SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUPERIOR COURTHOUSE
GEORGETOWN, DE 19947

Sean P. Lugg, Esquire
Department of Justice
820 North French Street
Wilmington, DE 19801

Allan Wendelburg, Esquire
Stone Mill, Suite 30
722 Yorklyn Road
Hockessin, DE 19707

Edmund D. Lyons, Jr., Esquire
The Lyons Law Firm
1526 Gilpin Avenue
Wilmington, DE 19806

Date Submitted: March 17, 2005
Date Decided: April 4, 2005

RE: ***State of Delaware v. Daniel J. Anker***
ID #0402010394
State of Delaware v. Laura Larks
ID # 0402010399

Dear Counsel:

This is my decision on Defendant, Daniel J. Anker's Motion to Sever. For the following reasons, Defendant Anker's Motion is granted.

STATEMENT OF THE CASE

Daniel J. Anker ("Anker") and Laura Larks ("Larks") allegedly stole large sums of money from an escrow account established by Anker's law practice. Anker is Larks' father. The escrow account was set up to hold mortgage proceeds from real estate transactions. Each has been charged with 19 counts of theft and one count of conspiracy to commit theft. Defendant Anker

filed a Motion to Sever the Defendants in this case. He alleges that his and Larks' defenses will be antagonistic. This belief is based, in part, on statements the two made during taped questioning by State Detective, Robert Carmine.

In its response, the State argued that Defendant Anker had introduced no real evidence that he would be prejudiced, other than hypothetical evidence and that, in any case, it would not be using the taped testimony during the trial at all. Upon receipt of the transcripts from the State, Defendant submitted them for this Court's review in considering his motion. Anker also learned of additional bad character evidence regarding Larks, which would be useful to his defense. In a letter dated October 27, 2004, Anker stated that this evidence would be key to showing Larks' motive to set up her father. In addition, he claimed it further evidenced the antagonistic nature of his and Larks' defenses.

At the urging of the Court for more detail of the defenses, Anker resubmitted his Motion to Sever along with a Memorandum in Support of Motion to Sever. In the memorandum, Defendant gave a proffer of the facts as they had developed since the original motion was filed. The State responded, arguing that despite the fact that Anker and Larks were denying culpability, it intends to prove they both stole from the escrow account. While both Defendants claim they did not steal client money, they both admit to having spent money from the escrow account. The State also argues that the Defendant failed to meet his burden of establishing substantial injustice or unfair prejudice sufficient to justify severance.

Anker further supplemented his proffer with a letter dated March 5, 2005. In the letter, he stated that the Defense plans to produce evidence at trial that Larks forged documents, created fraudulent e-mails in order to deceive Anker and his clients, withheld correspondences from him,

and created a false settlement in order to trick Anker into believing he had sufficient extra funds in his escrow account to cover personal expenses. Defendant Larks opposes Anker's Motion to Sever. Oral arguments were heard on Anker's Motion to Sever on March 17, 2005.

DISCUSSION

Pursuant to Superior Court Criminal Rule 8(b), two or more defendants may be tried together if they are alleged to have participated in the same act or transaction or series of acts or transactions constituting an offense or offenses. Criminal Rule 14 provides relief from prejudicial joinder, allowing a court to sever defendants and order separate trials when a joint trial may prejudice a defendant. The decision to sever rests within the sound discretion of the Court. *State v. Skinner*, 575 A.2d 1108, 1119 (Del. 1990). Judicial economy and efficiency favor joint trials, but, if joinder will result in a reasonable probability of substantial injustice and denial of a fair trial, the Court should grant severance. *Id*.

Four factors are considered when determining whether a motion to sever should be granted:

> (1) problems involving a co-defendant's extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the co-defendant and the movant; and (4) difficulty in segregating the State's evidence as between the co-defendant and the movant.

Floudiotis v. State, 726 A.2d 1196, 1210 (Del. 1999) ("*Floudiotis*").

If any one of the factors exist, severance may be appropriate. *Id*. The burden is on the defendant to demonstrate "substantial injustice" and "unfair prejudice" in order to show that severance is necessary. *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994).

As to the second factor, Defendant presented no evidence to show that there was a lack of substantial independent competent evidence. Indeed, the statements and the proffer indicate there is substantial evidence, such that a case could be made against Anker independent of the case against Larks. Anker also has not offered the fourth factor as justification for severing his trial from Larks. There has been no argument made nor evidence shown that there would be difficulty in segregating the State's evidence between the co-defendants. *See, e.g. Floudiotis*, 726 A.2d at 1211 (finding that statement "we're going to f...k somebody up" admitted against one defendant in a joint trial would be difficult for a jury to segregate out of the evidence against the other co-defendants).

In support of his motion, however, Defendant argues that Anker's and Larks' recorded statements are so intertwined that redacting the statements in a joint trial would be impractical. This argument involves the first factor - problems involving extra-judicial statements. The recorded statements, if introduced, might create a *Bruton* problem.[1] This argument is merely hypothetical, however, because the State says it will not introduce the statements in its case in chief (although it did reserve its right to use them for impeachment purposes on cross-examination). "'[M]ere hypothetical prejudice is not sufficient.'" *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citation omitted)).

The only factor supporting Anker's Motion to sever is the argument that Anker's and Larks' defenses are prejudicially antagonistic. "[T]he existence of defenses so antagonistic as to force the jury to accept the defense of one defendant only by rejecting the defense offered by the other demand[s] severance." *Manley v. State*, 1996 WL 527322, at *2 (Del. Super. Ct.), *aff'd*, 709 A.2d 643, 651-53 (Del. 1998), *citing*, *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989)

("*Bradley*"). However, mutually antagonistic defenses do not require automatic severance. *Id.*, *citing*, *Zafiro v. United States*, 506 U.S. 935, 938 (1992). They are merely one factor to be considered when determining a motion to sever. *Bradley*, 559 A.2d at 1241. Hostility between co-defendants or mere inconsistencies in defenses do not require severance. *Id*. *See also Outten*, 650 A.2d at 1298 (finding defenses of co-defendants were not sufficiently antagonistic when neither took the stand or presented evidence that implicated the other). "[A] defendant is not entitled to a separate trial simply because he might stand a better chance of being acquitted." *Id*.

In its survey of Rule 14 cases, Corpus Juris Secundum describes the threshold for severance this way: "[S]everance will be granted where . . . defenses are shown to be so mutually exclusive and irreconcilable that a jury will infer guilt from the conflict alone and must disbelieve the core of one defense in order to believe the other defense." 22A C.J.S. *Criminal Law* § 569 (1989). The *Bradley* case best exemplifies the situation where mutually antagonistic defenses would require severance.[2] 559 A.2d at 1240 - 42. There, each defendant presented an alibi defense which the jury could not accept without rejecting the co-defendant's alibi. Each defendant repeatedly tried to incriminate his co-defendant and each called his own witness to testify that the co-defendant had confessed that he was the one who had committed the crime.

State v. Robinson, 1994 WL 684483 (Del. Super. Ct.) ("*Robinson*") is another case in which severance was granted. The judge found it reasonably likely that the each of the defendants ultimately would lay guilt upon each other in order to exonerate himself. *Id*. at *1. In addition, in *Nocks v. State*, 622 A.2d 1096 (Table), 1993 WL 66564, at *1-2 (Del.)("*Nocks*"), the Supreme Court upheld a Superior Court's decision to sever the trials of several co-defendants

over the objection of Defendant Nocks. Each of the other defendants claimed he would deny his own culpability and place guilt on the other parties. The Court stated:

> Based on the declarations made by the codefendants, the Superior Court properly could have determined that the consolidated trial had the distinct possibility of degenerating into antagonistic alibi defenses. Thus, the Superior Court was well within its discretion in granting the motions to sever.

Id.

In *Stevenson v. State*, 709 A.2d 619, 629 (Del. 1998) ("*Stevenson*"), however, the Court upheld the trial court's refusal to sever the defendants when neither Manley nor Stevenson testified, and neither implicated the other in their own defenses. *See also Manley*, 1996 WL 527322. Similar reasoning was used to justify the trial court's decision in *Outten*, 650 A.2d at 1298. No antagonism was found when neither defendant took the stand, nor did they present evidence implicating each other. *Id*.

In *Fisher v. State*, 708 A.2d 630 (Table), 1998 WL 171104, at *1 (Del. 1998) ("*Fisher*"), there was no antagonism found in the defenses of the co-defendants because there could be no inconsistencies since both denied all of the allegations. *See also Jacono v. State*, 628 A.2d 83 (Table), 1993 WL 224734, at *2 (Del.) ("[T]he defendants' strategies were consistent in their denial of criminal culpability.") ("*Jacono*"); *Kelly v. State*, 577 A.2d 753 (Table), 1990 WL 84753, at *2 (Del.) ("Kelly and Perry did not present antagonistic defenses. Both men denied any involvement with Walker's death.") ("*Kelly*"). In still another case, the Court found that defenses that one defendant lacked the requisite intent to be guilty of murder and that the other defendant denied he was involved in the killing, were not inconsistent defenses. *State v. Baker*, 1992 WL 114324, at *3 (Del. Super. Ct.) ("*Baker*"). That Court also denied severance, finding

that a reasonable jury could easily accept both, either or neither of the defenses, such that the acceptance of one would not lead to the rejection of the other. *Id*. at *4.

After reviewing Defendant Anker's Motion, his proffer and letters, the State's briefs, and after having heard oral arguments, the Court finds that the Defendants' trials should be severed. Not only are both Defendants denying culpability but each accuses the other. There were only the two of them in the office who had the necessary access to the files, checks and escrow funds. According to Anker, in her statement, Ms. Larks claims that she did not willingly participate in the theft, but that she just did what her father told her to do. Consequently, she mistakenly believed the financial transactions could be made. Anker claims his daughter must have set up the whole scheme. He blames her for setting up fictitious settlements and for misleading him to believe that the firm's escrow and operating accounts were funded properly.

In this regard, Larks admits signing Anker's name to checks, but claims she did it at his bidding. She claims he was the one pulling the strings. Although she also admits to having received large sums of money (a $10,000.00 "gift" from the account for a trip to Jamaica and $53,000.00 for a new BMW, among other things), and to signing his names to many checks (allegedly with his permission) from the escrow account, written out to her personally, she denies any knowledge that it might have been stolen money. She claims the checks were either her wages, money set aside for her in the escrow account from a settlement from a car accident, or gifts from her father.

Mr. Anker, on the other hand, denies participation in and knowledge of the scheme. He claims that everything in the office came and went through Larks. He never gave her permission

to sign his name to checks. Money he may have allowed her to withdraw and money he withdrew from the escrow account for personal use, he thought, was his through a five million dollar settlement (later found to be a fraud) offered to him from Washington Mutual.[3] In addition, he alleges that Larks fired the firm's outside accountant in 2002 without his knowledge, secretly switched to different accounting software and fabricated e-mails in order to deceive him regarding the existence of the Washington Mutual settlement. With this background, Anker mistakenly believed all the accounts were funded properly.

In order to believe that Anker was mistaken and lacking any intent to appropriate his client's funds, and thus innocent of theft, a jury would have to believe that Larks intentionally committed the theft. On the other hand, if the jury were to believe that Larks mistakenly believed that the financial transactions were legal and also lacked the intent to appropriate client's funds, it would have to find that Anker is guilty. There is no other person in the office who had the necessary access to commit the thefts.

The State argues that despite the fact that each is pointing the finger at the other, even though they both allege they were mistaken in their belief that the funds were being taken out legally, both still could be guilty of theft. Mistake of fact, however, is a defense to a specific intent crime if it "negatives the state of mind for the commission of the offense." 11 *Del. C.* § 441. Both Anker and Larks have been indicted for theft in violation of 11 *Del. C.* § 841. Each count states that Anker and Larks "did take and obtain *with intent to appropriate* United States Currency. . . ." In addition, both Anker and Larks have been indicted for conspiracy pursuant to 11 *Del. C.* § 512, for *intending* to promote or facilitate the commission of a felony, specifically

theft. Thus, their mistaken beliefs would be a complete defense to the crimes they are accused of committing.

