IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)
	)
v.	) ID 0804009949
	)
MILLARD PRICE,	)

Upon Defendant's Motion for Relief from Prejudicial Joinder.
Denied.

Submitted: October 16, 2009
Decided: November 3, 2009

O R D E R

In this capital murder case, Defendant Millard E. Price has moved to sever the first two counts, Murder First Degree and Possession of a Firearm During the Commission of a Felony, from the remaining 17 counts in the Indictment. He argues that joinder of all the counts against him would be unfairly prejudicial at trial. The State opposes the motion, arguing that the charges are properly joined and that Defendant has not established substantial prejudice. For the reasons explained below, the motion for severance is denied.

Background. To resolve the motion to sever, the Court will consider the following facts as alleged by the State.[1] On April 9, 2008, Defendant drove to 7513 W. Newton Street

[1]*State v. Charbonneau*, 2003 WL 22232811 (Del. Super.)(motions to sever counts of an indictment involve analysis of the evidence); *State v. Garden*, 2000 WL 33114325 (Del. Super.) (stating that severance decisions are fact-intensive).

in Bridgeville, Delaware, looking for Deborah Sears. When Defendant entered the house he had a firearm in his possession. As he came inside, Elenor Manzanares and Glenn Morris were in the front living room, located immediately inside the front door. Gary Hastings and Nicole Eagleson were in the rear living room, which was separated from the front living room only by a sheet. Once inside, Price demanded to know where Sears was. Glenn Morris told Price to leave the gun outside if he did not intend to use it. Price replied that he did intend to use it and then fired the gun into the floor of the front living room. Still armed, Defendant pulled down the sheet between the two rooms and demanded that Eagleson and Hastings tell him where Sears was.

Thereafter, Defendant demanded a cell phone so he could call Sears. Glenn Morris called her twice but did not get an answer. Defendant proceeded to go upstairs to the second floor, followed by Glenn Morris. Oliver Morris came down the stairs, passing Defendant on the way. Glenn Morris turned around and came downstairs with Oliver Morris. Price entered the front bedroom where Sears was hiding in a pile of clothes on the floor. She was alone in the room. Having previously found Sears hiding in the closet of that room, Defendant went to the closet and yelled, "Are you in there?" He then fired his gun at the closed closet door.

Subsequently, he went to the back bedroom and kicked open the locked door. Inside he found Keith Kirby and Leslie Banks. Defendant looked at the two of them and said, "I should just go ahead and shoot your ass." He then shot Kirby in the chest, and Kirby died

moments later.

Discussion. Pursuant to Superior Court Criminal Rule 8(a), two or more criminal offenses may be joined in the same indictment if one of the following circumstances exists: (1) the offenses are of the same or similar character; (2) the offenses are based on the same act or transaction; (3) the offenses are based on two or more connected acts or transactions; or (4) the offenses are based on two or more acts constituting parts of a common scheme or plan. The rule of joinder is designed to promote judicial economy and efficiency, so long as the defendant's rights are not compromised by the joinder.[2] Rule 8(a) must be read in conjunction with Rule 14, which gives the Court discretion to order severance if it appears that either party will be prejudiced by joinder of either offenses or defendants.[3] The defendant bears the burden of showing prejudice sufficient to require severance, and a hypothetical assertion of prejudice is not enough.[4] The decision whether or not to grant a motion for severance is within the discretion of the Court.[5]

If the Court finds joinder appropriate under Rule 8 (a), the Court must then determine whether the defendant would be prejudiced by the joinder.[6] A defendant might suffer

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[2]*Mayer v. State*, 320 A.2d 713 (Del. 1974).

[3]*State v. Strickland*, 2007 WL 949481 (Del. Super.); *State v. Garden*, 2000 WL 33114325 (Del. Super.).

[4]*Bates v. State*, 386 A.2d 1139 (Del. 1978).

[5]*Id.* at 1141.

[6]*State v. Strickland*, 2007 WL 949481 (Del. Super.).

prejudice from joinder because (1) a jury may improperly infer a general criminal disposition on the part of the defendant from the multiplicity of charges; (2) a jury may accumulate evidence presented on all offenses charged in order to justify a finding of guilt of particular offenses; or (3) the defendant may be subject to embarrassment or confusion in attempting to present different defenses to different charges.[7] On the other hand, where the offenses charged are of the same general nature and give evidence of a *modus operandi*, severance may be denied even in the face of obvious prejudice to the defendant.[8] The test for determining whether Defendant has met his burden of showing prejudice is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the Court's discretion to sever.[9]

It is clear from the facts as alleged in the Indictment and in the State's response to the motion that Defendant's actions, although constituting separate acts, were of a similar nature, which can be characterized as threatening and terrifying. According to the State Defendant threatened everyone who crossed his path as he searched the house for Deborah Sears. He yelled, made demands about Deborah Sears and fired his gun into the floor and into the closet door. Unfortunately his actions culminated in a third gunshot which killed Keith Kirby. The Court finds that the acts alleged in the indictment are of a similar general character, involve

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[7] *State v. McKay*, 383 A.2d 260 (Del. 1978).

