

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1046-2012
 :
 vs. :
 :
 S.W., :
 Defendant : Motion to Sever

OPINION AND ORDER

Before the Court is a Motion to Sever that was filed by Defendant on October 19, 2012.

By Information filed on July 18, 2012, Defendant is charged with numerous sexual offenses including Involuntary Deviate Sexual Intercourse, Rape of a Child, Indecent Assault, Incest, Corruption of Minors and Endangering the Welfare of Children.

The Information alleges that the criminal conduct occurred between January 1, 2004 and December 31, 2010.

The charges involve alleged sexual misconduct against the Defendant's stepdaughter, D.D., and his daughter, L.W.¹ Counts one through six relate to allegations that between January 1, 2004 and December 31, 2005, Defendant sexually assaulted D.D. who was then nine (9) to ten (10) years old, at a residence located at 2934 King Court in Williamsport. The allegations concern the Defendant placing his tongue inside D.D.'s vagina, fondling her breasts, and placing his mouth on her breasts. Counts 15 and 17 also concern alleged criminal misconduct against D.D. More specifically, it is alleged that between January 1, 2004 and April 30, 2010, at three different residences, Defendant corrupted D.D.'s morals and endangered her

¹The Court has utilized initials throughout this opinion to protect the privacy of the alleged victims.

welfare by continually sexually assaulting her.

Counts seven (7) through twelve (12) of the Information relate to alleged criminal misconduct against L.W. Counts 7 and 10 specifically allege that between January 1, 2004 and December 31, 2005, while Defendant and L.W. resided at 2934 King Court and while she was four (4) to five (5) years old, he engaged in sexual intercourse with her. Counts eight (8) and eleven (11) allege the same misconduct between August 1, 2007 and December 31, 2008 while L.W. was eight (8) to nine (9) years old and when they resided at 825 Washington Boulevard in Williamsport. Counts nine (9) and twelve (12) also allege the same criminal misconduct between December 1, 2009 and April 30, 2010 when L.W. was ten (10) to eleven (11) years old and when they resided at 523 High Street in Williamsport. Counts 13, 14 and 16 relate to alleged criminal misconduct of Defendant having sexual intercourse with L.W. at the three different residences between January 2004 and April 30, 2010, and thereby committing the offenses of incest, corruption of a minor and endangering the welfare of a child.

Defendant requests that the charges relating to D.D. be severed from the charges relating to L.W. Defendant argues that “joinder of the two have no probative value and serves only to unduly prejudice the Defendant at trial.” (Defendant’s Memo in support of Motion to Sever, p. 1). Defendant also argues that evidence of the crimes against each separate alleged victim would not be admissible in separate trials and further that such evidence would be prohibited by Rule 404 (b) of the Pennsylvania Rules of Evidence. Defendant argues as well that the facts do not support a finding of an unusual modus operandi to warrant admissibility.

The Commonwealth counters that the evidence of each offense would be admissible in a separate trial for the other, the evidence is capable of separation by the jury so

as to avoid the danger of confusion, and that Defendant would not be unduly prejudiced by consolidation.

In considering Defendant's Motion, the parties stipulated that the Court could consider the allegations set forth in the criminal complaint and attached affidavit of probable cause, the Information and selected discovery provided to the Court. This selected discovery included a handwritten statement of Defendant, a Williamsport Bureau of Police report dated June 13, 2012 setting forth the reporting officer's summary of the statements of the alleged victims, and a Williamsport Bureau of Police report dated June 13, 2012 summarizing a videotaped statement of Defendant on June 11, 2012.

In addition to the factual allegations set forth above which were derived from the criminal complaint, affidavit of probable cause and Information, the selected discovery provided for the Court's review provides greater detail as to the circumstances surrounding the alleged crimes.

Defendant admits in his signed statement that while living in Williamsport with both D.D. and L.W., he sexually assaulted D.D. as she alleged. In his videotaped statement, he confirmed that the incidents with D.D. occurred while they were residing at the King Court address. He confessed to the incidents, although he admitted blocking out much of the sexual molesting incidents that occurred. He also stated he was depressed and suicidal during that time. He denied sexually molesting L.W. at any time.

The interviews of the alleged victims also provided some additional information. According to D.D., Defendant became her stepfather when she was eleven (11) months old. The first incidents of sexual assault occurred at the King Court address when she would have been nine (9) or ten (10) years old. Defendant directed D.D. to stay up for him.

The incidents occurred in either the bathroom or the living room of the residence. D.D. also indicated that L.W. told her that Defendant had molested L.W. when she was three (3), five (5) and ten (10) years old. D.D. indicated she did not initially tell anyone about Defendant sexually abusing her because she was afraid no one would believe her, but she told her mother in 2012 after she found out that Defendant also had been molesting L.W.

L.W. indicated she had been raped from the time she was two (2) years old. She claimed that she was molested when she was two (2), five (5), eight (8), ten (10) and eleven (11). She stated that the incidents occurred at all three residences, although she did not go into detail.

When L.W. told Defendant that he was hurting her, Defendant indicated “it was hurting him too.” She confronted Defendant about why he was doing it to her and he replied that he was depressed, sad, wanted to kill himself and didn’t care what he did.

