IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No: 0304014526
	)	
CURTIS L. ALLEN	)	

Submitted: October 28, 2003
Decided: December 9, 2003

Upon Defendant's Motion for Relief from Prejudicial Joinder:
GRANTED, in part; DENIED, in part.

Robert M. Goff, Jr., Assistant Public Defender, Wilmington, Delaware, and James D. Nutter, Assistant Public Defender, Wilmington, Delaware, for Defendant.

James V. Apostolico, Deputy Attorney General, Wilmington, Delaware, and Maria Knoll, Deputy Attorney General, Wilmington, Delaware, for the State.

MEMORANDUM OPINION

Gebelein, J.

Now this 9th day of December, 2003, after careful consideration of the parties' argument and the record, the Court concludes that Curtis Allen ("Defendant" or "Allen")'s motion for relief from prejudicial joinder must be granted, in part and denied, in part.

BACKGROUND

On August 27, 2003, Defendant, by and through his counsel, filed the instant motion pursuant to Superior Court Criminal Rules 14 and 8(a) requesting severance of his 17 count indictment. Allen was charged by way of a 17 count indictment for offenses against four separate victims. The first two counts charge Defendant with Rape First Degree and Robbery First Degree allegedly committed against Josefina Pinero-Serrano ("Pinero-Serrano") on March 21, 2003. Counts 3 through 7 of the indictment charge Defendant with Rape First Degree (3 counts), Robbery First Degree and Attempted Rape First Degree allegedly committed against Katherine Corey ("Corey") on September 20, 2002. Counts 8 charges Defendant with Rape Second Degree allegedly committed against Alexia Chiffens ("Chiffens") on September 6, 2002. Lastly, counts 9 through 17 of the indictment charge Defendant with Rape First Degree, Possession of a Deadly Weapon During the Commission of a Felony (4 counts), Kidnapping First Degree, Robbery First Degree and Aggravated Menacing allegedly against William Kendall ("Kendall") on January 21, 2002.

CONTENTIONS OF THE PARTIES

Defendant argues that he will be prejudiced by joinder of the four incidents. He claims that cumulation of the evidence could lead to a finding of guilt, where if each incident is considered separately, a jury would not so find. Defendant contends that the jury will infer a general criminal disposition from one set of offenses in considering another, thereby subjecting him to the embarrassment and confusion in attempting to present separate, different and conflicting defenses for different parts of the case. In furtherance of his argument for severance, Defendant indicates that: (1) the incidents are not sufficiently similar for proper joinder; (2) the

incidents do not constitute the same transaction; and, (3) the incidents do not constitute parts of a common scheme or plan. Defendant requests severance of the indictment and a separate trial for each of the four incidents.

In response, the State argues that judicial economy would be best served by incorporating all of Defendant's charged offenses into one trial. Because the State intends to rely on DNA evidence that conclusively ties Allen to each incident, a single trial would mean that only one jury would have to be educated about the science of DNA and the statistical significance of a DNA match. The State contends that all four cases are of relatively the same strength and that the incidents are of the same general character involving a common scheme or plan and a similar course of conduct. As a result, the State submits that the likelihood of conviction remains the same even if each incident was considered separately. If each incident is severed, the State asserts that based upon Delaware Rule of Evidence ("D.R.E.") 404(b) each incident would be admissible in the trial of the other to prove identity and *modus operandi*, thereby subjecting each victim to four different court appearances. The State indicates that each offense is not complex and the 17 count indictment is not so formidable that Allen would be subject to jury confusion or accumulation, particularly with the use of proper jury instructions as set forth in *Skinner* and *Siple*.[1] As such, the State argues that Allen has failed to meet his burden of showing undue prejudice, embarrassment or confusion, sufficient to justify severing Defendant's charges into four separate trials.

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[1] *See Skinner v. State*, 575 A.2d 1109, 1120 (Del. 1990) (finding that if the jury is instructed to consider the liability of each defendant separately and that evidence admitted against one defendant is not to be used in determining the guilt of the other defendants, it is sufficient to eliminate the potential "spillover" effect resulting from the joint trial); *State v. Siple,* 1996 WL 528396 (Del. Super.).

