[J-124-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 395 CAP
	:	
Appellee	:	Judgment of Sentence entered on 5/11/01
	:	in the Court of Common Pleas of
	:	Philadelphia County at Nos. 9905-0865
v.	:	2/2, 9906-0743 & 9910-0814
	:	
	:	
BERNARD COUSAR,	:	
	:	ARGUED: October 16, 2006
Appellant	:	

DISSENTING OPINION

MADAME JUSTICE BALDWIN **DECIDED: August 21, 2007**

I respectfully dissent because I believe that it was unduly prejudicial to Appellant to consolidate the three separate cases for trial. While it is of course true that under Pa.R.Crim.P. 582(A)(1) it is permissible to try separate cases together, it is equally true that the rule makes this permissible only if the evidence "is capable of separation by the jury so that there is no danger of confusion." Pa.R.Crim.P. 582(A)(1)(a). In addition, if consolidating unrelated cases would cause undue prejudice to the defendant, consolidation is not warranted. We have spoken cogently on the prejudice that could result:

> The argument against joinder or consolidation is that where a defendant is tried at one trial for several offenses, several kinds of prejudice may occur: (1) The defendant may be confounded in presenting defenses, as where his defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the

> defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find.

Commonwealth v. Morris, 493 Pa. 164, 171, 425 A.2d 715, 718 (1981) (citations omitted). Our Court has been careful to ensure that evidence of other crimes is not available for the jury to use as evidence that a defendant has a criminal disposition. For example, in Commonwealth v. Spruill, we stated:

> Evidence of prior criminal activity [ ] is probably only equaled by a confession in its prejudicial impact upon a jury. Thus, fairness dictates that courts should be ever vigilant to prevent the introduction of this type of evidence under the guise that it is being offered to serve some purpose other than to demonstrate the defendant's propensity to commit the charged crime.

Spruill, 480 Pa. 601, 606, 391 A.2d 1048, 1050-51 (1978).

Our criminal justice system is centered upon the premise that an accused must have a fair trial, and be tried based on evidence tied to the charges against him. Commonwealth v. Seiders, 531 Pa. 592, 595, 614 A.2d 689, 691 (1992) ("It is essential, both to the accused and to our system of criminal justice, that an accused obtain a trial on the specific charges against him and that he not be convicted on grounds that he possesses a criminal nature.") Moreover, our courts have recognized that juries are likely to consider evidence of unrelated criminal activity as supporting a finding of guilt. For example, the Superior Court noted in Commonwealth v. Harris:

> The law is well settled in Pennsylvania that the prosecution may not introduce evidence of defendant's prior criminal conduct as substantive evidence of his guilt of the present charge. The purpose of this rule is "to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more liable to commit the crime for which he is being tried.

> The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty and thus effectively to strip him of the presumption of innocence."

Harris, 397 A.2d 424, 427-28 (Pa. Super. Ct. 1979) (citations omitted).

The purpose for the consolidation in this case, according to the Commonwealth's request, was to establish the identity of Appellant as the murderer in both the Santos and Townes homicides. Even if the evidence in one of the murder cases was admissible in the other, the majority fails to weigh whether the jury might consider its finding of Appellant's guilt in one of the murders probative of his guilt in the other. This is the mischief that holding separate trials is designed to prevent. The gun recovered from the Schoenberger burglary tied the appellant to both murders, as the evidence established that the bullets from that gun were the same as the bullets recovered from the bodies of the two decedents. Thus, it would not have been error to consolidate the Schoenberger burglary case with one of the murder cases, as evidence admissible in one would be admissible in the other, and as the transactions and facts of the cases were so distinct that there would be little danger of jury confusion.

However, in my opinion, the two unrelated homicides should have been tried separately. In each one, the evidence in the Schoenberger burglary case regarding the gun would be admissible to establish the perpetrator's identity. However, the evidence from the Santos murder would not have been admissible in the prosecution of the Townes murder, and *vice versa*. The majority equates these cases to Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993), in which we found that evidence of a second murder was admissible to establish Reid's identity as the shooter in a first murder. In Reid, there were no eyewitnesses to the first murder, and the evidence of the shooter's identity was thus circumstantial. Under such circumstances, evidence that Reid was the shooter in the second murder, and the same gun was used in both shootings, tended to establish Reid's identity as the shooter in the first murder. In this case, however, aside from the use of the

same gun, there was no evidence in the Santos case that would have been relevant in the Townes murder case, except that a black man wearing a puffy black jacket had a tendency to commit murder, which is of course impermissible. Allowing the two murder trials to be consolidated would likely have the effect of leading the jury to believe that Appellant must have murdered Townes since the evidence was clear that he murdered Santos.

Finally, I must point out that judicial economy is never a valid basis for consolidation of unrelated offenses, and only exacerbates the prejudice of presenting evidence of more than one offense to the jury. As we noted in Morris:

> [T]he conservation of judicial resources and the efficient administration of justice, while estimable goals, does [*sic*] not justify the exposure of an accused to such a higher probability of prejudice. "When offenses are initially joined on the ground that they are of the same or similar character, and evidence of one offense would not be admissible at a separate trial for the other, the saving of time effected by a joint trial is minimal." More importantly, the saving of judicial time can never be given preference over the integrity of the factfinding process. When it is concluded that the evidence of the one crime would not be admissible in the separate trial for the other, we are in effect saying that the evidence is irrelevant and prejudicial in the second trial. To allow irrelevant and prejudicial evidence to influence a verdict in the name of judicial economy is abhorrent to our sense of justice.

Commonwealth v. Morris, 493 Pa. at 174, 425 A.2d at 719-20 (citation omitted).

In sum, trying the murder cases jointly created a strong likelihood that the jury would infer that Appellant had a propensity to commit the crimes charged, and this would have influenced the jury in its determinations of guilt and in deliberating in the penalty phase. It is hard to imagine a more prejudicial effect on a defendant than being convicted for a murder on the basis of compelling evidence that the defendant committed a *different* murder. While I recognize that even with separate trials the result might not have been different for

Appellant, I am convinced that it is our responsibility to ensure that every protection is provided for a fair trial, particularly in capital cases.

Mr. Justice Baer joins this dissenting opinion.