

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 V.) I.D. NO: 0403019957
)
 SEAN M. SISSON,)
)
 Defendant.)

Date Submitted: March 14, 2005

Date Decided: April 7, 2005

MEMORANDUM OPINION

*Upon Consideration of Defendant's
Motion to Sever.*

GRANTED.

Donald R. Roberts, Deputy Attorney General, DEPARTMENT OF JUSTICE,
Wilmington, Delaware, attorney for the State of Delaware.

William J. Rhodunda, Jr., Esquire, OBERLY, JENNINGS & RHODUNDA, P.A.,
Wilmington, Delaware, attorney for Defendant.

SLIGHTS, J.

I.

Pending before the Court is Defendant, Sean M. Sisson's, Motion to Sever Counts I through X from the remaining counts of a sixty-count indictment. Mr. Sisson was arrested on March 24, 2004, and subsequently indicted by the Grand Jury on ten counts of Sexual Exploitation of a Child ("Sexual Exploitation"), twenty-five counts of Unlawfully Dealing in Child Pornography ("Unlawful Dealing"), and twenty-five counts of Possession of Child Pornography ("Possession"). Counts I through X of the indictment charge Sexual Exploitation and allege that Mr. Sisson took photographs of his thirteen-year-old daughter while she was engaged in prohibited sexual acts.¹ These photographs were discovered on Mr. Sisson's business computer while Delaware State Police officers executed a search of the Sisson residence. The remaining charges of Possession and Unlawful Dealing, Counts XI through LX, relate to a voluminous library of child pornography also discovered by law enforcement on the same computer.

Mr. Sisson contends that Counts I through X (the Sexual Exploitation charges) should be severed from the remaining counts of the indictment (the Possession and Unlawful Dealing charges) because he cannot receive a fair trial if all charges are tried

¹See DEL. CODE ANN. tit. 11, § 1108 (2001) ("A person is guilty of sexual exploitation of a child when: (1) The person knowingly photographs or films a child engaging in a prohibited sexual act or in the simulation of such an act, or otherwise knowingly creates a visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act").

together. He contends that the jury will be unable to separate the images he acknowledges are child pornography (comprising the Unlawful Dealing and Possession charges) from the photographs of his daughter (comprising the evidence of Sexual Exploitation). According to Mr. Sisson, the photographs of his daughter were taken for a proper purpose, to assist in the medical diagnosis of a skin condition suffered by his daughter (clearly visible in the photographs), and do not, therefore, depict any prohibited sexual acts.² Mr. Sisson also argues that severance is appropriate because evidence supporting the Sexual Exploitation charges would not be admissible in a trial for Possession and Unlawful Dealing under Delaware Uniform Rule of Evidence 404(b) (“Rule 404(b)”) and, likewise, the evidence of child pornography would not be admissible in a trial for Sexual Exploitation.³

²The “prohibited sexual act” allegedly depicted in the photographs is nudity. *See* DEL. CODE ANN. tit. 11, § 1108 (2001)(defining “prohibited sexual act” to include “nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction.”).

³D.R.E. 404 (b)(“*Other crimes, wrongs or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove character of a person in order to show action 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.”). *See also Getz v. State*, 538 A.2d 726, 734 (Del. 1988)(“The evidence of other crimes must: (1) be material to an issue or ultimate fact in dispute; (2) be introduced for a purpose sanctioned by 404(b); (3) be proved by evidence which is ‘plain, clear and conclusive’; (4) not be too remote in time; (5) not be substantially outweighed by the danger of unfair prejudice; and (6) the trial judge must give appropriate jury instructions regarding the use of such evidence.”).

For the reasons that follow, the Court concludes that, although some evidence of the images of child pornography found on Mr. Sisson's computer likely would be admissible to prove the Sexual Exploitation charges, the admission of all of those images at a joint trial of all charges would cause substantial unfair prejudice to Mr. Sisson. Accordingly, Counts I through X of the indictment must be severed and tried separately from the remaining counts.

II.

