Filing # 55362504 E-Filed 04/20/2017 01:45:41 PM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

v.

PAUL KEVIN DYKES JR,

Defendant.
_______________________________________/

CASE NO.: 2015-00267-CFFA
JUDGE DENNIS P. CRAIG

OBJECTION TO STATE'S NOTICE OF INTENT TO ELICIT OTHER CRIMES, WRONGS, OR ACT EVIDENCE AND MOTION IN LIMINE

COMES NOW the Defendant, Paul Kevin Dykes Jr, by and through his undersigned attorney and hereby files this Objection to the State's Notice of Intent to Elicit Other Crimes, Wrongs, or Acts Evidence. The Defendant also files a Motion in Liminie to prohibit any state witness from mentioning any collateral crime, wrong or act in the event the Court grants severance of some or all counts from each other and as grounds in support hereof states:

FACTS AND EVIDENCE

1. The Defendant is charged in a thirty-eight count Information with a variety of charges ranging from Capital Sexual Battery, Promoting Sexual Performance by a Child, two counts of Transmission of Child Pornography, Principal to Capital Sexual Battery, three counts of Conspiracy to Commit Capital Sexual Battery and thirty counts of Possession of Sexual Performance by a Child. He is not charged with twenty counts of Production of Child Pornography contrary to the State's assertion in part 6 of their "Facts and Evidence" portion of their Notice of Intent.
2. The dates alleged in the Information vary widely. Some offenses are charged with occurring between July 29, 2012 to March 26, 2015. Two others are charged with occurring on August 14, 2015 and August 15, 2015 respectively. The three conspiracy counts are charged as occurring on February 27, 2015 and March 23, 2015 and between January 27, 2015 and March 26, 2015. The Principal to Capital Sexual Battery is charged with occurring between January 27, 2015 until March 26, 2015 and lastly the Possession of Sexual Performance by a Child charges are alleged to have occurred on or about March 26, 2015.
3. All of the counts alleging Possession of Sexual Performance by a Child probably relate to the seizure of a cell phone and a laptop on March 26, 2015 from the residence at 22 Buffalo Meadow Lane in Palm Coast pursuant to a search warrant. These devices were subjected to a forensic analysis and their contents were shown to contain over 1000 images of child pornography and 3 videos depicting alleged child molestation. Subsequent to the execution of the search warrant, a search warrant was obtained for the

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contents of a Dropbox account allegedly linked to the Defendant. Inspection of the contents of that Dropbox account revealed numerous images and videos of child pornography. The number is estimated at over 1090 as a conservative estimate. It is believed that the vast majority of these images/videos were downloaded well before the date of the March 26, 2015 warrant execution.

4. The search warrant executed on March 26, 2015 emanated from a cyber-tip that 2 images of child pornography were uploaded from a certain ISP address to the Whisper app and the dates of these uploads were August 14 and 15, 2014. These form the basis for the charges in Counts XI and XII.
5. A search of the co-defendant, Erin Vickers cellphone revealed a series of Skype Messenger conversations allegedly between the Defendant and Ms. Vickers. The conversations in question were on February 27, 2015, March 8, 2015, March 11, 2015 and March 23, 2015. These Skype chats were not discovered in a forensic extraction of the Defendant's cell phone contrary to the State's assertion in part 9 of their "Facts and Evidence" portion of their Notice of Intent.
6. The Defendant and the co-defendant has met maybe 3 -4 years before the date of the execution of the March 26, 2015 search warrant. They communicated verbally, never met in person and eventually stopped speaking for a number of years. It is unclear when they may have started speaking again whether it was late 2014 or early 2015.