[8] *Id.*

[9] *State v. Howard*, 1996 WL 190045 (Del. Super.).

a similar course of conduct and occurred within a brief span of time.[10] Thus they are appropriately joined in one indictment.

The next question is whether Defendant has shown a reasonable probability of substantial prejudice if the charges are not severed for trial.[11]

Defendant argues first that the jury will cumulate the evidence and thus find him guilty when they would not so find if the charges were severed. The Court finds that trying these charges together appears to be reasonable because they took place in one location in a short time frame and were all related to Defendant's desire to find Deborah Sears. In multiple trials, the evidence of the other crimes would be admissible to show intent, plan, knowledge and absence of mistake in the conduct of the charged crimes. That is, multiple trials would not prevent separate juries from seeing and hearing about all the crimes. Defendant also asserts that without severance the jury would have to try to overcome the emotion caused by the gruesomeness and quantity of the evidence, but he does not suggest a way of avoiding it.

The argument that Kirby's death was too gruesome to be joined with the aggravated menacing charges is not persuasive. Accepting it would imply that Defendant cannot receive a fair trial in a separate proceeding focused only on the events of April 9, 2008. Any murder is difficult. Juries are fully capable of filtering the emotion out of grisly evidence, such as

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[10] *Coffied v. State*, 794 A.2d 588 (Del. 2002).

[11] *Bates*, 386 A.2d at 1139.

autopsy photographs, to reach decisions on a proper basis with appropriate instructions. On these facts, there is no way around presenting the entire story.

Defendant also asserts that the aggravating menacing charges regarding Leslie Banks, the victim's partner, are too emotionally charged to be tried with the Murder charge and would be subject to cumulation if tried together. Again, a jury can properly be instructed. These two offenses are closely intertwined and cannot be tried separately, because Mr. Banks was a witness to the shooting and held the victim in his arms as he died. On the issue of cumulation, Defendant also objects to the number of witnesses the State intends to call, but that list is not final and the Court need not address it.

Second, Defendant argues that the jury would improperly use the evidence of one crime to infer a general pattern of criminal behavior. Again, the Court observes that parsing out the charges between different trials would not prevent each jury from hearing the whole story because evidence of the other crimes would be necessary for the State to present a credible case in each trial. These crimes are so inextricably intertwined that they should be tried to one jury.[12] Furthermore, the Delaware Supreme Court has affirmed this Court's denial of severance where the defendant engaged in a "continuous spree of related criminal conduct" that occurred in the course of one evening.[13] This is a case of related criminal activity that took place in less than one evening. For the case to make sense, the crimes need

[12] *McDonald v. State*, 307 A.2d 796 (Del. 1973).

[13] *Downes v. State*, 1996 WL 145236 (Del. Supr.).

to be seen together, as part of a course of related criminal conduct.

Third, Defendant asserts that he will suffer embarrassment or confusion in presenting different defenses to different charges. However, Defendant does no more than make a conclusory assertion, which, like hypothetical prejudice, is insufficient.[14]

Defendant also asserts that he could not receive a fair trial without severance of Counts 1 and 2 if he asserts multiple defenses to the other charges or argues that the State has not shown criminal intent. As to multiple defenses, unless they are conflicting defenses, which Defendant does not allege, he is not prejudiced. On these facts, the Court rejects the argument that Defendant would be prejudiced by arguing accident to one charge and recklessness to another charge. He seems to suggest that explaining the various states of minds would be too much for a jury and therefore prejudicial to him. However, juries manage this task every day, and it is not rendered unfair because it is difficult or the evidence is gruesome. The Court finds no merit in Defendant's argument that he would suffer substantial prejudice by going to trial on all charges. Instead, the Court finds that the charged offenses are so inextricably intertwined so as to make proof of one of the crimes impossible without proof of the others.[15]

Conclusion. Having considered Defendant's arguments, the Court finds that the charges are properly joined and that Defendant has not borne his burden of showing

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[14]*State v. Charbonneau*, 2003 WL 222328111 (Del. Super.).

[15]*McDonald v. State*, 307 A.2d 796 (Del. 1973).

substantial prejudice from the joinder. When a defendant's claims of prejudice are unsubstantiated, the interests of judicial economy outweigh the defendant's interests.[16] The Court concludes that no reasonable probability exists that Defendant will suffer substantial injustice if the charges are tried together.

For all these reasons, Defendant's motion for severance must be and hereby is ***DENIED.***

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary.
cc: Paula T. Ryan, Esquire
John W. Donahue, Esquire
Stephanie A. Tsantes, Esquire
John Daniello, Esquire
Joseph A. Hurley, Esquire

[16] *State v. Hammons*, 2001 WL 172919 (Del. Super.).