

BAR NEWS ITEM

TO: MEMBERS OF THE BAR ASSOCIATION

FROM: John R. Walker, President Judge

DATE: April 22, 1996

SUBJECT: Appointment of Divorce Master

Tim Wilmot has been appointed as the new Divorce Master. I hope to have him starting his duties by the first of June.

COMMONWEALTH OF PENNSYLVANIA vs KENNETH E. THOMPSON, DEFENDANT (Part 1) Franklin County Branch, Criminal Action - Nos. 136, 156 & 157-1993

Defendant charged with separate sexual offenses regarding three separate victims filed a motion to sever. The court denied the motion, holding that the crimes were sufficiently similar to demonstrate a distinctive modus operandi; the evidence regarding the offenses could be easily separated by the jury; and the defendant would not be unduly prejudiced by a consolidated trial, and therefore denied the defendant's motion.

1. When a defendant moves for severance of two or more informations which are not based on the same act or transaction, the court must determine whether evidence of the distinct offenses would be admissible in a separate trial for the other; whether such evidence can easily be separated by the jury so as to avoid confusion; and whether the defendant will be unduly prejudiced by the consolidation.
2. Evidence of distinct crimes are generally inadmissible solely to show the defendant's bad character or propensity to commit crimes.
3. Evidence of distinct crimes is admissible where relevant to show motive, intent, absence of accident or mistake, a common plan, scheme or design, or to establish the identity of the defendant at trial.
4. A distinctive *modus operandi* exists where the method used in committing the crimes is so unusual as to be like a signature.
5. For evidence to be unduly prejudicial, prejudice must result from the jury's exposure to evidence which shows only the defendant's propensity to commit crimes, or evidence which the jury is incapable of separating.

*District Attorney, Counsel for Commonwealth of Pennsylvania
Michael J. Toms, Esquire, Counsel for Kenneth E. Thompson*

OPINION

KAYE, J., July 16, 1993

Kenneth E. Thompson ("defendant") has been charged, in three separate criminal actions, with rape, attempted rape, involuntary deviate sexual intercourse, indecent assault, kidnapping and aggravated indecent assault. Defendant has filed an omnibus pretrial motion¹ which includes, *inter alia*, a motion

¹ The omnibus pre-trial motion also included a motion to reduce bail and a petition for writ of habeas corpus which challenged the Commonwealth's *prima facie* case for kidnapping. The undersigned issued an order at the conclusion of the hearing on July 13, 1993, which reduced defendant's aggregate bail from \$205,000 to \$105,000 and denied the habeas corpus petition.

for severance.² Defendant argues that the alleged acts upon which the charges are based are unrelated to each other and that a consolidated trial would be prejudicial. A hearing on the motion was conducted on July 13, 1993.³ For the reasons which follow, we conclude that defendant's motion for severance must be denied.

The Commonwealth alleges that three separate sexual assaults were committed by defendant against three different victims during the evenings of October 23, October 29 and November 1, 1992. Testimony by Sergeant Schultz of the Waynesboro police Department was presented by the Commonwealth regarding the October 23rd and 29th incidents. Sergeant Schultz, who investigated both incidents, testified that the victim in the first assault was Tina Stull (No. 156 of 1993). Ms. Stull, who was twenty-four (24) years old and then resided in a fourth floor apartment at the Leland Hotel in Waynesboro, reported that the defendant knocked on her door during the evening of October 23, 1992. When she answered the door, the defendant stated that he was her neighbor and that he knew she was having trouble with her boyfriend and that he would help protect her. Defendant further stated that he was attempting to start a telemarketing business and that he would pay her \$5.50 per hour to work as an executive secretary. Ms. Stull subsequently allowed the defendant to enter her apartment. After an unspecified period of conversation, Ms. Stull said that she would like to have some cigarettes, which the defendant left the apartment to purchase. Upon his return, the defendant and victim engaged in further general conversation following which defendant stated that he had something in his room for Ms. Stull. Instead of leaving the apartment, however, the defendant locked the door and forced the victim to remove her clothing. The defendant subsequently engaged twice in vaginal intercourse with Ms. Stull and once in

² The record does not reflect that the District Attorney has served a written notice of consolidation on the defendant, as required by Pa.R.Crim.P. 1127 (B)(1). Moreover, no motion to consolidate has been filed by way of omnibus pre-trial motion, as allowed by Pa.R.Crim.P. 1127 (B) (2). Despite this apparent procedural error, we will address the merits of the motion for severance since in filing such motion the defendant has effectively conceded notice of consolidation and has waived any procedural objection thereto.