On March 24, 2004, the Delaware State Police executed a search of Mr. Sisson's residence pursuant to a warrant. A number of items were seized from Mr. Sisson's residence, including his business computer.⁴ On this computer, detectives found several hundred pornographic images of prepubescent children engaged in various sexual acts with adult males.⁵ After being Mirandized, Mr. Sisson claimed ownership of the child pornography on his business computer and also admitted that he transmitted pornographic images of children to other individuals who collect and view these images via the Internet.⁶ The several hundred images found on Mr. Sisson's business computer along with his statements to police form the bases of the

⁴D.I. 3, at 16.

⁵*Id.*

⁶*Id.*

Possession and Unlawful Dealing charges.

Additionally, Mr. Sisson admitted that several of the images found on his computer were still photographs of his thirteen-year-old daughter.⁷ These photographs - - located in the same computer file as the other images - - depict Mr. Sisson's daughter posed in the nude and in positions the State contends are intended to insight sexual stimulation or gratification.⁸ Mr. Sisson has acknowledged that he took each of these photographs with his digital camera. He now moves to sever the ten counts of Sexual Exploitation from the remaining counts of the indictment.

III.

Mr. Sisson has presented two grounds for severance. First, he argues that Counts I through X should be severed because he will be severely prejudiced by the joinder of the offenses to an extent that a fair trial on the Sexual Exploitation charges will not be possible. He alleges that he will be prejudiced because: (i) the Sexual Exploitation charges are not of the same or similar character as the Possession and Unlawful Dealing charges because the pictures of his daughter, unlike the other images on his computer, are not sexually explicit; (ii) based on the overwhelming

⁷*Id.* Ten of the photographs display close-ups of his daughter's genitalia, breasts and buttocks. These photographs form the basis of the ten counts of Sexual Exploitation.

⁸*Id.*

amount of evidence supporting the Possession and Unlawful Dealing charges, the jury will cumulate the evidence; and (iii) the jury likely will use the evidence of Possession and Unlawful Dealing as a means improperly to impugn his character. Mr. Sisson also argues that the Sexual Exploitation charges should be severed because, under Rule 404(b), the photographs of his daughter would not be admissible in a trial for Possession and Unlawful Dealing or vice versa.

The State opposes severance. The State first argues that the photographs of Mr. Sisson's daughter are, in fact, sexually explicit because she was photographed in sexually suggestive poses, including close-up photographs of her genitalia, breasts and buttocks. In addition, the State contends that the Court should not sever the Sexual Exploitation charges because the photographs of Mr. Sisson's daughter were found in the same computer file as all of the other images of child pornography. Finally, the State alleges that the photographs of Mr. Sisson's daughter would be admissible under Rule 404(b) because they are highly probative of Mr. Sisson's plan, intent, and knowledge to collect and deal in child pornography, just as the images of child pornography are probative of Mr. Sisson's intent and motive to exploit his daughter.

Boiled to their essence, the parties' contentions present one issue for the Court to decide: whether Mr. Sisson would be unfairly prejudiced by the joinder of these offenses for trial.

IV.

The decision to grant or deny a motion to sever rests in the sound discretion of the trial court.⁹ On a motion to sever, the defendant bears the burden of demonstrating unfair prejudice and substantial injustice associated with the joinder of the offenses.¹⁰ In addition, the defendant must demonstrate that prejudice will in fact result; he cannot rely upon hypothetical prejudice.¹¹ Whether the offenses should be severed depends on the facts and circumstances of each case.¹²

V.

When crimes are of the same or substantial character, are based upon the same act, or represent a common plan or scheme, Delaware Superior Court Criminal Rule 8(a) allows the State to join the offenses and prosecute the defendant in one trial for

⁹*Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988); *Younger v. State*, 496 A.2d 546, 549-50 (Del. 1985).

¹⁰*State v. Hartman*, 2000 WL 33109146 (Del. Super.); *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978).

¹¹*See Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990) (“[M]ere hypothetical prejudice is not sufficient.”).

