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Commonwealth v. Keefer

COMMONWEALTH OF PENNSYLVANIA
v. WOODROW WILSON KEEFER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 191 of 2010

Witnesses; Examination; Taking Testimony in General; Refreshing Memory; Testimony Refreshed by Hypnosis. Criminal Law; Trial; Joint or Separate Trial of Separate Charges. Evidence; Other Misconduct by Accused; Nature and Circumstances of Other Misconduct Affecting Admissibility; Similarity to Crime Charged.

1. The allegation that a witness's memory has been corrupted by hypnosis goes to the competency of that witness to testify. A party alleging a witness is incompetent must prove their claim by clear and convincing evidence.

2. Under a hypnotic state, the subject is hypersuggestible, with a lessened perception of reality, as well as hypercompliant, more easily influenced and greatly disposed to please the hypnotist. Due to a process called confabulation, the subject may intercept and internalize suggestions from the therapist, creating answers to questions where requested details cannot be recalled.

3. A witness is incompetent to testify regarding hypnotically induced memories.

4. Where a witness has given a statement, or testified prior to a hypnotic interview, the fact that the witness later undergoes hypnosis does not render incompetent the testimony that is consistent with the witness's prehypnotic recollection.

5. Where a witness has undergone hypnosis, the party must advise the court that hypnosis has been utilized, they must show the testimony to be presented was established and existed prior thereto, and the hypnotist must be shown to be both trained in the process and neutral to the dispute. Additionally, at the time of trial, the court must instruct the jury that the witness was hypnotized, and that the testimony must be received with caution.

6. To admit the testimony of a person who has undergone hypnosis into evidence, the Court must be able to determine, definitively, through independent means, the scope of a witness's pre-hypnosis recollection by clear and convincing evidence. The standard of verification must be high and in keeping with the recognized dangers presented by a hypnotically refreshed recollection.

7. The testimony at hearing established that prior to hypnosis, T.A.H. recalled going to the bathroom as a child, expecting a bowel movement, and seeing instead only "white stuff" in the toilet. The Court cannot but hold the evidence of his extensive statements post-hypnosis shall be suppressed, and further, that T.A.H. shall be precluded from providing any testimony regarding his memories of abuse at trial, absent proof of his pre-hypnosis recollection.

8. 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.

9. Generally, evidence of other crimes, wrongs or bad acts is inadmissible in a criminal prosecution for another crime solely for the purpose of demonstrating criminal propensity or bad character. Such evidence may indeed be admissible under several "special circumstances" where the evidence is relevant for another, legitimate purpose.

10. Evidence of prior bad acts is admissible for the purpose of showing a common plan, scheme, or design embracing commission of multiple crimes where proof of one crime tends to prove the others. The standard is satisfied where the details of two distinct crimes have shared similarities.

11. Similarity may be established by considering the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed.

12. To be admitted under Rule 404(b)(2), the probative value of the evidence of other crimes must be shown to outweigh its potential for prejudice, and be capable of separation by the jury so there is no danger of confusion.

13. The acts of abuse against the victims occurring simultaneously, over a similar temporal period, in the same locations and with a similar and habitual behavior pattern, and the children being similarly situated in their relationships to the Defendant, proof of one act tends to prove the others, so that a sufficient logical connection for consolidation has been established.

14. Prejudice under the Rules of Evidence is not simply prejudice in the sense that the Defendant will be linked to the crimes for which he is being prosecuted. Rather, the prejudice of which the Rules speak is that which occurs where the evidence would convict a defendant solely by demonstrating criminal propensity, or is such that the jury would be unable to separate or be unable to avoid cumulating the evidence.

15. Here, the offenses are separable, and the danger of confusion minimal, the Court concludes undue prejudice will not result from consolidation.

Appearances:

Travis L. Kendall, Esq., *Fulton County District Attorney*

Jeffrey S. Evans, Esq., *Attorney for Defendant*

OPINION

Van Horn, J., May 31, 2011

Statement of the Case

The Defendant, Woodrow Wilson Keefer, Jr. ("Keefer"), is charged with six (6) counts of Rape[1], nine (9) counts of Involuntary Deviate Sexual Intercourse[2], three counts of Unlawful Contact with a Minor[3], three (3) counts of Statutory Sexual Assault[4], three (3) counts of Incest[5], twenty-four (24) counts of Indecent Assault[6], two (2) counts of Indecent Exposure[7], and three (3) counts of Corruption of Minors[8]. All of the charged crimes involve acts alleged to have been perpetrated by the Defendant against his grandsons, T.A.H., T.J.K., J.B.H., and N.R.C, during their minority.