³ At the conclusion of the hearing, counsel for the defense and prosecution were permitted to file memoranda of law, with a time deadline of eleven (11:00) o'clock a.m. on July 15, 1993. Legal memoranda have not been timely received and, thus, were not considered in our resolution of this matter.

forced oral sex before leaving her apartment. During the assault, the defendant pulled a folded knife from his back pants pocket. The victim reportedly felt threatened by the knife, but did not allege that the defendant threatened her verbally.

Sergeant Schultz testified that the victim in the second incident (No. 157 of 1993), Mary Stewart, was approached by the defendant at approximately 11:30 o'clock p.m. on October 29, 1992 when she entered the Leland Hotel to make a phone call. Defendant informed Ms. Stewart that he was starting a telemarketing business and asked if she was trained to use a computer. The defendant then accompanied her to an office which he had evidently rented in the hotel where Ms. Stewart demonstrated her ability to use the computer installed therein. Upon expressing her interest in employment, defendant informed Ms. Stewart that she would have to accompany him and another individual, identified as Scott Dibello, to his hotel room to complete an application form. The victim accompanied the men to the room. Apparently both men subsequently left the room for a short time, with defendant later returning alone. Upon his return, defendant proceeded to sexually assault the victim. When he was unable to gain penetration, the defendant masturbated to the point of ejaculation. The victim was subsequently released. She was unaware of the use of any weapon in connection with the assault and reported that Scott Dibello remained outside the room during the attack.

Facts regarding the third incident (No. 135 of 1993) were related by both the victim, Nicole Fox, and the investigating officer, Trooper George Cronin of the Pennsylvania State Police. In this instance the victim, who was sixteen (16) years old at the time, met the defendant the evening before she was allegedly assaulted. The defendant was apparently acquainted with Ms. Fox's roommate, Michelle Moudy. Both women accompanied the defendant and his friend, Scott Dibello, to a room at the Quality Inn in Greencastle, Pennsylvania on October 31, 1992. Nothing out of the ordinary was reported to have occurred during that evening and the defendant and Mr. Dibello returned the victim and Ms. Moudy to their home later that evening. The next afternoon Ms. Fox accompanied the defendant on errands. The defendant returned early that evening and relayed a message

through Ms. Moudy that he wanted Ms. Fox to accompany him back to the hotel with the promise that he would offer her a job in telemarketing. Ms. Fox proceeded back to the hotel room with the defendant and Mr. Dibello. Both men subsequently threatened to kill Ms. Fox if she refused to have sex with them. The defendant allegedly placed a knife at the victim's throat and attempted to remove her clothes. As in the prior incident, defendant was unable to penetrate the victim and, instead, masturbated while Mr. Dibello held the victim down on the bed. The victim was also aware that Mr. Dibello had a handgun in his pocket. The victim was released, otherwise unharmed, following the assault.

In determining whether separate informations should be consolidated for trial, the Court is guided by Pa.R.Crim.P. 1127, which provides as follows:

A. Standards.

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) 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; or

(b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. 1128 is also relevant to the analysis. It provides that, "The court may order separate trials of offenses or defendants or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." The Supreme Court has recently summarized the three-pronged analysis to be undertaken where the defendant moves for severance of two or more informations which, as here, are not based on the same act or transaction:

[T]he court must determine whether evidence of the distinct offenses would be admissible in a separate trial for the other; whether such evidence can easily be separated by the jury so as to avoid confusion;

and whether the defendant will be unduly prejudiced by the consolidation.

