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VIRLYNN TINNELL
CLERK SUPERIOR COURT

BY: _____ DEPUTY

**IN THE SUPERIOR COURT
MOHAVE COUNTY, STATE OF ARIZONA**

**Judge: Honorable Steven F. Conn
Division: 3 Courtroom: A
Court Reporter: Jim Glover**

**Virlynn Tinnell, Clerk of Superior Court
By: Jennifer Johnston, Deputy Clerk
Hearing Date: June 7, 2011**

STATE OF ARIZONA,

Plaintiff,

vs.

JOHN CHARLES MCCLUSKEY,

Defendant.

CASE NO: CR-2010-00823

EVIDENTIARY HEARING

START: 1:34 P.M.

APPEARANCES: Victoria Stazio, Deputy County Attorney; Jason Steffen, Attorney for and with the Defendant.

Prior to the hearing commencing the State has exhibits E000002 and E000003 marked for identification purposes.

This is the time set for hearing on the following Motions, which the Court has numbered in the order they have been filed:

1. Defendant's Motion to Sever Count One, filed May 16, 2011.
2. Defendant's Motion for Juror Selection Process, filed May 23, 2011.
3. Defendant's Motion to Preclude the Use of Restraining Devices on Defendant During Trial, filed May 23, 2011.
4. Defendant's Motion to Suppress Out of Court and Any in Court Identification of the Defendant, filed May 23, 2011.
5. State's Motion to Add Allegation of Aggravating Factors as an Addendum to the Indictment, filed May 23, 2011.
6. State's Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment, filed May 23, 2011.
7. Defendant's Motion in Limine, which raises four different evidentiary issues, filed on May 31, 2011.

The State intends to present evidence in regards to the Motion to Suppress Out of Court and Any in Court Identification and requests to take up this motion first.

Mr. Steffen requests to take up the Severance motion prior to the Suppression hearing; discussion ensues.

The State has no objection to taking up the Motion to Sever first.

The Court takes up the Motion to Sever Count One; the Court has read the motion filed by the Defense and the response filed by the State.

Mr. Steffen presents arguments to the State's response.

The State relies on its written response.

The Court now shows the presence of John A. Pecchia, Attorney for and with the Defendant.

The Court determines that there is not a legal basis to sever the charges.

IT IS ORDERED denying the Defense Motion to Sever Count One.

The Court finds that Counsels for the Defendant and the State agree to proceed on the Motion to Suppress Out of Court and Any in Court Identification of the Defendant, filed by Defense.

The State waives making an opening statement or preliminary comments.

Mr. Pecchia waives making an opening statement or preliminary comments.

Brad Conway is duly sworn and testifies.

The States moves for the admission of exhibits E000002 (CD 1-interview of victims) and E000003 (CD 2-interview of victims). The Defense has no objection.

IT IS ORDERED admitting into evidence exhibits E000002 and E000003, for the purpose of this hearing only.

Defense moves for the admission of exhibits E000004 (photo lineup McCluskey) and E000005 (photo lineup McCluskey cutup/numbered). The State has no objection.

IT IS ORDERED admitting into evidence exhibits E000004 and E000005, for the purpose of this hearing only.

Defense moves for the admission of exhibit E000006 (Flagstaff P.D. Criminal Investigations Photo Lineup Cover Sheet). The State has no objection.

IT IS ORDERED admitting into evidence exhibit E000006, for the purpose of this hearing only.

The witness is excused.

The State presents closing arguments.

Mr. Pecchia presents closing arguments.

The Court finds that there is nothing suggestive about the lineup itself, to the extent under the Dessureault case that the State needs to prove by clear and convincing evidence that the actual lineup itself was not unduly suggestive; the Court makes that determination.

The Court will review the two CD's and enter an order as soon as possible regarding the Motion to Suppress Out of Court and Any in Court Identification of the Defendant. Regardless of how the Court rules on whether the process was suggestible, the Court will still address the Neil v. Biggers issues.

The Court takes up the Motion for Juror Selection Process, filed by Defense.

Mr. Pecchia adds to the written motion and presents arguments.

Ms. Stazio presents arguments regarding the jury questionnaire and the scheduling of witnesses.