The Commonwealth alleges that on various dates between January of 1999 and December of 2004, the Defendant engaged in an ongoing course of sexually abusive conduct often involving the four (4) young men as a group. J.B.H., currently sixteen (16) years of age, T.A.H., now eighteen (18), N.R.C., currently age nineteen (19) and T.J.K., now twenty-two (22) years of age, are first-cousins, the children of the Defendant's biological daughters. According to the Affidavit of Probable Cause, the abuse came to light as a result of ongoing counseling services received by J.B.H., who during the sessions with his counselor began to recall being molested by the Defendant over a period of several years. After J.B.H. relayed his memories to his mother, she contacted her sisters due to concerns that her nephews may also have been victimized.

On August 9, 2010, T.A.H., T.J.K., and J.B.H. appeared at the State Police Barracks in McConnellsburg, Fulton County, and reported they had been victims of long-term sexual abuse at the hands of the Defendant. All three (3) were given Victim Statement Forms, which they completed and returned on August 10. The three (3) cousins told the interviewing officer they recalled incidents of sexual abuse in the woods behind their grandfather's home, when he would "check them for ticks," including fondling and anal intercourse. The three (3) also stated they recalled sexual abuse occurring in a closet in their grandfather's home, as well as in a shed behind the home. According to their recollection, the Defendant would often victimize them jointly, performing sexual acts on one while forcing the others to watch. The three (3) also told the officer they recalled a fourth cousin, N.R.C., also being present for some of the incidents, and that he, too, had been abused by their grandfather.

N.R.C. was subsequently interviewed on November 5, 2010. Upon being informed of the allegations against his grandfather by his cousins, N.R.C. stated that while he would not say their accusations were untruthful neither would he corroborate their statements. N.R.C. denied any recollection of abuse.

Before the Court for disposition is the Defendant's Omnibus Pre-Trial Motion, filed January 21, 2011, comprised of two (2) asserted grounds for relief. First, Defendant requests the Court suppress all statements, oral or written, given by T.A.H. to the Pennsylvania State Police, and further asks the Court to preclude T.A.H. from testifying at trial, by reason of the hypnotic refreshing of his recollection. Second, Keefer makes a motion for separate trials of the fifty-three (53) counts brought against him, requesting the Court grant him three (3) separate trials, so that he may answer the charges of each victim separately. The Court having received the Commonwealth's response, read the briefs submitted by the parties, and having held hearing thereupon, now disposes of the Defendant's Omnibus Motion with this Opinion and Order.

Discussion

I. Motion to Suppress

The Defendant asks the Court to suppress all statements given to the State Police by his grandson, T.A.H., regarding the alleged abuses perpetrated upon him by his grandfather. Indeed, Keefer requests the testimony of his grandson be precluded in any form at trial, arguing the substance of any pre-hypnosis recollections cannot be accurately ascertained. During the interviews recounted in the Affidavit of Probable Cause, conducted after the hypnotic sessions, T.A.H. was able to recall the abuse in greatest detail. Admitting that any memories recalled as a result of hypnosis must be excluded, the Commonwealth nonetheless asserts that T.A.H. should be permitted to testify regarding those things recalled previous to the procedure.

1. Relevant Facts

> After J.B.H. recalled his own victimization through therapy, his mother spoke with her sisters and their sons to determine whether her son was the sole victim. According to testimony at hearing, initially, T.A.H. did not concretely recall any incidents of abuse. In June or July of 2010, however, a sexual encounter with his girlfriend, J.M., triggered a disturbing memory. After the two engaged in anal intercourse, T.A.H. followed J.M. into the bathroom, and observed semen in the toilet. J.M. testified at hearing on the Omnibus Pre-Trial Motions that T.A.H. asked her what the white substance was, and she identified it as semen. T.A.H. was reportedly extremely disturbed by the sight, and after prompting relayed it mirrored memories from his childhood, and that he had seen what he now recognized as semen in a toilet during his minority after expecting a bowel movement. J.M. encouraged T.A.H. to tell his mother, M.H., who he telephoned shortly thereafter. M.H. promptly returned to her home, where she discussed the incident with J.M. and her son.
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> As a result of the recollection and their discussion, on July 28, 2010, T.A.H. along with M.H., one (1) of her sisters, a cousin and J.M., sought the assistance of licensed therapist Cynthia Henry, who has extensive experience in therapeutic hypnosis. During the first meeting, Henry told the family about hypnotic therapy, and arranged for a second appointment to perform the procedure. On August 4, 2010, T.A.H. returned to Henry's office with M.H., and completed an Intake Sheet, which briefly recounts the memory triggered after anal intercourse with J.M. (See Commonwealth Ex. 1.) Following the procedure, during which his mother was present in the room with the hypnotist, T.A.H. recalled further instances in great detail. A second hypnotic session was held August 5, 2010.

2. Legal Principles

Hypnosis can be defined as an altered state of consciousness between sleep and waking of "heightened concentration" during which "response to stimuli is more easily achieved than in a waking state." Commonwealth v. Nazarovitch, 436 A.2d 170, 173 (Pa. 1981); Commonwealth v. Henkel, 938 A.2d 433, 438-39 (Pa. Super. Ct. 2007). Under hypnosis, a subject can be "regressed to past times and places and recount the emotions and events experienced" even where waking-memories of such events have failed. Nazarovitch, 436 A.2d at 173. While clinical, therapeutic hypnosis has been recognized as a valuable tool for mental health professionals to aid a patient in alleviating distress and exploring their emotions and symptoms, forensic hypnosis has been greeted by courts with far more skepticism. See id.

> Indeed, under a hypnotic state, the subject is hypersuggestible, with a lessened perception of reality, as well as hypercompliant, more easily influenced and greatly disposed to please the hypnotist. See id. at 174. In a process called confabulation, a

subject may intercept and internalize suggestions from the therapist, and knowing the purpose of the session, may seek to please them by creating answers to questions if they cannot recall requested details. See id. Upon waking, the subject is unable to distinguish created memories from actual ones. See id. While historical accuracy is not required for therapeutic purposes, forensic hypnosis has been questioned in the state and Federal courts due to this risk of confusing fact with fantasy. See id. at 174-75.

The allegation that a witness' memory has been corrupted by hypnosis goes to the competency of that witness to testify. See Commonwealth v. Boich, 982 A.2d 102, 110 (Pa. Super. Ct. 2009). In Pennsylvania, the "operative assumption" is that a witness is competent. Commonwealth v. Henkel, 918 A.2d 433, 440 (Pa. Super. Ct. 2007). A party alleging a witness is incompetent must prove their claim by clear and convincing evidence. See id. Here, the fact T.A.H. was hypnotized is undisputed, nor is the fact that his recollection of abuse at the hands of the Defendant was dramatically increased as a result thereof. As to these hypnotically induced memories, the Court finds by clear and convincing evidence that T.A.H. is incompetent to testify. See Commonwealth v. McCabe, 449 A.2d 670, 677 (Pa. Super. Ct. 1982).

However, this conclusion does not end the inquiry. Indeed, where a witness has "given a statement, or testified prior to a hypnotic interview, the fact that the witness later undergoes hypnosis does not render incompetent the testimony that is consistent with the witness' prehypnotic recollection." Commonwealth v. DiNicola, 502 A.2d 606, 610 (Pa. Super. Ct. 1985). Thus, if the substance of T.A.H.'s pre-hypnosis memories can be clearly and convincingly established, he will not be rendered incompetent to testify to those memories due to the procedure. See id. at 612.