Commonwealth v. Newman, 528 Pa. 393, 398, 598 A.2d 275, 278 (1991).

In resolving whether evidence of the three incidents at issue would be admissible in separate trials, we are mindful of the general rule that evidence of distinct crimes are inadmissible solely to show the defendant's bad character or propensity to commit crimes. *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491 (1988). Exceptions to this general rule permit the admission of evidence regarding other crimes where it is relevant to show (1) motive; (2) intent; (3) absence of accident or mistake; (4) a common plan, scheme or design involving commission of two or more crimes which are so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the defendant at trial. *Newman, supra*.

Focusing on the fourth exception, it has been held that informations may be consolidated where the individual offenses demonstrate the defendant's unusual or distinctive *modus operandi*. *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981). A distinctive *modus operandi* has further been defined to exist where the method used in committing the crimes is so unusual "as to be like a signature." *Id.* at 176, 425 A.2d at 720 (quoting McCormick on Evidence §190 at 449 (2d Ed. 1972)). The Commonwealth's burden is to demonstrate more than the repeated commission of crimes of the same type or class. Rather, there must be shared details in the commission of each offense. *Newman supra*.

In the instant case, the clear "signature" of the defendant in each of the alleged offenses was his lure of promised employment in a telemarketing business which was made to each of the victims in an apparent attempt to gain either their trust or interest in an assertedly legitimate enterprise of the defendant. Other similarities include 1) the sexual nature of the assaults, 2) the relatively young age of each of the victims, 3) the fact that all of the assaults occurred within a relatively short time period, 4) the fact that two of the offenses allegedly occurred at the same hotel in Waynesboro, while the third also occurred in a hotel located in

Greencastle, 5) the fact that the defendant had limited or no prior acquaintance with each of the victims before the evening of the assault, and 6) the fact that the victims were all released without further harm following the assaults. Additionally, a knife was displayed or used in a threatening manner in two of the incidents, the defendant masturbated in two of the incidents, and Scott Dibello accompanied the defendant on two of the evenings involved. Based on the foregoing, we conclude that sufficient similarities exist to demonstrate a distinctive *modus operandi* or common design by the defendant. Since evidence of these distinct offenses would, therefore, be admissible if each offense was tried separately, the first element of the analysis for consolidation has been satisfied.

The second element is whether the evidence regarding the individual offenses may be easily separated by the jury so as to avoid confusion in a consolidated trial. We believe that our earlier factual summarization of the circumstances surrounding the assaults adequately demonstrates that, although a common design was used in the commission of each crime, the individual facts are sufficiently unique as to pose little danger of confusion by the jury. We note that, at a minimum, different sites, dates and victims were involved in each episode.

Finally, we must determine whether the defendant would be unduly prejudiced by a consolidated trial. The type of prejudice with which we are here concerned "is not simply prejudice in the sense that [defendant] will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of all Commonwealth evidence." *Commonwealth v. Lark*, 518 Pa. at 307, 543 A.2d at 499 (emphasis in original). Instead, prejudice must result from the jury's exposure to evidence which shows only the defendant's propensity to commit crimes, or evidence which the jury is incapable of separating. Prejudice may also result if the jury cumulates evidence of the distinct offenses at issue so as to find the defendant guilty when, if each offense was considered separately, a guilty verdict would not be returned. *Commonwealth v. Rose*, 265 Pa.Super. 159, 401 A.2d 1148 (1979). We have already concluded that evidence of the distinct offenses would not serve only to show the defendant's propensity to commit crimes, but rather, would tend to prove a common

modus operandi. We have also concluded that the jury would not have difficulty distinguishing among the three alleged offenses. For similar reasons we perceive it to be unlikely that the jury would improperly cumulate evidence regarding the separate offenses and that cautionary instructions will serve to further limit any such possibility.

Thus, we find that no danger of undue prejudice exists and will, accordingly, order that the defendant's pre-trial motion for severance be denied.

ORDER OF COURT

NOW, July 16, 1993, defendant's Omnibus Pre-trial Motion requesting severance of the above cases is DENIED.