Rule 583 of Pennsylvania Rules of Procedure, which governs severance, states: “The court may order separate trials of offenses...if it appears that any party may be prejudiced by offenses...being tried together.” Pa.R.Cr.P. 583; see also Commonwealth v. Dozzo, 991 A.2d 898, 901-02 (Pa. Super. 2010). Under Rule 583, the prejudice a defendant suffers due to not severing charges must be greater than the general prejudice any defendant suffers when the Commonwealth’s evidence links him to a crime. Dozzo, 991 A.2d at 902 (Pa. Super. 2010), citing Commonwealth v. Lauro, 819 A.2d 100, 107 (Pa. Super. 2003), appeal denied, 574 Pa. 752, 830 A.2d 975 (2003).

The Supreme Court has established a three-part test that the lower courts must apply in addressing a severance motion similar to the one raised in this case. First, the Court must determine whether the evidence of each of the offenses would be admissible in a separate

trial for the other. Second, the Court must determine whether such evidence is capable of separation by the jury so as to avoid the danger of confusion. Third, if the answers to the previous two questions are in the affirmative, the Court must determine if the defendant will be unduly prejudiced by the consolidation of offenses. Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418, 422 (1997), cert. denied, 525 U.S. 1015, 119 S. Ct. 538 (1998).

In deciding the first question of whether the evidence of each offense would be admissible in a separate trial for the other, the Court is guided by Rule 404(b) of the Pennsylvania Rules of Evidence, which precludes using evidence of other crimes “to prove the character of a person in order to show action in conformity therewith” but permits such evidence for other purposes, such as proof of motive, intent, plan, identity or absence of mistake or accident. Pa.R.E. 404(b)(1) and (2); see also Collins, 703 A.2d at 422-23. As the Pennsylvania Supreme Court aptly stated: “While evidence of distinct crimes is inadmissible solely to demonstrate a Defendant’s tendencies, such evidence is admissible...to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the others. This will be true when there are shared similarities in the details of each crime.” Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 481 (2004)(citations omitted); see also Commonwealth v. Judd, 897 A.2d 1224, 1231-32 (Pa. Super. 2006). The following factors should be considered in establishing similarities: the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed. Robinson, supra; Judd, supra. at 1232, citing Commonwealth v. Clayton, 506 Pa. 24, 33, 43 A.2d 1345, 1347-1350 (1984).

The Court concludes that there are shared similarities in the details of each

crime such that they are admissible to show a common plan, scheme or design. A majority of the offenses occurred in the same residence. Defendant initiated sexual contact with the respective victims. Defendant had a father-daughter relationship with both victims. The vast majority of the sexual contact occurred when the victims were between the ages of eight (8) to eleven (11) years old. All of the incidents occurred via Defendant utilizing a portion of his body on or in the victims. Finally, it appears that all of the sexual contact occurred by Defendant capitalizing on his “fatherly” status, age and experience to take advantage of the victims. It is not a situation in which he did not know the victims or forced an adult against her will. See for example Commonwealth v. Aikens, 990 A.2d 1181 (Pa. Super. 2010); Commonwealth v. Andrulowicz, 911 A.2d 162, 168-69 (Pa. Super. 2006).

Moreover, the exception language of 404 (b) (2) is not exclusive. See Pa.R.E. 404(b) comment; Commonwealth v. Dillon, 592 Pa. 351, 925 A.2d 131, 137 (2007); Commonwealth v. Watkins, 577 Pa. 194; 842 A.2d 1203, 1215 n. 11 (2003), cert. denied, 543 U.S. 960 (2004). Numerous cases, for example, admit bad acts evidence to explain a course of conduct, to complete the story or to evidence the natural development of the case. Commonwealth v. Williams, 586 Pa. 553, 896 A.2d 523, 539 (2006), cert. denied, 549 U.S. 1213 (2007); Commonwealth v. Drumhuller, 570 Pa. 117, 808 A.2d 893, 905 (2002), cert. denied, 539 U.S. 919 (2003).

Given the similarities as set forth above, the Court is also of the opinion that the prior crimes evidence and/or bad acts evidence is admissible to explain a course of conduct by Defendant, to complete the story, to evidence the natural development of the case and, as indicated previously, to prove a common scheme.

Additionally, the Court finds that the evidence would be capable of separation

by the jury and would not cause any danger of confusion. The facts are relatively simple and straightforward and certainly capable of being separated by the jury because Defendant is charged with different crimes involving different victims.

The final question the Court must determine is whether Defendant would be unduly prejudiced by the consolidation of the offenses. Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury's attention from its duty of weighing the evidence impartially. Pa. R.E. 403, comment. The practical concern involves whether the jury can separate the evidence with respect to each individual victim or if the jury would automatically find Defendant guilty with respect to the charges involving the one victim because the evidence is clear with respect to another victim. This concern, however, does not outweigh the probative value of the evidence and can certainly be alleviated by an instruction that reminds the jury of its responsibility to consider each charge separately and not use any other crimes evidence as proof of Defendant's bad character or a propensity. The Court does not find that trying the cases together would prejudice Defendant beyond that general prejudice that any defendant would suffer when the Commonwealth's evidence links that defendant to a crime.

Accordingly, the Court will enter the following Order.

ORDER

AND NOW, this ____ day of January 2013, following a hearing and argument,
the Court DENIES Defendant's Motion for Severance.

By The Court,

Marc F. Lovecchio, Judge

cc: CA
District Attorney's Office (MK)
Public Defender's Office (JL)
Gary Weber, Esquire (Lycoming Reporter)
Work File