Finally, in addition to the fact that each Defendant will be denying knowledge of the scheme and blaming the other for it, in his letter to the Court dated October 27, 2004, counsel for Anker wants to pursue Larks' motive, which would be based on her longstanding resentment of her father. He states:

> She suffered a very difficult adolescence over the several year period prior to the commission of the alleged thefts, including a false rape report documented by the New Castle County Police, a history of drug involvement, mental health treatments and admissions, money troubles, truancy, runaway, teenage pregnancy and other difficulties.

October 27, 2003 Letter at 2-3.

The admission of this information at a joint trial would likely prejudice Larks by attacking her character. It poisons the proverbial well. No jury would keep this evidence within the limiting bounds of an instruction. At the same time, if it were not admitted at a joint trial, its absence would prejudice Anker. In *Zafiro*, 509 U.S. at 938, the Supreme Court stated:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. . . . Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial.

It is clear that Anker actually plans and has the ability to take this avenue of attack, of introducing bad character evidence against Larks.

In sum, Anker has met his burden of showing the defenses are sufficiently antagonistic to warrant severing the trials. The antagonistic nature of the defenses posited in this case are more like those in *Bradley*, *Robinson* and *Nocks*, than those in *Stevenson*, *Fisher, Jacono, Kelly* or *Baker*. Each Defendant plans to argue that she or he was not aware of the other's scheme and that the other is solely responsible for the money stolen. In order to be able to accept the core of Anker's defense, the jury would have to reject the core of Larks' defense and vice versa. *See Robinson* at * 1 ("This court . . . concludes that the defenses offered by each defendant will be so antagonistic as to preclude a jury from accepting the core of one defendant's defense without rejecting the core of the defense offered by the other defendant.").

CONCLUSION

Considering the foregoing, Defendant Anker's Motion to Sever is granted. Trial was originally set for July 18, 2005. Another trial date will need to be set and the State should inform the Court whether it will try Anker or Larks first.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court held that the admission of a non-testifying co-defendant's confession which inculpates the accused in a joint trial violates the Confrontation Clause of the Sixth Amendment because it denied him the right of cross-examination. *See also Floudiotis*, 726 A.2d at 1212 ("[T]he admission of a non-testifying co-defendant's statement that tends to incriminate the defendant violates the Confrontation Clause."). In *Floudiotis*, the Court found that through properly redacted statements to eliminate any reference to the defendant, the trial court can eliminate any *Bruton* concerns. Furthermore, in *State v. Baker*, 1992 WL 114324 (Del. Super. Ct.), the Court pointed out that both United States and Delaware Supreme Court precedents had since found that a co-defendant's redacted confession did not incriminate the defendant unless it was linked either to evidence introduced later at trial or to direct evidence connecting the person to the generic persons in the statement. *Id*. at * 2, *citing, Blodgett v. State*, 310 A.2d 628, 630 (1973); *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).

The State claims that it will not be presenting the recorded statements of Anker and Larks, except perhaps during cross-examination. If that is the case, then no *Bruton* issue will arise. Furthermore, the *Bruton* problem is nullified if the statement clearly is accepted under traditional rules of hearsay. *See Floudiotis*, 726 A.2d at 1212. Such rules do not give rise to Confrontation Clause problems. In *Bruton*, the statement inculpating the petitioner "was clearly inadmissible against him under traditional rules of evidence." 391 U.S. at 128 n.3.

2. At oral arguments, the State argued that *Outten* limited the ruling of *Bradley* when it found

that co-defendants Outten and Steven did not have antagonistic defenses because neither of them took the stand or presented evidence implicating the other. In *Floudiotis*, however, the Supreme Court reiterated that antagonistic defenses exist in situations when in order to believe one co-defendant's version of events a jury must disbelieve the other's.

3. Anker had credit problems with Washington Mutual. He received a phony e-mailed letter of settlement offering to pay him $5 million. The letter appeared as if it was e-mailed from an employee of Washington Mutual. Anker thought that at some point the money was transferred to his escrow account and he left it in there, drawing against it when he needed something. Apparently, however, the employee from whom the e-mail came, McIntyre, was not a real person and was also one of the screen names on Laura Larks' computer. Larks said she had no knowledge of the screen name.