensual and the credibility of the complaining witness is in issue. Indeed, the entire purpose of this trial will be to determine whether or not there is an actual victim in this case.
3. The loaded (and unnecessary) reference to these witnesses as “victims” inevitably has a subconscious effect on a jury, undermining Mr. Cosby’s presumption of innocence. *See Com. v.*

Neal (Penn. 1981) 426 A.2d 576, 578 (the presumption of innocence in favor of the accused is foundational and axiomatic in criminal law) (citing *Estelle v. Williams* (1976) 425 U.S. 501, 503) (presumption of innocence is “a basic component of a fair trial”).

4. Notably, the statute under which Mr. Cosby is being charged, 18 Pa.C.S.A. 3125, never uses the term “victim.” And that is because “victim”—especially in the current context—is a loaded, inflammatory, premature, and unduly prejudicial term. *See U.S. v. Leroy* (W.D. Pa. 2017, No. CR 16-0243) 2017 WL 82498, at *2 (granting in part defendant’s motion *in limine* to exclude the term “victim” from the proceedings). Accordingly, there is no statutory basis to refer to Ms. Constand as a “victim.”

5. Ms. Constand is not and cannot be a “victim” unless and until a jury determines that a crime has been committed *after* all of the evidence is presented. Otherwise, Mr. Cosby will have been denied his constitutional right to an impartial jury and a fair trial. *Com. v. Johnson* (Pa. 1987) 533 A.2d 994 (prosecution’s “assertions of personal opinion are blatantly improper because they invade the province of the jury which alone bears the duty of determining criminal culpability”). Courts in many other jurisdictions have come to this same conclusion as well. *See, e.g., Talkington v. State* (Tex. App. 1984) 682 S.W.2d 674, 675 (trial court improperly commented on the weight of the evidence in the charge; referring “to the complainant as the ‘victim’ when the issue is whether or not she consented to the sexual intercourse, constitutes reversible error”).¹

¹ *See also State v. Cortes* (Conn. 2005) 885 A.2d 153, 158, n.4 (jury could have drawn only one inference from trial court’s repeated use of the term “victim,” where the very commission of a crime was at issue); *Jackson v. State* (Del. 1991) 600 A.2d 21, 24-25 (“The term ‘victim’ is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the perpetrator is in issue. We agree with defendant that the word ‘victim’ should not be used in a case where the commission of a crime is in dispute.”); *Allen v. State* (Del. 1994) 644 A.2d 982, 983, n.1 (“when, as here, consent is the sole defense in a rape case, the use of the term ‘victim’ by a prosecutor at trial is improper and to be (footnote continued)

6. Similarly, there is no basis under Pennsylvania Rule of Evidence 404(b) to refer to the Accuser as a “victim.” There has never been an adjudication that Mr. Cosby committed any crime against the Accuser, who has never pursued any criminal or civil complaint against Mr. Cosby, much less obtained a conviction or judgment.

7. For the same reasons, the Accuser should not be referred to as a “prior bad act” witness – which term necessarily implies that a “bad act” (*i.e.*, criminal sexual assault) has in fact been committed. This colloquial term finds no support in the language of Rule 404(b), which instead is framed only in terms of offering “[e]vidence of a crime, wrong, or **other act**” (Pa. R. Evid. 404(b) (emphasis added)). Instead, the Accuser should be referred to in this trial by her given name or as a “witness.”

8. While referring to these witnesses with loaded terms is plainly prejudicial, it is important to note that there is no offsetting benefit to be gained by these references. Allowing the use of the terms “victim” or “prior bad act” witness does not have **any probative value** that could

avoided”); *State v. Nomura* (Hawaii Ct. App. 1995) 903 P.2d 718, 721 (“the term ‘victim’ is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged. Because the question of whether Witness had been abused was a question yet to be decided by the jury, it was improper to refer to her as “the victim.”); *Veteto v. State* (Tex. App. 2000) 8 S.W.3d 805, 816-17 (holding that the trial court had commented on the weight of the evidence by referring to complaining witness as “the victim”; “The sole issue of [the defendant’s] case was whether he committed the various assaults on [the child]. Referring to [the child] as the Victim instead of the alleged Victim lends credence to her testimony that the assaults occurred and that she was, indeed, a Victim” (citation omitted)); *State v. Devey* (Utah Ct. App. 2006) 138 P.3d 90, 95 (the word “victim” undermines presumption of innocence and should not be used in a case where the commission of a crime is in dispute; single instance of “victim” reference was harmless error); *People v. Bryant* (Colo. Dist. Ct. 2004) (No. 03 CR 204), Order Re Mr. Bryant’s Motion to Preclude References to the Accuser as the “Victim,” available at http://www.courts.state.co.us/exec/media/eagle/05-04/ordr_re_victim_issue.pdf (court precluded use of the term “victim” during trial; “it remains in dispute whether a crime has actually been committed and therefore the use of the term ‘victim’ creates a bias in that it assumes the commission of a crime prior to any such determination by a jury and is accordingly inconsistent with the presumption of innocence.”).

possibly outweigh the prejudicial effect it will have on Mr. Cosby. *See* Pa. R. Evid. 403, 404(b)(2).²

9. The burden of the Commonwealth should not be alleviated, minimized or diminished by the use of such loaded terms, which imply that the prosecution has met its burden of proof that the alleged crime has actually been committed.

10. **WHEREFORE**, Mr. Cosby respectfully requests this Court to order that between now and the end of trial, when not referring to Ms. Constand in this case by her proper name, the Court, the Commonwealth, and all prosecution witnesses shall refer to her as the “alleged victim.” For the same reasons, the Accuser should never be referred to as a “victim” or as “prior bad act” witness, and she should only be referred to by her given name or as a “witness.”

Dated this 6 day of JUNE, 2017

By:



Brian J. McMonagle
MCMONAGLE, PERRI, MCHUGH, & MISCHAK P.C.
1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
Telephone: (215) 981-0999
Facsimile: (215) 981-0977

Angela C. Agrusa (*pro hac vice*)
LINER LLP
1100 Glendon Avenue, 14th Floor
Los Angeles, California 90024.3518
Telephone: (310) 500-3500
Facsimile: (310) 500-3501

Attorneys for Defendant William H. Cosby, Jr.

² Unlike its federal counterpart (*i.e.*, Fed. R. Evid. 404(b)), Pennsylvania Rule of Evidence 404(b)(2) expressly requires that the probative value of the evidence must outweigh its potential for prejudice.

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S
MOTION IN LIMINE TO EXCLUDE ALL REFERENCES TO
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To protect Mr. Cosby’s constitutional right to an impartial jury (Pa. Const., Art. I, § 9) and the presumption of innocence, the Court should exclude all references to Ms. Constand as a “victim.” Instead, the Court, all counsel, and all prosecution witnesses should instead refer to Ms. Constand either by her proper name or as the “alleged victim.” Similarly, the Court should exclude all references to the Commonwealth’s Rule 404(b) witness (hereinafter, the “Accuser”) as either a “victim” or a “prior bad act” witness; instead, the Court, all counsel, and all prosecution witnesses should instead refer to her by her proper name or as a “witness.”

“Victim” is defined in Black's Law Dictionary, 5th Ed. (1979), as “[t]he person who is the object of a crime ...” Accordingly, referring to Ms. Constand and the Accuser as “victims” necessarily implies that a crime has occurred. This term is particularly problematic here, where there is no dispute that there was sexual contact between Ms. Constand and Mr. Cosby, but the defendant’s theory of the case is that the sexual contact was consensual and the credibility of the complaining witness is in issue. Indeed; the entire purpose of this trial will be to determine whether or not there is an actual victim in this case.

Such a loaded (and unnecessary) reference inevitably has a subconscious effect on a jury, undermining Mr. Cosby’s presumption of innocence. *See Com. v. Neal* (Penn. 1981) 426 A.2d

576, 578 (the presumption of innocence in favor of the accused is foundational and axiomatic in criminal law) (citing *Estelle v. Williams* (1976) 425 U.S. 501, 503) (presumption of innocence is “a basic component of a fair trial”).

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While referring to these witnesses with loaded terms is plainly prejudicial, there is no offsetting benefit to be gained by these references. Allowing the use of the terms “victim” or “prior bad act” witness does not have **any probative value** that could possibly outweigh the prejudicial effect it will have on Mr. Cosby. *See* Pa. R. Evid. 403, 404(b)(2).²

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The burden of the Commonwealth should not be alleviated, minimized or diminished by the use of such loaded labels, which imply that the prosecution has met its burden of proof that the alleged crime has actually been committed. Accordingly, Mr. Cosby requests this Court to order that between now and the end of trial, when not referring to Ms. Constand in this case by her proper name, the Court, the Commonwealth, and all prosecution witnesses shall refer to her as the “alleged victim.” For the same reasons, the Accuser should never be referred to as a “victim” or as “prior bad act” witness, and she should only be referred to by her given name or as “witness.”

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Brian J. McMonagle
MCMONAGLE, PERRI, MCHUGH, & MISCHAK P.C.
1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
Telephone: (215) 981-0999
Facsimile: (215) 981-0977

Angela C. Agrusa (*pro hac vice*)
LINER LLP
1100 Glendon Avenue, 14th Floor
Los Angeles, California 90024.3518
Telephone: (310) 500-3500
Facsimile: (310) 500-3501

Attorneys for Defendant William H. Cosby, Jr.