(FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, **v.** CARMELITA M. GUIAO, d.0.b. 06/02/1977 Defendant.	CRIMINAL CASE NOS. 12-0001A & 12-0055D ORDER DENYING THE COMMONWEALTH'S MOTION TO CONSOLDIATE CASES FOR TRIAL AND APPROVING THE COMMONWEALTH'S NOTICE OF INTENT RE: 404(b) EVIDENCE

I. INTRODUCTION

THIS MATTER came before the Court on the Commonwealth's Motion to Consolidate Cases for Trial ("Commonwealth's Motion") on July 10, 2012. James B. McAllister, Assistant Attorney General, appeared on behalf of the Commonwealth of the Northern Mariana Islands ("the Commonwealth). Daniel T. Guidotti, Assistant Public Defender, appeared on behalf of Carmelita M. Guiao ("Defendant").

At the hearing, the Defendant opposed the Commonwealth's motion to consolidate the above-entitled criminal cases under Rules 13 and 8(a) of the Commonwealth Rules of Criminal Procedure. Defendant also objected to the sufficiency of the Commonwealth's notice of intent to introduce evidence under Rule 404(b) of the Commonwealth Rules of Evidence in both cases.

Based on the pleadings, the papers on file and arguments of counsel, the Court DENIES the Commonwealth's Motion and APPROVES the Commonwealth's notice of intent to introduce Rule 404 (b) evidence.

II BACKGROUND

On December 31, 2011, Defendant allegedly attacked her then-husband, John Saimon ("the Victim") with a frying pan. On January 9, 2012, the Commonwealth charged Defendant with Assault with a Dangerous Weapon, Assault and Battery, Criminal Mischief, and four counts of Disturbing the Peace in Criminal Case number 12-0001A. The case was initially assigned to Presiding Judge Robert C. Naraja. On January 6, 2012, Defendant was released on bail and ordered to have no direct or indirect contact with the Victim.

On March 11, 2012, Defendant allegedly ran over the Victim with her vehicle. On March 22, 2012, Defendant was charged with Attempted Murder in the Second Degree, Aggravated Assault and Battery, Assault with a Dangerous Weapon, Contempt (for violating the Bail Order in 12-0001), Reckless Driving, and related charges in Criminal Case number 12-0055D. This case was assigned to Judge Perry B. Inos.

On April 24, 2012, Presiding Judge Naraja transferred case 12-0001A to Judge Inos, citing judicial economy as the reason for the transfer. Presiding Judge Naraja did not consolidate or join the cases, nor did he order the Commonwealth to produce a consolidated information.

On May 31, 2012, at a pretrial conference for case 12-0001A, Defendant requested the Court to have cases 12-0001A and 12-0055D tried separately. The Court found severance to be appropriate at that time because the cases contained separate informations that had not been consolidated. The Court also noted as an aside that severance would avoid any unfair prejudice to Defendant. Neither party filed any motions nor made any oral arguments regarding severance or consolidation. Consequently, the Court did not grant any motion in ordering a severance; rather, it maintained the status quo of hearing two separate cases with two separate informations. On June 20, 2012, the Commonwealth filed a detailed motion to consolidate the above-entitled criminal cases.

III LEGAL STANDARD

Severance of offenses is within the court's discretion. United States v. Coleman, 22 F.3d 126, 134 (7th Cir. 1994) ("Severance decisions...are inevitably discretionary matters best

informed by the observations and experience of the overseeing judge who is also singularly situated to accurately assess the cost of separate trials.") (citation omitted); *see also Williams* v. US. 265 F.2d 214, 215 (9th Cir. 1959) (noting that the court has "wide discretion" in determining whether to consolidate cases). Offenses that are similar in character or are part of the same transaction or common scheme or plan may be consolidated. NMI R. Crim. P. 8(a), 13.

However, the court should deny a motion for consolidation of offenses if it would cause the defendant unfair prejudice. US. v. Peoples, 748 F.2d 934, 936 (4th Cir. 1984). "The defendant bears a heavy burden of showing real prejudice from [] joinder of [multiple] counts." United States v. Muniz, 1 F.3d 1018, 1023 (10th Cir. 1993) (citation omitted). Nevertheless, "[courts] should not hesitate to order severance...if the risk of real prejudice grows too large to justify whatever efficiencies a joint trial does provide." United States v. Coleman, 22 F.3d 126, 134 (7th Cir. 1994).

IV. DISCUSSION

A. UNFAIR PREJUDICE WOULD SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE IF CASES 12-0001A AND 12-0055D WERE CONSOLIDATED.