In Commonwealth v. Smoyer, our Supreme Court set forth the standards which must be observed where a party seeks to introduce the testimony of a witness who has been hypnotized. See Commonwealth v. Smoyer, 476 A.2d 1304, 1308 (Pa. 1984). See also Commonwealth v. Robinson, 864 A.2d 460, 469 (Pa. 2005) (reiterating Smoyer guidelines are still applicable). Under Smoyer, the party must advise the court hypnosis has been utilized, they must show the testimony to be presented was established and existed prior thereto, and the hypnotist must be shown to be both trained in the process and neutral to the dispute. See Smoyer, 476 A.2d at 1308. The fourth requirement, applicable at the time of trial, mandates the court instruct the jury that the witness was hypnotized, and that the testimony must be received with caution. See id.

The methods for demonstrating, with reasonable reliability, the substance of pre-hypnosis recollections include: tape or video tape recordings, signed statements, and written notes of a police officer, the accuracy of which are not disputed. See DiNicola, 502 A.2d at 612; Commonwealth v. Mehmeti, 500 A.2d 832 (Pa. Super. Ct. 1985). Whatever method, the Court must be able to determine, definitively, through independent means, the scope of a witness' pre-hypnosis recollection by clear and convincing evidence. See DiNicola, 502 A.2d at 612. Further, our appellate courts have made clear that the "standard of verification must be high and in keeping with the recognized dangers presented by a hypnotically refreshed recollection." Id.

3. Discussion

The Commonwealth offered at hearing the testimony of Cynthia Henry, J.M., and M.H., in an attempt to demonstrate the substance of T.A.H.'s pre-hypnotic recollection. All three testified the view of semen in the toilet following anal sex triggered a memory from T.A.H.'s minority of a similar viewing, and the memory was connected to his grandfather. J.M. testified that prior to hypnosis, T.A.H. relayed to her that he recalled going into the closet at the Defendant's home, where his grandfather forced him to take off his clothes and anally raped him, and that the rape was painful. J.M. also testified T.A.H. told her prior to hypnosis that as a child he was afraid to go to his grandfather's home, but was scared to tell his mother why. In addition to corroborating

the story regarding the semen, M.H. recounted a conversation with her son Easter Sunday of 2010, during which he became disturbed and told her he recalled the cousins being taken "to see the big teddy bear" in their grandfather's shed. T.A.H. did not tell M.H. anything further regarding his recollection.

There are no written records of T.A.H.'s recollection prior to the hypnosis. The young man did not give any statements to police previous to the procedure, nor did the hypnotist herself make a detailed record of the unaided recall of her subject. J.M. asserts she recorded the incident involving T.A.H. viewing semen in a journal, but no such writing was produced at hearing. There is, indeed, no independent means to verify what facts were recalled prior to hypnotic recollection, and which were only present thereafter. Even the memory of seeing semen in the toilet, triggered after T.A.H. engaged in anal intercourse with J.M., cannot be dispositively tied to the Defendant. T.A.H. apparently told mother, girlfriend, and therapist that a memory was triggered, but he did not elaborate, so that they could not recount the substance of the unaided recollection.

The Court concludes that all statements made by T.A.H. to police subsequent to hypnosis must be suppressed. There is simply no way to determine which portions of the statements arise from hypnotically refreshed memory, and which were present prior to hypnosis. Clear and convincing evidence was presented that a memory was triggered in T.A.H. after viewing semen in the toilet, but the Court was not able, based on the evidence presented, to say what the substance of that memory might be. The Commonwealth asserts that testimony at hearing established the scope of T.A.H.'s prehypnotic recollection. To the contrary, the testimony established only that T.A.H. recalled going to the bathroom as a child, expecting a bowel movement, and seeing instead only "white stuff" in the toilet. The Court cannot but hold the evidence of his statements shall be suppressed, and further, that T.A.H. shall be precluded from providing any testimony regarding his memories of abuse at trial, absent proof of his pre-hypnosis recollection.

II. Motion for Separate Trials

Arguing the evidence of abuse against one (1) of his grandsons would not be admissible in a separate trial involving abuse of another, and that to allow joint trials would be highly prejudicial, the Defendant asks the Court to grant him separate trials as to the alleged crimes against T.A.H., J.B.H., and T.J.K. Defendant argues the jury would be incapable of separately weighing the evidence regarding each victim, and that the danger of confusion is too great to allow consolidated trials. The Commonwealth responds that it was statutorily required to charge the offenses together, and further, that the evidence would indeed be admissible in separate trials to establish a common scheme, plan, or design. Further, the Commonwealth asserts that the evidence would not be **unfairly** prejudicial.