¹²*See Wiest*, 542 A.2d at 1195 (“In determining whether the trial court has abused its discretion in denying a motion [to sever], we must examine the facts in each case.”).

different counts.¹³ The purpose of the joinder of offenses is to promote judicial economy.¹⁴ When joining the offenses will prejudice the State or the accused, however, one trial is not appropriate and, pursuant to Delaware Superior Court Criminal Rule 14, severance may be granted.¹⁵

In determining whether offenses should be severed, the court considers three factors: (i) whether the jury might accumulate evidence on all offenses without weighing each offense separately; (ii) whether the jury might improperly conclude that the defendant has a criminal disposition from the multiplicity of the charges themselves; or (iii) whether the defendant may be subject to embarrassment or confusion in presenting different defenses on different charges.¹⁶ When considering the prejudice to the parties, the court also examines whether the evidence would be admissible in the severed trial for a proper purpose under Rule 404(b).¹⁷ If the

¹³DEL. SUPER. CT. CRIM. R. 8(a) (2005)(“*Joinder of offenses*. Two or more offenses may be charged in the same indictment or information in a separate count for each offense 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.”).

¹⁴ *Wiest*, 542 A.2d at 1195.

¹⁵ DEL. SUPER. CT. CRIM. R. 14 (2005)(“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.”).

¹⁶*Weist*, 542 A.2d at 1195; *State v. McKay*, 382 A.2d 260, 262 (Del. 1978).

¹⁷*Skinner*, 575 A.2d at 1118; *Bates*, 386 A.2d at 1142.

evidence supporting one charge would be admitted in a trial of the other(s), it is less likely that joinder will cause prejudice.¹⁸

In this case, the Court finds that severance is appropriate. At a joint trial, the State could (and, indeed, would be obliged to) introduce all of the images of child pornography found on Mr. Sisson's computer because those images would be the evidence of Possession and Unlawful Dealing. During the State's case-in-chief, the Court would have no ability to limit the introduction of those images and, more importantly, would have no ability to cure the obvious and overwhelming prejudice to Mr. Sisson that would result from the pool of child pornography in which the jury would be immersed.¹⁹

On the other hand, if the Sexual Exploitation charges are severed and tried separately, the Court would be in a better position to minimize the prejudice to Mr. Sisson by limiting the introduction of Rule 404(b) evidence while preserving the State's right to present probative evidence. Regardless of the means by which it is

¹⁸*See Skinner*, 575 A.2d at 1118 (“Although reciprocal admissibility is not a prerequisite for initial joinder, reciprocal admissibility is a pertinent factor for the trial court to consider.”); *Bates*, 386 A.2d at 1142 (“[W]here evidence concerning one crime would be admissible in the trial of another crime . . . there is no prejudicial effect in having a joint trial.”).

¹⁹*See* D.R.E. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”).

accomplished, the Court's ability to balance the needs of the parties and to ensure the fairness of the proceedings in separate trials outweighs any judicial economy that may be realized in a joint trial.²⁰

VI.

In conclusion, the Court finds that Mr. Sisson would be unfairly prejudiced by a joint trial. Notwithstanding that it is likely that some evidence of Mr. Sisson's child pornography library will be admissible at a separate trial on the Sexual Exploitation charges, the admission of all of the images at a joint trial would unfairly prejudice Mr. Sisson without the Court having any ability to control or minimize that prejudice. Severance of the Sexual Exploitation charges, however, will allow the Court to tailor the presentation of the evidence relating to Possession and Unlawful Dealing in order to limit the prejudice to Mr. Sisson while preserving the State's right to present probative *prima facie* evidence of the charged offenses.

For the foregoing reasons, Defendant's Motion to Sever Counts I through X of the indictment is **GRANTED**.

²⁰See *State v. Siple*, 1996 WL 528396, at *2 (Del. Super.) ("The Court must weigh the prejudice to the defendant caused by joinder against the important considerations of economy and expedition in judicial administration."). In making this determination, the Court is mindful of the fact that the State has not attempted to argue any particular prejudice or disadvantage that the State would suffer as a result of severance (beyond the lost economies of a joint trial).

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary