[Cite as *State v. Reed*, 2024-Ohio-43.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JEREMY REED Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 2023 CA 00012 O P I N I O N
CHARACTER OF PROCEEDINGS:	Appeal from the Fairfield County Court of Common Pleas, Case No. 21 CR 556
JUDGMENT:	Vacated and Remanded
DATE OF JUDGMENT ENTRY:	January 8, 2024

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
R. KYLE WITT Fairfield County Prosecutor SARAH A. HILL Fairfield County Prosecutor's Office 239 West Main Street, Suite #101 Lancaster, Ohio 43130	STEPHEN E. PALMER Palmer Legal Defense 511 South High Street Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Defendant-appellant Jeremy Reed appeals his convictions and sentence entered by the Fairfield County Court of Common Pleas, after the trial court found him guilty following his plea of no contest. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On January 20, 2022, the Fairfield County Grand Jury indicted Appellant on seven (7) counts of rape, in violation of R.C. 2907.02(A)(1)(b) and (B), felonies of the first degree; eight (8) counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4) and (C)(2), felonies of the third degree; four (4) counts of kidnapping, in violation of R.C. 2905.01(A)(4) and (C)(3), felonies of the first degree, with each count carrying attendant sexual motivation and sexually violent predator specifications; and three (3) counts of sexual imposition, in violation of R.C. 2907.05(A)(4), misdemeanors of the third degree. The offenses involved four (4) victims, all of whom were minors at the time the offenses were perpetrated upon each of them, and occurred during a fifteen (15) year period.

{¶3} Appellant entered a written plea of not guilty on January 24, 2022. The matter proceeded through the discovery process. On April 11, 2022, Appellant filed a motion to sever. Therein, Appellant sought separate trials for the counts related to each of the four (4) victims, arguing the specific evidence relative to the offenses involving one victim was "irrelevant to the prosecution of the offenses relating to any other victim." Defendant's Motion to Sever Offenses and to Order Separate Trials at p.2, unpaginated. Appellant asserted he would be prejudiced by joinder of all of the offenses in single trial.

{¶4} The state filed a memorandum contra on April 27, 2022. Via Entry filed May 2, 2022, the trial court denied Appellant's motion. The trial court found the evidence of each alleged victim would be simple and direct and, given a specific instruction to the jury

to consider each count and each victim from its own evidence and the jury's verdict on one count must not influence the other counts, the state overcame Appellant's claim for severance.

{¶5} Appellant appeared before the trial court on February 7, 2023, and entered pleas of no contest to two counts of rape (Counts 1 and 13, as amended), in violation of R.C. 2907.02(A)(2) and (B), felonies of the first degree; and one count of gross sexual imposition (Count 16), in violation of R.C. 2907.05(A)(4), a felony of the third degree; and one count of gross sexual imposition (Count 22), in violation of R.C. 2907.05(A)(4) and (C)(2), a felony of the third degree. After conducting a Crim. R. 11 colloquy, the trial court accepted Appellant's pleas and found him guilty. On February 23, 2023, the trial court sentenced Appellant to an aggregate minimum prison term of 28 years to an aggregate maximum prison term of 33 years. The trial court classified Appellant as a Tier III sex offender pursuant to R.C. 2950.01.

{¶6} It is from his convictions and sentence Appellant appeals, raising as his sole assignment of error:

> THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SEVER IN VIOLATION OF THE OHIO CRIMINAL RULES, THE OHIO RULES OF EVIDENCE, AND APPELLANT'S RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

{¶7} At Oral Arguments on November 9, 2023, this Court sua sponte raised the issue of whether a no contest plea preserves a defendant's right to appeal an adverse ruling on a motion to sever. We subsequently issued an Order on November 14, 2023, requesting the parties brief the issue. The state filed its supplemental brief on December 1, 2023. Appellant filed his supplemental brief on December 6, 2023.

{¶8} Upon review of the supplemental authority submitted by the parties, we answer the question in the affirmative and find Appellant preserved his right to appeal the trial court's decision overruling his motion to sever. See, e.g., *State v. Greene*, 5th Dist. Fairfield No. 98CA71, 1997 WL 770203 (Plea of no contest was part of plea deal. "[W]e find the spirit of Crim.R. 12(H) should be preserved. Appellant has the right to appeal the denial of his pretrial motions.")[1]; *State v. Purkhiser,* 2nd Dist. Miami No. 2005 CA 34, 2006–Ohio–4014 (*Alford* plea preserved defendant's right to appeal trial court's denial of motion to sever); *State v. Wilson*, 8th Dist. Cuyahoga No. 105876, 2018-Ohio-3666 (Guilty plea waived right to appeal denial of motion to sever. "Moreover, if severance was crucial to Wilson's defense, he could have pleaded no contest to properly preserve the error on appeal."); *State v. Perkins*, 7th Dist. Mahoning No. 21 MA 0073, 2022-Ohio-2841, 2022 WL 3364562 (Defendant advised trial court he was entering no contest plea for the purpose of preserving the issue, i.e., the denial of his motion to sever, for appeal).