1. Relevant Facts

In ruling upon the instant motion, the Court considers the summary of interviews with T.J.K. and J.B.H. set forth in the Affidavit of Probable Cause, as well as the Victim Statement Forms completed by each. Having determined that the testimony of T.A.H. regarding his hypnotically refreshed memories shall be suppressed, the Court did not consider the statements attributed to him in the Affidavit, nor his Victim Statement Form.

The Affidavit recounts J.B.H. recalled his grandfather being naked from the waist down in the shed behind his home, and also recalled seeing him hold "the teddy bear" in the shed, and being in possession of a bottle of lotion. (See Affidavit, 11 of 13, 12 of 13.) He recalled T.A.H., T.J.K., and N.R.C. all being present with him in the shed during the time the Defendant was half-clothed. (See id. at 11 of 13.) J.B.H. recalled his grandfather anally raping the four cousins in the shed. (See J.B.H. Victim/Witness Statement.) T.J.K also recalled being taken into the shed behind Defendant's home with his cousins by his grandfather, and recalled the teddy bear. (See Affidavit at 12 of 13.)

J.B.H. recalled being taken into the woods behind the Defendant's home with N.R.C. more than five (5) times when he was between the ages of nine (9) and ten (10), and N.R.C. was twelve (12) or thirteen (13). (See id. at 11 of 13.) The Defendant would tell the cousins he was checking them for ticks, take off their clothes, disrobe himself from the waist down, and then fondle them. (See id.) He recalled the Defendant saying "someone made a mess on themselves" after one such an instance of fondling. (See id.) J.B.H. recalled at least one (1) instance during such a "check" where the Defendant made the two bend over and anally raped them. (See id. at 12 of 13; J.B.H. Victim/Witness Statement Form.) T.J.K. also recalled being taken into the woods, though with T.A.H., J.B.H. and N.R.C., for what the Defendant called "Guys Day Out," and recalled being told not to disclose what occurred there. (See id. at 12 of 13; T.J.K. Victim/Witness Statement Form.) T.J.K. and J.B.H. recalled the Defendant giving them money after they were taken to the woods, and that he called the bills "dirty dollars." (See Affidavit, at 11 of 13, 12 of 13; T.J.K. Victim/Witness Statement Form.)

J.B.H. also recalled seeing the Defendant in a closet in his home, and that the memory was negative and not associated with simply obtaining an item stored therein. (See Affidavit, 12 of 13.) J.B.H. did not specifically recall being assaulted in the closet, but told interviewers it carried an extremely negative connotation in his mind, tinged with fear. (See J.B.H. Victim/Witness Statement Form.) T.J.K. recalled using the bathroom in the Defendant's home and hearing thumping and pounding coming from the aforementioned closet, and thinking the Defendant "had someone in there." (See id.)

As did T.A.H., T.J.K. recalled several instances of going to the bathroom as a child, expecting a bowel movement, and seeing only "white stuff" in the toilet bowl. (See Affidavit at 12 of 13; T.J.K. Victim/Witness Statement Form.) In a telephone call following interviews with the cousins, the investigating officer spoke with J.B.H.'s mother, who told him that when her son was five (5) he had issues with bowel movements, including blood in his stool. (See Affidavit, 12 of 13.) The pediatrician suggested child abuse and blunt force trauma to the rectum as a possible cause. (See id.)

2. Legal Principles

The Pennsylvania Rules of Criminal Procedure provide for consolidation and for severance of separately indicted offenses under very specific circumstances. See Pa. R.C.P. 582(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.) Instantly, it is alleged by the Commonwealth the charged offenses should be tried together under the first subsection of the Rule.

Generally, evidence of other crimes, wrongs or bad acts is inadmissible in a criminal prosecution for another crime solely for the purpose of demonstrating criminal propensity or bad character. See Commonwealth v. Lark, 543 A.2d 491, 497 (Pa. 1988); Pa. R.E. 404(b)(1). However, such evidence may indeed be admissible under several "special circumstances" where the evidence is relevant for another, legitimate purpose. See Commonwealth v. Levanduski, 907 A.2d 3, 17 (Pa. Super. Ct. 2006); Pa. R.E. 404(b)(2). Here, the Commonwealth argues the evidence would be admissible for the purpose of showing a "common plan, scheme, or design embracing commission of multiple crimes" where "proof of one crime tends to prove the others." Commonwealth v. Robinson, 864 A.2d 460, 482 (Pa. 2004). The standard is satisfied where the details of two distinct crimes have shared similarities. See id.