<u>LAW AND ARGUMENT</u>

1. Since the Defendant is charged with offenses involving alleged molestation of a minor (s) and the State is seeking to introduce evidence of other acts of child molestation the Supreme Court has recognized that this type of collateral act evidence carries with a "greater chance of unfair prejudice than the admission of other types of collateral crimes". <u>MacLean v. State,</u> 934 So. 2d 1248, 1256 (2006). Thus the Court should be extra careful when conducting the 90.403 balancing analysis.
2. The test is still one of relevancy, that is evidence that tends to prove or disprove a material fact in dispute.
3. The charges against Mr. Dykes can be grouped into four categories. One category is the possession of images or videos allegedly depicting child pornography. These are Counts I – X and Counts XV – XXXIV. The second category involves the alleged transmission of images of child pornography. These are Counts XI and XII. The third category is the alleged sexual battery on I. D. and the video alleged to show the act. These are Counts XIII and XIV. Lastly are the allegations of Principal to Capital Sexual Battery and Conspiracy to commit Capital Sexual Battery all involving Erin Vickers. These are Counts XXXV – XXXVIII.
4. The State filed its Notice of Intent in anticipation of severance of many counts from others because of the temporal and factual differences in the allegations forming the Second Amended Information
5. It appears the State in its Notice intends to show all images of child pornography in its prosecution of each and every count. It also seeks to introduce evidence of other counts and collateral acts in the prosecution of certain counts.

6. The Defense will address State's Notice as it relates to the categories listed above and their sub categories.
7. First the Defense addresses the State's Notice as it relates to Counts XIII and XIV. The Defense would argue that the possession of random images and videos of child pornography do not tend to prove or disprove that Mr. Dykes sexually battered his child or videotaped that act. The acts charged and the collateral acts are separate and distinct in their elements. They are alleged to have occurred at different times. The collateral images and videos involved do not depict Mr. Dykes performing a sexual act on any child. The acts described in Counts I – X are different than the acts alleged in Count XIII. The sheer number of the images and videos that the State seeks to introduce (over 2000 by a conservative estimate) carries with it the inherent risk that this will become a feature of the trial. The amount of time needed to show all of these images and videos to the jury will take hours. It will be mind numbing to the jury and carries with it a great risk that their passions will become so inflamed and their reasoning so clouded with disgust that they will be unable to act as analytical fact finders and may decide the case based on anger or disgust toward the Defendant. The MacLean Court mentions in footnote 11 that one factor to consider in whether to admit collateral crime evidence is whether the State has other methods to prove the crime charged without having to resort to admission of collateral crimes. In footnote 11 they quote with approval the case of United States v. Enjady, 134 F. 3 1427, 1431 (10th Circuit 1998). In regards to these two counts the defense argues that the State has ample evidence it may produce without having to resort to collateral crime evidence. This consists of a video alleged to depict the act itself, testimony from FDLE agents about certain items of bedding identified as being in the Defendant's bedroom that are seen in the video and lastly the statement of the Defendant barring any objections to its admissibility. It is simply unnecessary to introduce over two thousand images and videos of child pornography for the State to have a fair opportunity to prove these Counts. Since the probative value of the alleged possession of these items is so small and the danger of unfair prejudice is so great, the Court should prohibit their introduction in any prosecution of Counts XII – XIV because it fails the 90.403 balancing test.
8. Second, the Defense addresses the State's Notice as it relates to the counts involving Possession of Sexual Performance by a Child. Any evidence that the Defendant sexually battered I. D. or engaged in any alleged conspiracy to sexually batter any other child or was involved in the sexual battery of a child as a principal or possessed other uncharged images or videos of child pornography is wholly irrelevant to the crime of Possession of Sexual Performance by a Child. All that is required to prove these allegations is that the Defendant possessed the items charged, that he was aware of the contents of the items charged and that the items charged depicted a sexual performance by a child. Here, again the State has ample evidence to prove these counts without having to resort to extraneous evidence of other acts. As stated in the Enjady case referenced above, the Court should look to the necessity of the State having to produce this information, if there are other methods available to the State and how much in dispute is the material fact that the collateral evidence is offered to prove. In this case, the State has the Defendant's own statement made after administration of his Miranda warnings. This statement can only be viewed as a confession to the downloading of images and videos of child pornography and the ownership of the cell phone and laptop that these images were discovered on as

well as his access to and use of a Dropbox account where more of these images and videos were discovered. The same danger of unfair prejudice exists and the probative value is small and the Court should disallow the introduction of any collateral crimes, wrongs or acts.