APPLICABLE LEGAL STANDARDS

Joinder of offenses is permissible under Superior Court Criminal Rule 8 ("Rule 8") "...if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[2] Rule 8 must be read in conjunction with Superior Court Criminal Rule 14 which states, in pertinent part, that if it appears that a defendant is prejudiced by a joinder of offenses, the court may elect to order separate trials of counts or provide whatever other relief that justice requires.[3] Rule 8 was designed to promote judicial economy and efficiency, and those objectives outweigh a defendant's unsubstantiated claims of prejudice.[4] In *Weist v. State,* the Delaware Supreme Court identified the following three forms of prejudice that criminal defendant may suffer as a result of joinder of offenses: (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.[5] The defendant bears the burden to establish prejudice, and mere hypothetical prejudice is insufficient.[6] The test for determining whether a defendant has met his

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[2] DEL. SUPER. CT. CRIM. R. 8(a).

[3] DEL. SUPER. CT. CRIM. R. 14.

[4] *Sexton v. State,* 397 A.2d 540 (Del. 1979), *overruled on other grounds by Hughes v. State,* 437 A.2d 559 (Del. 1981).

[5] *Weist v. State,* 542 A.2d 1193, 1195 (Del. 1988).

[6] *Bates v. State,* 386 A.2d 1139, 1142 (Del. 1990).

burden of showing prejudice is whether joinder is so manifestly prejudicial that it outweighs the dominant concern of judicial economy and compels the Court's discretion to sever.[7]

Joinder is proper where offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively short period of time.[8] Although not a prerequisite for initial joinder, reciprocal admissibility of evidence is a pertinent factor for the trial court to consider.[9] Where evidence concerning one crime would be admissible in the trial of another crime, there is no prejudicial effect in having a joint trial.[10] "Evidence of one crime is admissible in the trial of another crime when it has 'independent logical relevance' and its probative value outweighs prejudice to the defendant."[11] Severance has been denied, even in the face of obvious prejudice, where the offenses charged are of the same *modus operandi*.[12] However, severance has been granted, where the "sheer mass" of charges against a defendant renders it extremely unlikely that a jury would be able to resist the cumulative effect of evidence linking the defendant to separate charges.[13]

ANALYSIS

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[7] *State v. Howard,* Del. Super., Cr.A. No. IN-95-07-1295, Barron, J. (Mar. 12, 1996) (Mem. Op.) (citations omitted).

[8] *Younger v. State,* 496 A.2d 546, 550 (Del. 1985) (citing *Brown v. State*, 310 A.2d 870, 871 (Del. 1973)).

[9] *Skinner v. State,* 575 A.2d 1108, 1118 (Del. 1990).

[10] *Bates*, 386 A.2d at 1142 (citing *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964)).

[11] *State v. Garden,* 815 A.2d 327, 334 (citing *Getz v. State,* 538 A.2d 726, 730 (Del. 1988)).

[12] *State v. McKay,* 382 A.2d 260, 262 (Del. Super. Ct. 1978) (holding that to ask the jury to make compartmentalized judgments of guilt or innocence concerning eight separate incidents, including 35 separate charges and nine victims is to expect an usual degree of detachment).

[13] *Id.* at 262.

The State contends that DNA evidence will be introduced in connection with each incident. Furthermore, the State asserts that pursuant to D.R.E. 404(b), each incident would be admissible in the trial of the other to prove identity and *modus operandi*, thereby subjecting each victim to four different court appearances. As such, the State argues that a single trial would be in the best interest of judicial economy since one only jury would need to be educated about the science of DNA and the statistical significance of a DNA match. In response, Defendant argues that identity is not likely to be an issue at trial; therefore, joinder would permit the State to introduce evidence of other crimes which would be otherwise excluded by D.R.E. 404(b).

D.R.E. 404(b) determines the admissibility of other crimes evidence into the trial of an accused, and provides that:

> Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[14]

In the instant case, the State intends to introduce testimony of each alleged victim as to the particular aspects of each incident, thereby showing identity and *modus operandi*. Even though *modus operandi* is not an explicitly sanctioned purpose provided in D.R.E. 404(b), the seminal case in Delaware for determining the admissibility of other crimes evidence, *Getz v. State,* held that the stated purposes are "illustrative, not exclusive."[15]

Defendant's argument is not sufficiently persuasive to overcome the interest of judicial economy. When each incident is viewed in conjunction with the others, the four incidents in this

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[14] DEL. R. EVID. 404(b).

[15] *State v. Braithwaite*, 1997 WL 902840 (Del. Super.) (citing *Getz v. State*, 538 A.2d 726, 730 (Del. 1988)).

case involve a common plan or scheme and similar course of conduct taking place over a period of fourteen months.[16] The Defendant befriended each victim and lured them from the area of the bus and train stations in downtown Wilmington.[17] Three of the rapes were committed within an hour of midnight and in furtherance of a robbery. The fourth victim was lured in a similar fashion to an apartment at which she was also raped.[18]

The State intends to offer DNA evidence in connection with all four incidents. The Wilmington Police Department determined on April 16, 2003 that all four sexual assaults were committed by a single individual via DNA evidence. Allen was not developed as a suspect until a few days later. After a blood sample was obtained from Defendant on April 25, 2003, it was subsequently determined that his DNA matched the previously obtained samples from all four incidents. Three of the four victims positively identified the Defendant through a photographic line-up. The aforementioned evidence is material to the issue of identity and is therefore being offered for a recognized purpose under D.R.E. 404(b).[19] Based upon the evidence presented, the Court is satisfied that the charged offenses are of the same general nature and indicate a similar *modus operandi*. The Court agrees that if severance was granted, evidence relating to each of the incidents would be reciprocally admissible in the other trials pursuant to D.R.E. 404(b). As a result, judicial economy would be best served by a single trial on all of the charges.

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[16]Severance has been denied in cases involving longer period of time between the various joined offenses. *See, e.g. State v. Siple*, 1996 WL 528396 (Del. Super.) (seven rapes occurring within 35 month period); *Pennell v. State*, 602 A.2d 48 (Del. 1991) (three murders occurring within ten month period).

[17]Corey and Pinero-Serrano were approached in the vicinity of train station. Kendall was approached at the bus station. Chiffens was approached in the 300 block of Orange Street, Wilmington, Delaware, in front of Delaware Technical Community College which is located within blocks of both the train and bus stations.

[18]In three of the four incidents, Defendant lured the victims by offering to assist them in some way.

[19]*See* DEL. R. EVID. 404(b).

The Court must also consider whether Defendant has shown prejudice sufficient to warrant severance pursuant to Rule 14. In *Weist v. State,* the Delaware Supreme Court set forth three prongs that describe where such prejudice could be sufficient to overcome joinder.[20] The cumulated evidence prong in *Weist* requires that the defendant show that there is a risk the jury may cumulate the evidence of the various crimes and find guilt when, if considered separately, it would not so find.[21] The State purports to introduce DNA evidence that conclusively ties Defendant to each incident. Since the evidence and charges connected with each incident are similar and of the same impact, separate consideration would probably not enhance Defendant's chances of acquittal.

The second prong of the *Weist* analysis involves an inquiry as to whether the jury may use 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.[22] Given the aforementioned evidence, the State argues that it cannot be said that a conviction for any of the crimes charged would be based solely or primarily upon a finding of criminal disposition by the jury. Defendant claims that he will suffer prejudice if the offenses committed against Chiffens are joined together with the other incidents at trial. Specifically, Defendant argues that if the jury believes that Allen committed the rapes of Kendall, Corey or Pinero-Serrano, while armed with a weapon or during the commission of a robbery, the issue of consent is likely to be subsumed by the evidence presented in support of the other offenses. As a result, Defendant contends that the jury may cumulate the evidence to find

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[20] *Weist v. State*, 542 A.2d 1193, 1195 (Del. 1988).