{¶9} Such finding aligns with the spirit of Crim. R. 12(I), which provides: "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

[1] Crim. R. 11(H) is now Crim. R. 11(I).

{¶10} In its Supplemental Brief, the state noted in *State v. Brock,* 3rd Dist. Hancock No. 5–06–27, 2006–Ohio–6681, the Third District Court of Appeals "held the right to appeal the trial court's decision on a motion to sever is *not* preserved by a no contest plea." Supplemental Brief of Appellee at p. 3. Upon review, we find the *Brock* decision is factually distinguishable; therefore, does not affect our finding.

{¶11} The defendant in *Brock*, as part of a plea bargain, entered a plea of no contest with the understanding such would preserve his appellate rights to contest the trial court's denial of his motion in limine. *Id*. at ¶ 6. The *Brock* Court found "[a] party may not plead no-contest to preserve for appellate review the trial court's ruling on a motion *in limine.*" *Id*. at ¶ 8. The *Brock* Court further found the "no-contest plea was premised upon a plea bargain that included the erroneous belief by defense counsel, the prosecutor, and the trial court that he would be able to preserve his appellate rights to contest the pre-trial evidentiary decisions made by the trial court and that the issue regarding the admissibility of evidence would be decided on appeal by this Court." *Id*. at ¶ 12. Because the full plea bargain agreement could not be effected, the *Brock* Court was "compelled to vacate the no-contest plea and remand this matter for further proceedings on the original charges." *Id*.

{¶12} Appellant herein appealed an adverse ruling on his motion to sever, not a motion in limine as was the situation in *Brock*. In addition, the plea agreement between Appellant and the state could be effectuated as neither party had an erroneous belief as to Appellant's right to appeal the issue.

I

{¶13} The standard of review for a motion to sever trials is abuse of discretion. *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, citing *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, and ¶ 166. "Abuse of discretion" implies the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *Ford*, at ¶ 106, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶14} "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged * * * are of the same or similar character * * *." Crim. R. 8(A). Crim. R. 8(A) also allows the joinder of offenses which are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Permitting joinder "conserves resources by avoiding duplication inherent in multiple trials and minimizes the possibility of incongruous results that can occur in successive trials before different juries." *State v. Hamblin*, 37 Ohio St.3d 153, 158, 524 N.E.2d 476 (1988).

{¶15} "Notwithstanding the policy in favor of joinder," Crim.R. 14 permits a defendant to request severance of the counts in an indictment "on the grounds that he or she is prejudiced by the joinder of multiple offenses." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 49. The defendant "has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring

joinder against the defendant's right to a fair trial." *State v. Torres,* 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). However, even if the equities appear to support severance, the state can overcome a defendant's claim of prejudicial joinder by showing either (1) it could have introduced evidence of the joined offenses as other acts under Evid.R. 404(B), or (2) the "evidence of each crime joined at trial is simple and direct." *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶16} In its Entry filed May 2, 2022, the trial court denied Appellant's motion to sever, finding, even if Appellant could establish the burden of unfair prejudice to justify severance, joinder was proper as the state could introduce evidence of the joined offenses as other acts under Evid.R. 404(B), and the evidence of each offense is simple and direct.

Evid.R. 404(B)

{¶17} Evid.R. 404(B) provides:

> *Prohibited Uses.* Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> *Permitted Uses; Notice.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
>
> Evid.R. 404(B).

{¶18} "Evid.R. 404(B) categorically prohibits evidence of a defendant's other acts when its only value is to show that the defendant has the character or propensity to commit a crime." *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 36. Other acts evidence may, however, be admissible for another non-character-based purpose, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B)(2). "The key is that the evidence must prove something other than the defendant's disposition to commit certain acts." *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22.

{¶19} In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Ohio Supreme Court set forth a three-part analysis for consideration of admissibility of other-acts evidence:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403.
>
> *Id.* at ¶ 20.

{¶20} The admissibility of other acts evidence pursuant to Evid.R. 404(B) is a question of law. *State v. Hartman*, supra at ¶ 22. A trial court is precluded from admitting improper character evidence under Evid.R. 404(B), but it has discretion to allow other acts evidence which is admissible for a permissible purpose. *Id*., citing *Williams*, supra at ¶ 17.

{¶21} In support of its position the other acts evidence would be admissible under Evid.R. 404(B) as evidence of a scheme, plan, or system, the state relies on this Court's decision in *State v. Markwell,* 5th Dist. Muskingum No. CT2011–0056, 2012–Ohio–3096. In *Markwell*, we found the evidence clearly indicated a "scheme, plan or system" negating any claim of accident as "1) the acts were against family members, 2) the acts occurred when the children stayed overnight at a residence where Markwell was present and 3) all the acts occurred when the children were sleeping." *Id*. at ¶ 48. This Court further found the acts were consecutive in nature, beginning with one victim and following through to last victim, each victim testified separately, the issues were clearly laid out for the jury, and the jury was instructed each count and each victim should be considered from its own evidence. *Id*.

{¶22} We find *Markwell* to be distinguishable from the matter at hand. First, the appellant in *Markwell* "did not move to sever the counts for trial; nor did appellant object to the joinder of the cases for trial." *Id*. at ¶ 41. Accordingly, our review was limited to a plain error analysis, which is different from the standard of review for the denial of a motion to sever. Next, this Court found the facts clearly indicated a "scheme, plan or system," which negated any claim of accident by the appellant. *Id*. at ¶ 48. Appellant herein does not claim accident. Rather, Appellant denies perpetrating the offenses altogether. The

other acts evidence, thus, would not be necessary to negate any claim of identity, absence of mistake, or lack of accident.

{¶23} We further find the probative value of the evidence at issue is substantially outweighed by the danger of unfair prejudice. The similarities between the offenses committed against each of the four separate victims, each of whom was a minor at the time the offenses were perpetrated and Appellant was dating their mothers or grandmothers at the time, coupled with the inflammatory nature of the offenses elevate the risk of prejudice to the degree the trial court should have severed the offenses. See, *State v. Kaufman,* 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143. As the number of alleged victims increases, the potential for a jury to improperly consider a defendant's other alleged acts as propensity evidence, despite the court giving an instruction to the contrary, also increases. Multiple charges involving multiple victims inherently has a synergistic effect of prompting jurors to consider each separate allegation as propensity evidence. This Court has recognized, "Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of these past acts poses a higher risk, on the whole, of influencing the jury to punish the defendant for the similar act rather than the charged act. *State v. Short*, 5th Dist. Richland No. No. 14CA67, 2015 -Ohio-3183, ¶ 49.

Simple and Direct

{¶24} If other acts evidence would not be admissible in each case under Evid.R. 404(B), the trial court must analyze whether the evidence of each crime is simple and direct. *State v. Schaim*, 65 Ohio St.3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661, citing *State v. Hamblin*, 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 (1988).

{¶25} Evidence is "simple and direct" if (1) the jury is capable of readily separating the proof required for each offense, (2) the evidence is unlikely to confuse jurors, (3) the evidence is straightforward, and (4) there is little danger that the jury would "improperly consider testimony on one offense as corroborative of the other." *State v. Valentine*, 5th Dist. Fairfield No. 18 CA 27, 2019-Ohio-2243, ¶ 48 (Citations omitted).

{¶26} Although the offenses involved four different female victims and each victim was a minor at the time the acts were perpetrated upon them, the offenses against each victim occurred years apart, and, as discussed infra, the danger of a jury improperly considering testimony on one offense as corroborative of another alleged offense is significant. In addition, the offenses against each victim varied in degree from gross sexual imposition to kidnapping to rape. We find the fact-finder would have had a difficult time looking at the evidence in support of each offense as simple and distinct because the temptation would be too great to respond to the evidence emotionally rather than rationally." See, *State v. Frazier,* Cuyahoga App. No. 83024, 2004–Ohio–1121, ¶ 18.

{¶27} Based upon the foregoing, we find the trial court abused its discretion in overruling Appellant's motion to sever.

{¶28} Appellant's sole assignment of error is sustained.

{¶29} The judgment of the Fairfield County Court of Common Pleas is reversed, Appellant's plea is vacated, and the matter remanded for further proceedings consistent with this Opinion and the law.

By: Hoffman, P.J.
Wise, J. concurs.
Delaney, J. dissents.

Delaney, J., dissenting

{¶30} I respectfully dissent from the majority opinion.

{¶31} Upon the limited record before us, I conclude the Appellant has not met the burden of demonstrating prejudice simply due to the nature of the allegations and chronology of events as set forth by the State of Ohio in the bill of particulars and memorandum in opposition to the Appellant's conclusory motion to sever.

{¶32} Moreover, the trial court acted within its discretion to deny the pre-trial motion to sever under this Court's prior rulings and analysis in similar cases such as *State v. Scheeler,* 5th Dist. Delaware No. 21CAA110064, 2023-Ohio-1130; *State v. Valentine*, 5th Dist. Fairfield No. 18 CA 706, 2019-Ohio-2243; *State v. Wilson,* 5th Dist. Delaware No. 16-CAA-08-0035, 2017-Ohio-5724; *State v. Grubbs*, 5th Dist. Delaware No. 15CAA100080, 2016-Ohio-5147; *State v. Meeks II*, 5th Dist. Stark No. 2014CA0017, 2015-Ohio-1527; and *State v. Wagner*, 5th Dist. Licking No. 03 CA 82, 2004-Ohio-3941.

{¶33} For these reasons, I would affirm the well-reasoned decision of the trial court and overrule Appellant's sole assignment of error.