

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH</b>	<b>: No. CR-1583-2018</b>
	<b>: CR-679-2019</b>
<b>vs.</b>	<b>:</b>
	<b>:</b>
<b>JOEL L. KIESSLING,</b>	<b>: Opinion and Order regarding</b>
<b>Defendant</b>	<b>: Commonwealth's Motion to Consolidate</b>

**OPINION AND ORDER**

Before the court is the Commonwealth's motion to consolidate CR-1583-2018 and CR-679-2019. The parties agreed that, in deciding this motion, the court could consider the affidavits of probable cause for both cases.

From July 26, 2018 through August 20, 2018, Defendant engaged in text messages and chat app conversations with an undercover FBI agent posing as a 13-year old female. During these messages, Defendant allegedly sent photos of himself and his genitals. He also allegedly asked her to take a bus to Pennsylvania, asked if he could come and pick her up, asked if she would let him get her pregnant, and commented about his proficiency at giving oral sex and how she would love it. The FBI forwarded this information to the Williamsport police on September 18, 2018.

On October 9, 2018, the Commonwealth filed a criminal complaint against Defendant in case 1583-2018 charging him with unlawful contact with a minor, criminal solicitation-statutory sexual assault, criminal solicitation-involuntary deviate sexual intercourse, obscene and other sexual materials-dissemination to minors, criminal use of a communication device, and corruption of minors.

On October 11, 2018, Williamsport police officers made contact with Defendant at his home regarding case CR-1538-2018. Defendant possessed on his person a

white Samsung Galaxy J7 smartphone. During the course of the investigation, Defendant agreed to an interview at police headquarters. He made statements in which he noted that he was the owner of that phone and that it was the personal phone he uses for communications. He also made statements “indicating that he had been communicating with several underage females, and admitted to both sending nude photos of himself as well as receiving nude photos of underage females.”

On October 30, 2018, the police obtained a search warrant to recover data from the phone. During the search of the phone, investigators discovered at least 35 separate images of child pornography depicting pre-pubescent females who were fully nude and/or engaged in sexual acts with an adult male. The police sent the images to the National Center for Missing and Exploited Children (NCMEC) for possible identification. On April 4, 2019, the police received a report from NCMEC indicating that two of the females depicted in several of the images were of real juvenile victims, namely the “Vicky” series depicting a 10-year old female being sexually abused and the “aprilblonde” series depicting an 8-year old female being sexually abused.

On April 22, 2019, the Commonwealth charged Defendant in case 679-2019 with numerous counts of possession of child pornography and one count of criminal use of a communication facility. The affidavit of probable cause does not indicate when these images were downloaded or accessed.

On March 16, 2020, the prosecutor filed a motion to consolidate these cases for trial. The prosecutor alleged that evidence in each case would be admissible in the other to prove motive, intent, absence of mistake or accident or a common plan or scheme. The

prosecutor noted that case CR-679-2019 arose directly out of the investigation of Defendant's actions in CR-1583-2018, the witnesses and evidence in the two cases were "largely identical," and consolidation would be expedient and would promote the interests of judicial economy.

On April 27, 2020, the court held an argument on the Commonwealth's motion. The prosecutor argued that this was a *res gestae* type of situation and that Defendant's actions evinced a common plan or scheme. When the court asked the prosecutor if he needed the evidence of one case to prove the other, the prosecutor answered "not necessarily" but he noted that if Defendant said he accidentally clicked on a link, the FBI agent's testimony regarding the other case would show the lack of accident or mistake. When the court asked if any of the pornographic images were shared with the FBI agent, the prosecutor answered that he did not believe that they were. The prosecutor also noted that if he had charged all of the offenses in a single information, "no one would have batted an eye."

Defense counsel argued that this was just "propensity evidence." The prejudice to the defendant would be great and the Commonwealth's need for the evidence was speculative or low. She was deeply concerned that if the cases were consolidated, the jury would "paint with a broad brush." She argued that these were different offenses with different victims. For evidence to be admissible to show motive or intent, the crimes needed to be so similar as to be part of the same *m.o.* (*modus operandi*) or the same pattern of conduct, which these cases were not. Defense counsel also argued that the Commonwealth did not timely file its motion to consolidate, as it did not file a notice of joinder at the time of

arraignment or file its motion within the time limits for filing an omnibus pretrial motion.

The prosecutor did not offer any reason for the delay in filing the motion and defense counsel did not assert any prejudice specific to the timing of the motion.

“Offenses charged in separate indictments or informations may be tried together if the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion....”

Pa.R.Crim.P. 582 (A)(1)(a).

“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Pa. R. E. 404(b)(1). Such evidence, however, “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.” Pa.R.E. 404(b)(2). “‘Unfair prejudice’ means a tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” Pa.R.E. 403, cmt.

While the court understands the Commonwealth’s argument that the child pornography case arose out of the investigation of the unlawful contact with a minor case, it appears that the relevant evidence would be the fact that law enforcement searched the defendant’s phone and discovered the pornography, rather than the underlying offenses that they were investigating. See *Commonwealth v. Crispell*, 193 A.3d 919, 937 (Pa. 2018)(res gestae exception “might provide an arguable basis for making the jury aware of Crispell’s

arrest in Arizona, but it does not address or substantiate the legality of also disclosing to the jury the reason for that arrest.”). Furthermore, the court fails to see how the evidence regarding the defendant’s alleged possession of child pornography would be relevant or admissible in the unlawful contact with a minor case, particularly when the pornography was not shared with the FBI agent posing as a minor. Even if the evidence of each case was marginally relevant in the other, the relevance is outweighed by the potential for danger for unfair prejudice. Typically, images of child pornography tend to be rather graphic and disturbing. While the defendant might have viewed the images, he did not commit the acts depicted therein. If the cases are consolidated, the jury for the unlawful contact with a minor case (1538-2018) will see the images of child pornography when the images themselves are not relevant to the unlawful contact case, even if the defendant claims accident, mistake or a lack of intent.<sup>1</sup> As sexual images involving children tend to evoke a visceral reaction, there is a real danger that if the jury in the unlawful contact case (1528-2018) views the pornographic images (from 679-2019) that the jury will be unable to impartially and objectively weigh the evidence.

**ORDER**

**AND NOW**, this \_\_\_ day of July 2020, the court denies the Commonwealth’s motion to consolidate these cases for trial.

By The Court,

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Marc F. Lovecchio, Judge

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<sup>1</sup> If the defendant presents one of these defenses, the Commonwealth can seek a ruling from the court on the admissibility of rebuttal testimony about the defendant’s possession of images of children on the phone (as opposed to introducing the 35 images of child pornography).

cc: Joseph Ruby, Esquire (ADA)  
Helen Stolinas, Esquire  
Work file