THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	
JOHN J. THOMAS,	)	I.D.: 1611001708
	)	
Defendant.	)	

Date Submitted: May 14, 2018
Date Decided: May 21, 2018

Upon Defendant's Motion to Sever Counts of the Indictment.
GRANTED.

ORDER

Before the Court is a motion filed by Defendant John J. Thomas ("Defendant") to sever counts of the indictment. For the reasons set forth below, the motion is **GRANTED**.

1. In July, 2016, investigators became aware of the distribution of child pornography from an IP address that they learned was associated with Defendant's name. In October, 2016, the same subscriber information appeared again, this time at a different address. Believing their suspect to have moved, police ultimately obtained a search warrant on the new address and executed it in November, 2016. Police recovered electronic devices containing child pornography and took the defendant into custody. At the police station, Defendant confessed to possession of

the child pornography.

2. Defendant also had children living at the address and police interviewed the ten-year-old daughter at the Children's Advocacy Center, where the child revealed she had been fondled and touched inappropriately "3-4 times" by her father. As he did with the child pornography, Defendant made a statement to police incriminating himself in these crimes as well.

3. Defendant was ultimately indicted, in a single indictment, for offenses relating to his possession of the child pornography as well as offenses related to his unlawful contact with the child. Pointedly, there is no evidence that the child victim of the sexual abuse was photographed and no evidence that the allegedly unlawful photographs were ever shown to the child.

4. After more than a little pretrial skirmishing and plea negotiations, the defense moved to sever the charges relating to the child pornography from those related to his molestation of his daughter. The State opposed severance and briefing was done by both sides. The Court is therefore prepared to rule.

5. The State has indicted Defendant for two separate species of conduct—possession of child pornography and sexual exploitation of a child—both of which are highly inflammatory before any jury and it is hardly a stretch to say they are at least doubly inflammatory when tried together in one indictment. That may be all as it should, at least in cases in which the sex abuse victim appears in the

photographs,[1] or the photographs were somehow used in an effort to incent the victim to engage in the conduct depicted.[2] An argument can be made, and some cases have held, that in such circumstances, evidence of one would be admissible in a separate trial of the other.

6. But it is by no means true, or even fair, to conclude that child predation is some monolithic offense and any predation may be prosecuted in a single indictment, regardless of the relationship of the various counts to each other.

7. In the Court's view, this case is most analogous to the holding in *State v. McGraw*.[3] In that case, the defendant was charged with thirty-one counts of dealing in child pornography and two counts of unlawful sexual contact with his seventeen-year-old niece, who was living in the family abode at the time. As here, there was no evidence that the defendant had shown the images to his niece or any evidence that his niece was photographed inappropriately. The Court said, "[t]he State has not shown that any evidence to establish guilt of one offense will be used to establish guilt of the other offense. Therefore, it does not appear that the evidence is inextricably intertwined to justify joinder of the offenses at trial."[4] This truth is

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[1] *See, e.g., Kemske v. State*, 918 A.2d 338, 2007 WL 3777 (Del. Jan. 2, 2007) (TABLE).

[2] *See, e.g., State v. Hartman*, 2000 WL 33109146 (Del. Super. Aug. 24, 2000).

[3] *State v. McGraw*, 2002 WL 1038823 (Del. Super. May 16, 2002).

[4] *Id.* at *2.

even more pronounced in this case, in which Defendant confessed to both offenses in separate confessions to the police so that even the confessions are not intertwined.

8. While the State recites the rules of joinder, severance, and Rule 404(b) of the Delaware Rules of Evidence, its analysis of these rules as applied to the facts is unsatisfying. For example, the State assures the Court that "the jury would not feel disposed to find guilt of the one crime merely because the child pornography and sexual abuse offenses were tried together,"[5] which reminds the Court of the rejoinder "that's easy for you to say." Understanding that there may well be cases in which such prejudicial evidence must be introduced because the crimes are "inextricably intertwined" or to rebut a specific defense claim, the danger of unfair prejudice is quite present even in those cases. But the fact that the evidence may occasionally find itself in a single trial is no reason to give the State *carte blanche* to try all such cases together and introduce the separate crime evidence in its case-in-chief.

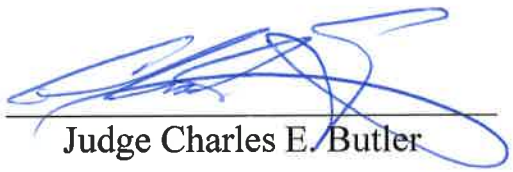
9. We would do well to recall that severance only eliminates the admission of the "other crimes" evidence in the State's case-in-chief. In the crucible of trial, there are any number of ways the defense may open the door to the admissibility of the very evidence the Court here declares off limits. The irrelevant or overly prejudicial evidence on day one of trial may be highly relevant and probative come

[5] State's Resp.to Def.'s Mot. to Sever, D.I. 36, at 4.

day three. The Court here only holds that the counts must be severed for trial and excluded during the State's case-in-chief. The Court will withhold rulings on the admissibility of the other crimes evidence if and when the need arises at trial.

10. For the reasons stated, Defendant's Motion to Sever Counts of the Indictment is **GRANTED**.

IT IS SO ORDERED.



Judge Charles E. Butler