Similarity may be established by considering "the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." Commonwealth v. Rush, 646 A.2d 557, 561 (Pa. 1994). The Court must consider whether there exists a commonality of actions, roles and situs,

establishing the habits and patterns of action needed to show a common scheme or design. See Commonwealth v. O'Brien, 836 A.2d 966, 969 (Pa. Super. Ct. 2003). Patterns of conduct in commission of the crimes, and similar types of victims, are also relevant. See Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super. Ct. 1993). Additionally, to be admitted under Rule 404(b)(2), the probative value of the evidence of other crimes must be shown to outweigh its potential for prejudice, and be capable of separation by the jury so there is no danger of confusion. See Pa. R.E. 404(b)(3); Commonwealth v. Keaton, 729 A.2d 529, 537 (Pa. 1999).

3. Discussion

Here, the conduct at issue is clearly so closely related that proof of one act indeed tends to prove the others, and the shared similarities are numerous. See Robinson, 864 A.2d at 481. A sufficient logical connection for consolidation has been established. See Keaton, 729 A.2d at 537. First, in terms of the time elapsed between the crimes, many of the alleged acts of abuse occurred against the victims simultaneously, in the presence of the others. Indeed, it seems the Defendant engaged in simultaneous, on-going abuse of the victims over several years, according to his access to them. The temporal period of the abuse is also similar when one victim is compared to the others, beginning when the young men were very young children and continuing into their early teenage years.

The testimonial evidence from T.J.K. and J.B.H. discloses the manner and locations of the incidents of abuse were markedly similar, further establishing sufficient connection for consolidation. *Cf*. Keaton, 729 A.2d at 537. Each testified the woods, the shed, and the storage closet in the Defendant's home were locations where abuse regularly occurred against all four (4) alleged victims. Each victim was subject to sexual crimes in each location, often together in the woods and the shed, and individually in the closet. Thus, the geographical locations where the crimes were perpetrated against each victim are identical. The type of victim chosen is similar, each being one of the Defendant's grandsons, biologically related members of his family, who were victimized while their parents trusted him with their care.

The method and manner of the instances of abuse are also similar, the Defendant displaying habitual behavior in the commission of the crimes. Each victim testified the Defendant often victimized one child in the presence of another, forcing them to observe the sexual assaults perpetrated on one another. Fondling and anal rape were the most common forms of sexual abuse perpetrated against each victim. The Defendant would tell his grandsons he was "checking for ticks" as an excuse to disrobe and victimize them. Both T.J.K. and J.B.H. recalled being paid by the Defendant, in "dirty dollars," for their silence, and being told what occurred in the woods was a secret. Each recalls the Defendant disrobing only from the waist down, but taking all the clothes off his victims. The Defendant also used lotion on each victim.

The Commonwealth has demonstrated the other crimes evidence will show a common scheme, plan or design by the Defendant to perpetrate abuse upon his grandsons. Further, while the similarities are sufficient for consolidation, the facts will also be capable of separation by the jury. While the victimization and locations were the same, the recollection of each grandson as to the crimes against themselves and the others are distinct. The children were of differing ages at the times of the offenses, and often were victimized in different combinations. Further, N.R.C. denies any recollection of abuse, but is often present in the recollections of J.B.H., who recalls these two (2) often being victimized together. The criminal offenses are distinguishable in time, space and characters involved. Additionally, at the time of trial, if so requested, the Court will certainly instruct the jury on their duty to separate the evidence, thereby diminishing any danger of confusion. Here, the alleged offenses to be tried together "were inextricably linked by [Defendant's] own actions" and the Court will not "disentangle" them. Commonwealth v. Carter, 643 A.2d 61, 72 (Pa. 1994).