9. The Defense addresses the third category and that is the allegations of transmission of child pornography (Counts XI and XII). The Defense states that the only collateral crime evidence that should be allowed is the evidence that the images allegedly uploaded to the Whisper account were located on the cell phone/ laptop/ Dropbox account owned or used by the Defendant. The State again, has the Defendant's own statement and the records from the ISP provider and from the records of Whisper. It is wholly unnecessary to introduce any other uncharged or collateral evidence in order for the State to have a fair opportunity to prove these two counts. The same great danger of unfair prejudice versus very limited probative value as it relates to the other Counts and uncharged acts compel the prohibition of any other evidence other than the evidence of the Defendant's possession of the two images in question.
10. The Defense addresses the Count alleging Principal to Capital Sexual Battery (Count XXXV). The Defense argues that the alleged possession of unrelated images or videos is completely irrelevant to the charged offense and thus has no probative value at all. How would the possession of these images/videos show the Defendant's participation in the act alleged? There is no proof that these images played any role in the planning and preparation of the act alleged. They do not show opportunity or common plan. Absence of mistake is not an issue in this count. It is anticipated that the evidence will show that the vast majority of the images possessed were downloaded in 2014 well before the alleged act in Count XXXV. If the State wishes to introduce text messages and Skype chats to prove the Defendant's participation in the act alleged, the Defense asserts that the State cannot prove that it was the Defendant who was the person making those messages. As MacLean states, the State must first prove the collateral crime/act by clear and convincing evidence before the Court may engage in the 403 balancing test. Clear and convincing evidence has been described as follows: "clear and convincing evidence requires that the evidence must be found to be credible, the facts to which the witnesses testify must be distinctly remembered: the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established" Slomowitz v. Walker, 429 So. 2d 797 at 800 (Fla 4th DCA 1983). Here the only person who may testify it was the Defendant engaged in these chats and texts is the co-defendant, Erin Vickers. This creates a severe Bruton if Ms. Vickers exercises her right to remain silent in any court proceeding related to these facts. If that is the case the Defense argues that the State cannot prove the Defendant's participation in these chats and messages and therefore will not clear the first hurdle of establishing the act by clear and convincing evidence and the collateral acts of alleged KIK and Skype messages and chats should be excluded.
11. Concerning the allegation in Count XXXVI - XXXVII, the Defense reiterates the same arguments stated above regarding the lack of clear and convincing evidence that it was Paul Dykes who was the person engaged in these chats and messages via KIK and Skype. Regarding the possible introduction of the photographs and videos, there is no proof that

these photos or videos played any possible role in the alleged conspiracy. They were never referred to in any KIK message. They were downloaded in 2014 well before the date alleged in this count (February 27, 2015) and most likely during the time when the Defendant and Ms. Vickers were not even communicating at all. They are irrelevant to any alleged conspiracy charged and should be excluded.

12. Lastly, concerning Count XXXVIII, the Defense makes the same argument regarding the lack of clear and convincing evidence that it was the Defendant who was engaged in any of these Skype chats that allegedly occurred on dates different from the date charged in this count. The Defense makes the same argument concerning the lack of relevancy of the possession of the unrelated images or videos referenced in the State's Notice as is made in section 10 and 11 above as well as the same argument regarding the volume of the images and the danger of unfair prejudice assuming they have any relevancy at all.

Other grounds to be argued *ore tenus.*

WHEREFORE, Defendant prays this Honorable Court grant this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to: Joseph Ledonne, Assistant State Attorney, 1769 East Moody Blvd., Bldg. #1, Bunnell, FL 32110, on April 19, 2017.

/s/ William M. Bookhammer

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