The Commonwealth moves the Court to consolidate cases 12-0001A (hereinafter, "First Case") and 12-0055D (hereinafter, "Second Case") in the interests of judicial economy and expediency. "The court may order two or more informations to be tried together if the offenses...could have been joined in a single information." NMI R. Crim. P. 13. Two or more offenses can be joined in a single information if the offenses are (1) "of the same or similar character;" (2) "based on the same act or transaction or on two or more acts or transactions connected together;" or (3) "constituting parts of a common scheme or plan." NMI R. Crim. P. 8(a). The Commonwealth focuses its argument on the first and third bases for joining the above-entitled criminal cases pursuant to Rule 8(a). (Commonwealth's Mot. at 3.)

1. Same or Similar Character

Two separate offenses have the "same or similar character" to warrant joinder when "the two counts refer to the same type of offenses occurring over a relatively short period of

time, and the evidence as to each count overlaps." United States v. Rodgers, 732 F.2d 625,629 (8th Cir. 1984) (citing cases). The Commonwealth argues that the two charged offenses are sufficiently similar because they both include a violent assault against the same victim, and the alleged crimes occurred within a two-month period of time at or near the same residence. (Commonwealth's Mot. at 7.)

The Court agrees that the offenses occurred over a relatively short period of time; however, the offenses are not of the same type, and the overlap of evidence is minimal while the prejudice of joinder would be substantial. The main charge in the First Case is Assault with a Dangerous Weapon, and the main charge in the Second Case is Attempted Murder in the Second Degree. These charges are widely different in the elements that must be proven[1] and in the severity of punishments that they carry.[2] Moreover, there are very few commonalities between the two incidences. Contra State v. Pereira, 973 A.2d 19, 26-27 (R.I. 2009) (joining multiple sexual assault counts because "each involved the strangulation or attempted strangulation of the victim . . . and they all had strong overtones of erotic motivation and brutality."); contra State v. Long, 575 A.2d 435 (N.J. 1990) (holding that joinder of murder and a separate assault crime were properly joined where the same gun was used in both offenses). The weapon used in the First Case was a frying pan and the weapon used in the Second Case was a moving motorized vehicle. Other than the identity of the victim, there appears to be no

[1] "A person commits the offense of ***assault with a dangerous weapon*** if he or she threatens to cause, attempts to cause, or purposely causes bodily injury to another with a dangerous weapon." 6 CMC § 1204(a) (emphasis added). "A person commits the offense of ***attempt*** if, with intent to commit an offense, he does an overt act which constitutes a substantial step in a course of conduct planned to culminate in the commission of that offense." 6 CMC § 301(a) (emphasis added). ***Second degree murder*** is "the unlawful killing of a human being by another human being with malice aforethought" and which is *not* "(1) Willful, premeditated, and deliberated; (2) Perpetrated by poison, lying in wait, torture, or bombing; or (3) One that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child." *See* 6 CMC §§ 1101, 1101(a), and 1101(b) (emphasis added).

"A person convicted of ***assault with a dangerous weapon*** may be punished by imprisonment for not more than 10 years." 6 CMC § 1204(b) (emphasis added). "Every person guilty of ***murder in the second degree*** shall be punished by imprisonment for a minimum term of five years and may be punished for a maximum term of life imprisonment, except as provided for in subsection (c)(3) of this section. 6 CMC § 1101(c)(2) (emphasis added). The punishment for murder in the second degree is enhanced to a minimum of ten years imprisonment if "[t]he offense was committed against a person known by the defendant to be a juror or witness in a criminal proceeding under circumstances indicating that the offense was committed because the person was a juror or a witness." 6 CMC § 1101(c)(3)(D).

unique commonalities between the two cases. In addition, the two cases concern events at different locations. The First Case involves an assault inside the Victim's and Defendant's residence; whereas, the assault in the Second Case occurred outside on the street and sidewalk nearby the same residence.

The Commonwealth makes a bold argument that Defendant attempted to murder the Victim in order to prevent him from testifying in the First Case, which is relevant evidence in the First Case to show Defendant's "consciousness of guilt." (Commonwealth's Mot. at 5.) However, the investigating detective submitted an affidavit of probable cause, concluding that Defendant drove her car into the Victim immediately after having a heated argument involving an exchange of insults and allegations of adultery. (Second Case, Decl. of Probable Cause, Compl. at 2.) Conversely, the apparent motive for the assault in the First Case is that the Victim was not listening to Defendant. (First Case, Decl. of Probable Cause, Compl. at 2.)

Given the different weapons, settings and motivations involved in each case, there seems to be minimal overlap in evidence. See, generally, Meade v. State, 85 So. 2d 613 (Fla. 1956) (holding that the two homicide cases should not have been consolidated because the defendant was charged with killing his victims with different instrumentalities and in different ways). Furthermore, apart from the Victim, all the percipient witnesses identified thus far are different. The witnesses in the First Case include a neighbor and the Victim's and Defendant's children. (First Case, Decl. of Probable Cause, Compl. at 1-2.) Conversely, the only eyewitness in the Second Case, other than the Victim, is a different neighbor who called the police. (Second Case, Decl. of Probable Cause, Compl. at 3.) The witnesses and the Victim's testimonies will vary widely between the two cases that involve separate events distinct in time, location, motivation, and nature. In conclusion, the Commonwealth failed to show the two cases are of the "same or similar character" to warrant consolidation under Rule 8(a).