[21] *Id.*

[22] *Id.*

guilt, when it may not so find if the incidents were considered separately. Furthermore, Defendant argues that the State is bootstrapping a less serious incident to a more serious incident with the potential that the evidence of the more serious offenses will overwhelm his claim that Chiffens consented. If the jury finds the Kendall evidence credible, Defendant contends that the jury is likely to infer that he is a child molester and/or a sexual predator with a general criminal disposition.

"Severance is not required *ispo facto*, simply because the alleged charges involve different victims or occur at separate times."[23] Because the evidence in connection with each incident is of relatively the same strength, Defendant's argument that the State is attempting to bootstrap a weaker case to stronger cases is not applicable. This case does not require an "unusual degree of detachment" on the part of the jury to consider each charge separately.[24] A seventeen count indictment is not so complex as to subject a jury to confusion or accumulation. The evidence is of the same type and impact and each incident involves offenses of a sexual nature. In a joint trial, the risk of prejudice to a defendant as a result of jury confusion and accumulation can be minimized through the use of proper jury instructions.[25] To eliminate the potential "spillover" effect that would result from a joint trial, it is sufficient that the jury be instructed to consider liability for each charge separately and that evidence admitted for one

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[23] *Fortt v. State,* 767 A.2d 799, 803 (Del. 2001) (citing *Younger v. State*, 496 A.2d 546, 550 (Del. 1985).

[24] *State v. McKay,* 382 A.2d 260, 262 (Del. Super. Ct. 1978).

[25] *State v. Siple,* 1996 WL 528396 (Del. Super.) (citing *Pandiscio v. State,* Del. Supr., No. 163, Horsey, J. (Oct. 9, 1991) (ORDER) (holding that a court's carefully constructed jury instructions can belie a claim of jury confusion)).

offense is not to be used in determining guilt for another.[26] It is presumed that a jury is able to understand and follow instructions.[27] Accordingly, the Court finds that Defendant has not met his burden of showing unfair prejudice with regard to the cumulated evidence prong and the general disposition prong defined in *Weist.*

The final prejudice prong of the *Weist* analysis involves an inquiry as to whether the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[28] Defendant indicates an intention to present a consent defense with respect to the incidents involving some, if not all, of the female victims. Kendall, at fourteen years of age, is legally incapable of consenting to sexual contact with a person of Defendant's age. As a result, Defendant asserts that joinder of the Kendall incident with the other offenses will place him in an awkward and confusing position of challenging the State's evidence and identification of the Defendant as the perpetrator of the Kendall crimes, while at the same time presenting a consent defense as to the other victims. In *State v. Flagg,* the Court held that if the defendant were forced to present separate and distinct defenses to the two sets of charges, he would be subject to embarrassment and confusion.[29] Recognizing that Defendant will be placed in a tenuous position if he offers a consent defense in a joint trial, while challenging identity as to the Kendall offenses, the Court finds there is a reasonable probability that Defendant will suffer "substantial injustice" if the Kendall set of charges are not severed. As

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[26] *Skinner v. State,* 575 A.2d 1108, 1120 (Del. 1990).

[27] *Fortt v. State,* 767 A.2d 799, 803 (Del. 2001).

[28] *Weist v. State,* 542 A.2d 1193, 1195 (Del. 1988).

[29] *State v. Flagg,* 739 A.2d 797, 800 (Del. Super. Ct. 1999) (granting severance where defendant would be presenting a psychiatric defense as to one set of charges and challenging identity as to the other).

a result, the Court finds that joinder of the offenses against Kendall with the other three victims meets the test for severance under the embarrassment or confusion prong of *Weist.*

CONCLUSION

Defendant has met his burden of showing that denial of severance of the offenses against a

minor, who is unable to give consent to sexual contact, would be so manifestly prejudicial as to outweigh concerns for judicial economy. The Court does not find that a reasonable probability exists that substantial injustice would result from a joint trial of all of the remaining counts of the indictment. For the foregoing reasons, Defendant's motion for relief from prejudicial joinder is granted, in part and denied, in part.

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Robert M. Goff, Jr., Assistant Public Defender, Wilmington, Delaware.
James D. Nutter, Assistant Public Defender, Wilmington, Delaware.
James V. Apostolico, Deputy Attorney General, Wilmington, Delaware.
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