

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	:	
	:	I.D. Nos. 0401006193
v.	:	and 0403024956
	:	
JAMES F. EISENBACK,	:	
	:	
Defendant.	:	

Submitted: November 19, 2004

Decided: November 30, 2004

ORDER

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

Marie O' Connor Graham, Esquire, Deputy Attorney General, Dover, Delaware;
attorneys for the State of Delaware.

Deborah L. Carey, Esquire, Assistant Public Defender, Dover, Delaware; attorneys
for the Defendant.

WITHAM, J.

State v. James F. Eisenback
I.D. Nos. 0401006193 & 0403024956
November 30, 2004

Before the Court is a Motion to Sever combined with a Motion for Relief from Prejudicial Joinder filed by Defendant, James F. Eisenback. These motions were heard on November 19, 2004. From the submissions of the parties it appears to this Court that:

FACTS

Defendant was indicted on 63 counts including 19 counts of Rape First Degree, 12 counts of Rape Second Degree, 2 counts of Continuous Sexual Abuse of a Child, 15 counts of Use of a Computer to Unlawfully Depict a Child Engaging in a Prohibited Sexual Act, and 15 counts of Possession of Child Pornography. Defendant alleges that he would be unfairly prejudiced if the rape counts and the counts of continuous sexual abuse of a child are brought against him at the same trial with the child pornography and computer counts, which he argues are distinct and separate offenses.

The State asserts that Defendant would not be prejudiced by joinder of all the charges because the crimes are of a similar nature and were part of the same act. The State specifically alleges that the charges are all based on the same act or transaction or part of a common scheme or plan because Defendant, in a taped statement, acknowledged that he viewed pornographic images of children immediately after he abused the victims in order to achieve an orgasm. The State further contends that all the counts against Defendant are “ inextricably intertwined” because the investigation of the charges of rape led the State to discover the pornographic images of children.

STANDARD OF REVIEW

Superior Court Criminal Rule 8(a) permits two or more offenses to be joined in the same indictment 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.”¹ If it appears that the defendant would be prejudiced by such joinder, the Superior Court may sever the offenses.² The decision whether to grant or deny severance is a matter within the sound discretion of the trial court.³

The defendant has the burden of establishing that joinder of the offenses will subject him to substantial injustice and unfair prejudice.⁴ Prejudice may be shown where: (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

¹ Super. Ct. Crim. Rule 8(a).

² Superior Court Criminal Rule 14 provides:
If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
Super. Ct. Crim. R. 14.

³ *Weist v. State*, 542 A.2d 1193, 1195 (Del. 1988); *Younger v. State*, 496 A.2d 546, 549-50 (Del. 1985).

⁴ *State v. Hartman*, 2000 WL 33109146, at *2 (Del. Super.) (citing *Lampkins v. State*, 465 A.2d 785 (Del. 1983)); see also *Weist*, 542 A.2d at 1195.

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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 Severance may be denied even where there is prejudice to the defendant if the offenses charged are of a similar nature or tend to show a modus operandi.⁶

DISCUSSION

In this case, the counts of Use of a Computer to Unlawfully Depict a Child Engaging in a Prohibited Sexual Act and the counts of Possession of Child Pornography may be prejudicial to Defendant to some extent if joined in the same trial with the counts of Rape and Continuous Sexual Abuse of a Child. It is also possible that the jury could cumulate the evidence against Defendant or infer a general criminal disposition based on the pornography charges. In the Court's opinion, however, Defendant has failed to show that joinder of these offenses would prejudice Defendant substantially enough to outweigh the factors which favor joinder of all the counts. The State has indicated that Defendant's own statement acknowledges that all the counts are based on the same act or transaction or

⁵ *Weist*, 542 A.2d at 1195.

⁶ *State v. McKay*, 382 A.2d 260, 262 (Del. Super. Ct. 1978). *See also State v. Hartman*, 2000 WL 33109146 (Del. Super.) (denying severance because the Defendant showed the victim pornographic images in an attempt to induce the victim to engage in the prohibited sex act that ultimately occurred). *Cf. State v. McGraw*, 2002 WL 1038823 (Del. Super.) (granting severance where it was not alleged that Defendant viewed the pornographic images in conjunction with his unlawful contact with the victim).

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functioned as part of a common plan or scheme in that Defendant viewed child pornography immediately after he abused the victims. This testimony by Defendant provides a sufficient link between all the counts against Defendant such that they may be considered part of the same act or transaction or a common scheme or plan and therefore precludes severance of the counts.

The Motion to Sever the counts of Use of a Computer to Unlawfully Depict a Child Engaging in a Prohibited Sexual Act and the counts of Possession of Child Pornography as well as the Motion for Relief from Prejudicial Joinder are therefore denied. The Court understands, however, that this case is still in the early stage of the proceedings and that circumstances may change as the matter progresses. The Court therefore denies the Motion to Sever and the Motion for Relief from Prejudicial Joinder without prejudice. Defense counsel may renew these motions later in the proceeding.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution