

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) ID No. 0106019765
)
 DARYL MCGRAW,)
)
 Defendant.)

Date Submitted: April 29, 2002
Date Decided: May 16, 2002

MEMORANDUM OPINION

*Upon Defendant's Motion to Sever the 31 Counts of Unlawfully
Dealing in Child Pornography and the 2 Counts of Unlawful Sexual Contact.*
GRANTED.

Paul R. Wallace, Esquire, Deputy Attorney General, Carvel State Office Building, 820 North French Street, Wilmington, Delaware 19801, for State of Delaware.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware 19801, for Defendant.

JURDEN, J.

FACTS

The Defendant, Daryl McGraw, was indicted in a 33 count indictment with 31 counts of Unlawfully Dealing in Child Pornography in violation of Del. Code ANN. tit. 11, § 1109 (1985) and 2 counts of Unlawful Sexual Contact in the Third Degree in violation of Del. Code ANN. tit. 11 § 767 (1995). It is alleged that the defendant engaged in the 31 counts of Unlawfully Dealing in Child Pornography between February 2, 2000 and June 28, 2000. On June 23, 2000 a search warrant was executed by the New Castle County Police that permitted them to search and seize the Defendant's personal computer. It is alleged that a review of the files in the computer's hard drive revealed visual depictions of child pornography.

It is alleged further that on April 28, 2000, the Defendant engaged in sexual contact with Lauren Chandler, his wife's niece, who was seventeen years old at the time, and who lived with Defendant and his family. According to the State, it is alleged that Defendant touched Chandler's breasts and buttocks while she was resting on a couch.

Defendant filed a Motion for Relief From Prejudicial Joinder on December 19, 2002 and seeks to sever the 31 counts of Unlawfully Dealing in Child Pornography from the 2 counts of Unlawful Sexual Contact. On March 15, 2002, Defendant filed his opening brief arguing that joining the crimes in a single indictment would unfairly prejudice him because the crimes are independent and separate offenses. Defendant argues that the evidence of one crime would subject him to embarrassment or confusion in presenting the different and separate defenses.

On April 19, 2002, the State filed a timely answering brief arguing there is no indication that the jury will improperly use evidence of one crime to infer guilt of the other. The State also argues

that the evidence is similar for both crimes and the nature of the investigation and the facts are also intertwined. The Defendant's reply brief was timely filed on April 29, 2002. This matter is now ripe for decision.

DISCUSSION

Del. Code ANN. tit. 11, § 1109 (1985) is a Class D Felony and provides, in pertinent part, as follows:

A person is guilty of dealing in child pornography when...[t]he person, by means of a computer, intentionally complies, enters, accesses, transmits, receives, disseminates, stores, makes, prints, reproduces or otherwise possesses any photograph, image, file, data, or other visual depiction of a child engaging in prohibited sexual act or in the simulation of such an act.

Del. Code ANN. tit. 11 § 767 (1995) is a Class A Misdemeanor and the provides, in pertinent part, as follows:

A person is guilty of unlawful sexual contact in the Third Degree when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person if the person knows that the contact is either offensive to the victim or occurs without the victim's consent.

Under Del. Super. Ct. Crim R. 14, the Defendant can seek relief from joinder:

If it appears that a defendant...is prejudiced by a joinder of offenses...in an indictment...or by such joinder for trial together, the Court may order...separate trials of counts...or provide whatever other relief justice requires.

A defendant may suffer prejudice that would justify severance when (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general

criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.¹

The defendant bears the burden of demonstrating prejudice.² Even if the defendant cannot establish sufficient prejudice would result that would *require* severance, a crucial factor to be considered is whether the evidence of one crime would be admissible in the trial of the other crime.³

For the reasons that follow, the Court grants Defendant's Motion to Sever.

1. The offenses sought to be several are not of the same or similar character to justify joinder.

Unlawful Sexual Contact in the Third Degree is a Class A Misdemeanor, the commission of which is not related to the age of the victim. Unlawfully Dealing in Child Pornography is a more severe crime in that it is a Class D Felony, and is meant to prohibit behavior involving persons under a particular age.

2. The offenses are not part of the same act or transaction.

It is not alleged that Defendant viewed the pornographic sites in conjunction with his unlawful contact with Chandler. It is not enough that Defendant may have viewed the pornographic sites on the same day that he allegedly had unlawful contact with Chandler.

The State cites *State v. Hartman*⁴ to establish that these particular offenses should be joined

¹*Wiest v. State* 542 A.2d 1193, 1195 (Del. 1988).

²*Id.*

³*Id.* at 1195 note 3 (citing *Bates v. State*, A.2d 1139, 1142 (Del. 1978)).

⁴2000 Del. Super. Lexis4 400 (Del. Super.).

at trial. The Court in *Hartman* refused to sever charges of Sexual Solicitation of Child and Unlawfully Dealing in Material Depicting a Child Engaging in a Prohibited Sexual Act and Possession of Child Pornography. The evidence in that case indicated that defendant showed the victim pornographic images on a computer in an effort to induce the child to engage in a prohibited sex act that ultimately occurred.⁵ The offenses involved the same sex act and took place in a single event.⁶ It was this type of overlapping of events and acts that made the evidence so “inextricably intertwined” that it was “virtually impossible for the State to present its evidence as to any one of the counts without presenting its evidence with respect to all three.”⁷

In the case at bar, it is not alleged that Chandler was shown the pornographic pictures or that she was even aware that Defendant had ever viewed them. On the contrary, it appears that Defendant viewed the images privately and did not reveal them to anyone. The State’s answering brief indicates that the police had reason to believe Defendant viewed child pornographic images because of information they received from his wife, not Chandler. The alleged unlawful contact with Chandler appears to be an entirely separate and unrelated incident. The 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.

⁵*Id.* at *5-*6.

⁶*Id.*

⁷*Id.* at *6.

3. Defendant has established that he may suffer unfair prejudice by the joinder of offenses.

Defendant argues that the offensive nature of the child pornography charges would lead the jury to impermissibly and automatically find him guilty of unlawful sexual contact. There is the possibility that the jury might indeed make this improper inference. Given the substantial and unfair prejudice that could result, justice requires that the offenses be severed for trial.

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Sever the 31 Counts of Unlawfully Dealing in Child Pornography and the 2 Counts of Unlawful Sexual Contact in the Third Degree is **GRANTED.**

Jan R. Jurden, Judge