

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 1412007022
v.	:	
	:	
JOHN A. GALLEGOS, JR.,	:	
	:	
Defendant.	:	

Argument Heard: May 22, 2015
Decided: May 22, 2015
Written Decision: May 26, 2015

ORDER

Upon Defendant's Motion to Sever.
Denied.

Gregory R. Babowal, Esquire, Department of Justice, Dover, Delaware; attorney for the State.

Jayce R. Lesniewski, Esquire of A. Delaware Lawyer, Inc., Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

The Court, having considered the submissions and arguments of counsel and determined that the motion to sever be denied, issues the following:

1. John A. Gallegos, Jr. (hereinafter “Defendant”) requests that this Court sever Count 1 (Assault Second Degree) and Count 2 (Endangering the Welfare of a Child) from Count 3 (Endangering the Welfare of a Child) and Count 4 (Child Abuse Second Degree) of the Indictment.

2. The Defendant was charged with the above offenses after John Gallegos III, who was five months old, sustained injuries which were discovered at the hospital. The victim had a “transverse fracture” to the right humerus and was healing from a fracture of the eighth rib. According to the State’s response, the Defendant was interviewed and admitted to picking up the child “by the arms.”

3. The Defendant argues that he will be prejudiced by the charges being joined and that it is a violation of Rule 404(b). The State argues that all of the charges stem from the medical treatment received by the victim on the same day - resulting from one investigation and one arrest. The Defense relies upon *State v. McKay*¹ in that factors important to the case are whether the Defendant is subject to embarrassment or confusion; if there’s the possibility of an improper inference by the jury as to general criminal disposition of the Defendant based on the multiplicity of the charges; and the possibility that the jury will accumulate evidence in order to justify a finding of guilt. However, the facts in *McKay* were entirely different than the present case. The Delaware Supreme Court held that *McKay* was “extreme”: “In *McKay*, the

¹ *State v. McKay*, 382 A.2d 260 (Del. Super. 1978).

Superior Court ordered a severance of the offenses because the case involved eight indictments, nine defendants, and thirty-five charges against one of the defendants.”² The case at bar has but one defendant, four counts in the indictment, and one victim.

4. The Defendant’s reasons for arguing he will suffer prejudice by a joinder of the offenses are that there are no specific allegations to the suspected healing fracture of the eighth rib, that the indictment fails to indicate that the suspected fracture happened on a particular date, nor who caused the injury.

5. The Defendant next argues that the jury will be forced to make an improper inference as to the general criminal disposition of Defendant if the State is to be successful on those counts. The Defendant concludes by arguing that the charges are not based on the same transaction or occurrence, contrary to the State’s assertion.

6. Superior Court Criminal Rule 8(a) holds: 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.

7. Superior Court Rule 14 governs a motion for severance.³ Whether to grant

² *Caldwell v. State*, 780 A.2d 1037, 1056 (Del. 2001).

³ 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 of separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney general to deliver to the court for inspection in camera any statements or confessions made by the defendants which the State intends to introduce into evidence at the trial.

or to deny severance is a matter within the sound discretion of the trial court.⁴ Moreover, the determination by the trial judge in denying a motion for severance will not be reversed except for a clear abuse of discretion, that is, on appeal it must appear that the trial judge had the likelihood of the reasonable probability of prejudice before him when he denied the motion.⁵ The defendant bears the burden of demonstrating prejudice from a denial of a motion to sever.⁶ Furthermore, mere hypothetical prejudice from a denial of a motion to sever is not sufficient.⁷ Severance has been denied where the offenses charged are of the same general nature and give evidence of modus operandi, even though obvious prejudice existed as to the defendant.⁸ On the other hand, severance should not be denied when the sheer mass of charges in a case renders it extremely unlikely that a jury will be able to resist the cumulative effect of evidence linking the defendant to separate charges.⁹

8. The Defense has also cited to Delaware Rules of Evidence 404(b): “Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

⁴ *Bates v. State*, Del. Supr., 386 A.2d 1139 (1978). *Lampkin v. State*, Del. Supr., 465 A.2d 785 (1983).

⁵ *Burton v. State*, Del. Supr., 149 A.2d 337 (1959).

⁶ *Bates*, supra.

⁷ *Id.*

⁸ *State v. McKay*, Del.Super., 382 A.2d 260 (1969).

⁹ *Id.*

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.”¹⁰ However, the Defense has failed to articulate why specifically that rule of evidence will be violated.

9. With regard to any prejudice suffered by the Defendant pursuant to Rule 8(a), the Delaware Supreme Court in *Caldwell v. State* has held that charges need not be “inextricably intertwined” in order to be joined, so long as they are part of the same “‘common scheme’ or course of conduct.”¹¹

10. The Defendant has the burden of proving that denial of severance will result in prejudice, however, the Defense has not supported its motion with enough facts to suggest that (a) any prejudice will result and (b) that the charges are so distinct as to necessitate a severance.

¹⁰ Delaware Rules of Evidence 404(b).

¹¹ “The Trial Court properly instructed the jurors that they “should consider each of the counts separately and reach a separate verdict on each count.” *See Steckel v. State*, Del. Supr., 711 A.2d 5,9 (1988). (“Further, any prejudice to Steckel [from the joinder of charges] was diminished by the jury instruction.”); *see also Fortt*, 767 A.2d at 804 (suggesting that the jury instruction minimized prejudice from joinder of charges). The jury in *Steckel* received essentially the same instruction as the jury in the present case. *See Steckel citing Caldwell*, 780 A.2d 1037, 1056 (Del. 2001).

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CONCLUSION

Therefore, Defendant's motion to sever is **denied**.
IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Gregory R. Babowal, Esquire
Jayce R. Lesniewski, Esquire