Mr. Pecchia presents final argument.

Based on the Courts statements made on the record;

IT IS ORDERED denying the Motion, insofar as it requests a Jury Questionnaire.

IT IS ORDERED granting the Motion, insofar as it requests that Mr. Pecchia and Mr. Steffen not be identified as being with the Public Defender's office.

IT IS ORDERED granting the Motion, insofar as it requests latitude in attorney conducted voir dire; the Court will continue to obey the requirements under the rules that allow individual voir dire by the attorneys; the Court reserves the right to make objections to any questions that the Court believes is improper.

IT IS ORDERED granting the Motion, insofar as it requests private questioning of jurors if requested; the Court reserves the right to conduct private questioning of jurors, whether they request it or not depending on whether Counsel and the Court make a determination that doing so is going to advance the process that the Court and Counsel is going through to select a fair and impartial jury.

The Court takes up the Motion to Preclude the Use of Restraining Devices on Defendant during Trial, filed by Defense.

Mr. Pecchia presents arguments.

The State leaves it at the discretion of the Court.

The Court finds that the State has not filed a written response.

Based on the Courts findings as stated on the record;

IT IS ORDERED granting the Defense Motion to Preclude the Use of Restraining Devices on Defendant During Trial, to the extent that it refers to specifically a stun belt.

The Court is not purporting to rule on any other security measures that the Sheriff's Office or the Jail may take regarding of the Defendant, during the pendency of the Trial.

The Court takes up the State's Motion to Add Allegation of Aggravating Factors as an Addendum to the Indictment and a Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment. Mr. Steffen has no objection to the motions and enters a denial to the allegations.

IT IS ORDERED granting the State's Motion to Add Allegation of Aggravating Factors as an Addendum to the Indictment and the State's Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment.

The Court takes up the Motion in Limine, which addresses four separate issues, filed by the Defense on May 31, 2011. The State has not filed a written response.

1. Defendant's Prior Crimes, requesting a preclusion of any prior bad acts, presented during the State's case in chief.

1b. If the Defendant were to testify and were sought to be impeached with a prior felony under Rule 609; that the State not be allowed to identify the nature of the felony.

Neither Counsels for the Defendant, nor the State add to the motion.

IT IS ORDERED granting the Defendant's in Limine, as to #1 Defendant's Prior Crimes, insofar as it requests that the State be precluded from eliciting evidence of prior crimes by the Defendant during their case in chief.

IT IS ORDERED that if the Defendant testifies, he may be impeached with a prior felony conviction, that would be admissible under Rule 609, but that he cannot be impeached with the identity of the priors; the Court determines that identifying the actual felony conviction itself would be unduly prejudicial, so if the Defendant does testify he can be impeached with the fact of a prior, but not the identity of what that prior conviction is.

2. Defendant Subsequent Crimes, relating to any crime that the Defendant is believed to have committed after dropping off the truck drivers in Flagstaff.

The Defense has nothing to add to the written motion.

The State advises the Court that the State will not be bringing up any subsequent acts by the Defendant.

IT IS ORDERED granting the Defense Motion in Limine, as to #2 Defendant's Subsequent Crimes, any crimes that he has alleged to have occurred, sometime after dropping off the truck drivers in Flagstaff will not be admissible.

3. Co-Defendant's Statements.

The Defense has nothing to add to the written motion.

The State will not be bringing in any statements that they are not allowed to under the rules.

IT IS ORDERED granting the Defense Motion in Limine, regarding #3 Co-Defendant's Statements; any statements made by the Co-Defendant's will not be admissible at the trial of Mr. McCluskey.

4. Untested Evidence.

Mr. Steffen adds to the written motion.

The Stazio advises the Court that the State will follow the rules of evidence.

Based on the Court statements made on the record;

IT IS ORDERED denying the Defense Motion in Limine, as it relates to #4 Untested Evidence.

The Court recesses at 3:26 p.m.

cc:

MOHAVE COUNTY ATTORNEY*

MOHAVE COUNTY PUBLIC DEFENDER*

John A. Pecchia

Jason Steffen

Attorneys for Defendant

MOHAVE COUNTY JAIL*

HONORABLE STEVEN F. CONN*

Division 3