Even if the two cases were of the "same or similar character," severance is still necessary to prevent exposing Defendant to unfair prejudice. State v. Barnes, 896 N.E.2d 1033, 1043-44 (Ohio Ct. App. 2008); Peoples, 748 F.2d at 936 ("Even if Rule 8(a) permits joinder, the court should not grant a motion to join if unfair prejudice results to the

defendant."). In determining whether to sever offenses, "the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration." Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). Several forms of prejudice may arise when a court joins two separate offenses, including:

> (1) [The defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964).

The instant matter presents a serious risk that the jury may use the evidence of the charged crimes to improperly infer a criminal disposition. Both crimes involve violent acts that will likely brand Defendant as having a violent disposition, which could impermissibly influence the jury in its decision. See Muniz, 1 F.3d at 1023 ("When joinder of offenses is based upon their 'same or similar character,' the prejudice to the defendant is more likely since proof of one crime may tend to corroborate the commission of the other crime in violation of the evidentiary rules against evidence of a general criminal disposition or propensity to commit crime.") (citation omitted); Coleman, 22 F.3d at 134 ("Indeed, when offenses are joined because of their 'same or similar character,' the risk of unnecessary unfairness infiltrating the joint trial is elevated."); McNabb v. State, 967 So. 2d 1086, 1087 (Fla. Ct. App. 2007).

As Defendant argued during the hearing, evidence of the Second Case involving the sensational act of running someone over with a vehicle would be particularly prejudicial in the First Case. This evidence is likely to inflame the passions of the jury and unfairly infer Defendant's guilt in the First Case since she is charged with a much more serious crime against the same victim. See Commonwealth v. Tracey, 8 A.2d 622, 625 (Pa. Super. Ct. 1939) ("We are of the opinion that defendant in the trial of the assault and battery case was prejudiced by the charges of serious crimes tried before the same jury.") Even assuming that introducing evidence of the First Case in the Second Case would not be unfairly prejudicial unlike the

reverse, the cases should still be severed. See Commonwealth v. Terrell, 339 A.2d 112, 115 (Pa. Super. Ct. 1975).

The Commonwealth correctly points out that a defendant is not unfairly prejudiced if evidence in each case is admissible to prove the charges in both cases. See, e.g., U.S. v. Rodgers, 732 F.2d 625, 630 (8th Cir. 1984). The Commonwealth asserted that the extrinsic act evidence is admissible in each case to prove (1) Defendant's consciousness of guilt due to her alleged witness tampering; (2) a bail violation; and (3) intent, motive and absence of mistake. (Commonwealth's Mot. at 4-6.) None of these bases for admissibility of evidence are persuasive. First, Defendant is not charged with witness tampering, nor is there any evidence of witness tampering. See supra note 4. Second, Defendant's bail violation does not require evidence of the underlying offense due to the absence of a connection between the two. Contra US. v. Gabay, 923 F.2d 1536, 1539-1540 (11th Cir. 1991). As mentioned before, the evidence contradicts the Commonwealth's theory that Defendant impermissibly contacted the Victim in order to prevent him from testifying in the First Case.

Third, the Court is doubtful that evidence of the Second Case can prove intent, motive and absence of mistake regarding the earlier incident in the First Case. Also, the Commonwealth's need to use extrinsic act evidence to prove intent in either case seems rather weak and tenuous. Evidence of other crimes is "not looked upon with favor" and its use "must be narrowly circumscribed and limited." United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985) (quotations and citations omitted). At this time, it is uncertain whether evidence of either alleged crime would be admissible in the other case pursuant to Rules 403 and 404(b) of the Commonwealth Rules of Evidence. See Ellerba v. State, 398 A.2d 1250, 1259 (Md. Ct. Spec. App. 1979). In conclusion, the charges are not sufficiently similar in character for the benefit of judicial economy to outweigh the real prejudice that Defendant would suffer if the cases were consolidated.

2. Common Scheme or Plan

The Commonwealth argues that "Defendant is believed to have developed a plan to intimidate and/or eliminate the victim, a key witness, in 12-0001 by assaulting him in 12-0055

in direct violation of the Bail Order." (Commonwealth's Mot. at 8.) However, the Commonwealth provided no corroborating evidence for this theory. Furthermore, the investigating officer in the Second Case noted that the incident occurred as a result of a heated argument regarding allegations of adultery, rather than any intent of Defendant to "cover up" the First Case. (Second Case, Decl. of Probable Cause, Compl. at 2.) There is no evidence that Defendant made any mention to the Victim about the First Case before allegedly running him over with her vehicle. *Contra Gov't. of* the *V.I.v.* Sanes, 57 F.3d 338, 341-42 (3d Cir. 1995) (finding a common scheme between two separate assaults against the same victim because "during the second attack [the defendant] inculpated himself in the first offense by referring to [the victim]'s failure to keep quiet following the first attack.").

The mere fact that Defendant committed the two assaults against the same victim does not, standing alone, create a common scheme or plan to justify consolidation. See Teas *v.* State, 587 S.W.2d 28, 29 (Ark. 1979). In reviewing the declarations of probable cause for each case, it appears that Defendant's alleged assaults resulted from different motivations and were in no way connected to one another. Also, the First Case and Second Case involve different times, settings, witnesses and evidence, diminishing the usefulness of consolidating the cases. Conversely, Defendant would suffer substantial prejudice since both cases involve violent conduct towards the same victim, creating a high risk of improper character inferences and criminal propensities. Therefore, the two cases shall be tried separately.

B. THE COMMONWEALTH PROPERLY ESTABLISHED A RELEVANT AND PROPER PURPOSE FOR THE ADMISSION OF THE RULE 404(B) EVIDENCE IT INTENDS TO INTRODUCE AT TRIAL.

Rule 404(b) of the Commonwealth Rules of Evidence prohibits the admission of other crimes, wrongs, or acts "to prove the character of a person in order to show that he acted in conformity therewith." However, such evidence may be admissible for other purposes such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Unlike the Rule 404(b) federal counterpart, there is no requirement for the Commonwealth to provide reasonable notice of its intent to introduce Rule 404(b) evidence.

Nevertheless, it is good practice for counsels to resolve any potential evidentiary issues prior to trial in the interest of judicial economy and for the convenience of the parties, witnesses, and jurors. On June 18, 2012, the Commonwealth filed a notice of intent to introduce Rule 404(b) evidence[3] at the jury trial for case 12-0001D scheduled for July 30, 2012. The Commonwealth explained that the evidence is relevant to show Defendant committed the charged offenses with "intent" and in the "absence of mistake." (Commonwealth's Mot. at 6.) Furthermore, Defendant's alleged attempt to eliminate the sole witness in case 12-0001D by running him over with her vehicle is relevant to show "consciousness of guilt." *(Id*. at 4-5.) Finally, the Commonwealth reiterated its evidentiary hypotheses for the Rule 404(b) evidence in open court during the July 10, 2012 hearing. The Court ruled from the bench that the Commonwealth enunciated relevant and proper purposes for the admission of the Rule 404(b) evidence it intends to introduce.[4]

The Court reaffirms its ruling and encourages both parties to, prior to trial, present written or oral argument regarding the Rule 403 analysis in aid of the Court's decision whether to admit the Rule 404(b) evidence in either or both criminal cases.[5]

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[3] The Commonwealth seeks to introduce the following Rule 404(b) evidence: "1. On or about March 11, 2012, on Saipan, CNMI, Defendant intentionally ran over victim John Saimon with a car causing him serious bodily injury." *Commonwealth* v. *Guiao* (NMI Super. Ct. June 18, 2012) (Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts Pursuant to NMI. R. Evid. 404(b) and 609 at 1). The Commonwealth's Motion and oral arguments also provided notice of the Commonwealth's intent to introduce evidence from case 12-0001A in case 12-0055D to similarly prove "intent" and "absence of mistake" (Commonwealth's Mot. at 4) ("CNMI intends to introduce evidence of the assault in 12-0055 at the trial for 12-0001, and vice versa.").

[4] Upon reviewing the record of the July 10,2012 hearing, the Court detected some ambiguity in its ruling from the bench. It may appear that the Court held the Commonwealth's proposed Rule 404(b) evidence is admissible in both criminal cases 12-0001A and 12-0055D. In fact, the Court merely found the Commonwealth met its initial burden to enunciate the relevancy and a proper purpose for the evidence it intends to admit under Rule 404(b). The Court must still weigh the evidence according to the Rule 403 balancing test in determining whether it will be actually admitted into evidence in either or both cases.

[5] The fact that the Court has severed the cases does not mean that evidence of one case is *per se* inadmissible in the other case. *United States* v. *Abdelhaq,* 246 F.3d 990, 993 (7th Cir. 2001) **("All** severance does is reduce the number of counts or the number of defendants. It is not the equivalent of a ruling granting a motion in limine to exclude specified evidence from trial.").

V. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** the Commonwealth's Motion, and **APPROVES** the Commonwealth's Notice of Intent to introduce Rule 404(b) evidence in the above-entitled cases.

IT IS SO ORDERED this 18th day of July, 2012.

PERRY B. INOS, Associate Judge