Indeed, while the Commonwealth did not so argue, consolidation will also provide the fact-finder with the complete story of the crime[9], the significance of which has been long recognized by Pennsylvania courts. See Commonwealth v. Wattley, 880 A.2d 682, 687 (Pa. Super. Ct. 2005). Indeed, *res gestae* evidence is of particular import in trials involving sexual assault, as by their nature, these crimes often lack for witnesses aside from the victims of abuse, and rarely present physical evidence. See id.

Additionally, the Defendant will not be **unduly** prejudiced by a joint trial of the charged offenses. *Cf*. Lark, 543 A.2d at 499. As our Supreme Court has stated, prejudice under the Rules of Evidence is not "simply prejudice in the sense that [the Defendant] will be linked to the crimes for which he is being prosecuted." Id. Indeed, "that sort of prejudice is the purpose of all Commonwealth evidence." Id. Rather, the prejudice of which the Rules speak is that which occurs where the evidence would convict a defendant solely by demonstrating criminal propensity, or is such that the jury would be unable to separate or be unable to avoid cumulating the evidence. See Lark, 543 A.2d at 499. Having determined the offenses are separable, and the danger of confusion minimal, the Court concludes undue prejudice will not result from consolidation. This Court is not required "to sanitize the trial to eliminate all unpleasant facts from consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses" charged. Wattley, 880 A.2d at 687 (citation omitted).

Conclusion

As set forth in the foregoing pages, the Court will grant the Defendant's request for suppression of any statements given by T.A.H. to the State Police following his submission to hypnosis. The sole memory which can demonstrably be proven to have existed prior to the procedure, that of expecting a bowel movement as a child, but going to the bathroom and seeing only "white stuff" in the toilet, shall be the extent of allowable testimony absent dispositive proof of his pre-hypnosis recollection. The Court declines to rule upon the admissibility of such testimony on other grounds for exclusion, as the parties have not yet raised such issue. In addition, the Commonwealth having demonstrated the other crimes evidence shows a common plan, scheme, or design, and the Court further noting the import of such *res gestae* evidence and the lack of undue prejudice from consolidation, the Motion for Separate Trials shall be denied.

ORDER OF COURT

May 31, 2011, upon review of the Defendant's Motion to Suppress Evidence and Motion for Separate Trials, the Commonwealth's Answer, the legal memoranda and arguments submitted by the parties, the Court having held hearing and conducted a review of the applicable law, it is hereby ordered:

1. The Motion to Suppress Evidence relating to T.A.H.'s post-hypnosis recollections of abuse shall be granted, as provided in the attached Opinion.

2. The Defendant's Motion for Separate Trials shall be denied.

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[1] 18 Pa. C.S.A. §3121. Three (3) counts are charged under subsection (a)(1), as Rape by forcible compulsion, and three (3) under subsection (a)(6), as the Complainants were under age thirteen (13) at the time.

[2] 18 Pa. C.S.A. §3123. Three (3) counts are charged under subsection (a)(1), being by forcible compulsion, three (3) under subsection (a)(6), the complainant being under age thirteen (13), and three (3) counts under subsection (a)(7), the Complainants being under the age of sixteen (16).

[3] 18 Pa. C.S.A. §6318(a)(1).

[4] 18 Pa. C.S.A. §3122.1.

[5] 18 Pa. C.S.A. §4302.

[6] 18 Pa. C.S.A. §3126. Eight (8) counts were filed under subsection (a)(7), involving indecent contact with a complainant under age thirteen (13), eight (8) counts under subsection (a)(2), by forcible compulsion, and eight (8) counts under subsection (a)(8), as the complainant was under sixteen (16), the Defendant then at least four (4) years older.

[7] 18 Pa. C.S.A. §3127(a).

[8] 18 Pa. C.S.A. §6301(a)(1).

[9] The Court notes that while the exception was not raised, another "special circumstance" where evidence of other crimes may be relevant and admissible also applies: "where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special circumstance, sometimes referred to as the '*res gestae*' exception to the general proscription against evidence of other crimes, is also known as the 'complete story' rationale, i.e., evidence of other criminal acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Levanduski, 907 A.2d at 17 (quoting Commonwealth v. Lark, 543 A.2d 491, 497 (Pa. 1988)).