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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

EDWARD L KLINE
Defendant

FILED
OCT 14 2021
Clerk of Courts
Cuyahoga County, Ohio

Case No: CR-20-653476-A

Judge: TIMOTHY MCCORMICK

INDICT: 2907.05 GROSS SEXUAL IMPOSITION /SVPS
2907.05 GROSS SEXUAL IMPOSITION /SVPS
2907.05 GROSS SEXUAL IMPOSITION /SVPS
ADDITIONAL COUNTS...

JOURNAL ENTRY

OPINION AND ORDER ATTACHED

10/13/2021
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OSJ

Judge Signature Date

HEAR
10/13/2021

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

State of Ohio,	)	
	)	Case Nos. CR 20 653476-A
Plaintiff;	)	CR 21 662232-A
	)	
	)	Judge Timothy P. McCormick
-v.-	)	
	)	**Opinion and Order**
Edward L. Kline,	)	
	)	
Defendant.	)	
	)	

Background

The State initially charged Defendant Edward L. Kline with one count of gross sexual imposition under R.C. 2907.05(A)(4), fifteen counts of gross sexual imposition under R.C. 2907.05(A)(1), counts of and one count of sexual imposition under R.C. 2907.06(A)(4). The counts 1, 2-3, 4-6, 7-9, 10, 11, 12-14, 15-17, and 18 each correspond to a different alleged victim.

Kline moved to sever the counts under Crim. R. 14 and have the counts related to each alleged victim tried separately. Subsequent to that, the State indicted Kline on further counts of gross sexual imposition against an alleged tenth victim in Case No. CR 21 662232-A. The State seeks to join that case with the captioned case for trial as well.

All of the alleged offenses occurred while Kline was serving as a band director in the Solon schools. Each of the alleged victims were students, or in one case a former student in the Solon High School Band. While they ranged in

ages, each student was generally either a section leader or other student leader in the band at the time of the alleged assault and were allegedly assigned office and other tasks by Kline, such as making copies.

Kline argued that failure to sever the counts into nine different trials will be highly prejudicial because the State will be able to present nine different witnesses testifying to different acts of alleged sex crimes in different circumstances.

The Court held a hearing on the matter and initially granted Kline's motion. The State, however, moved to reconsider its order and highlighted several cases in support of their motion. Kline has filed a timely response to the motion. For the following reasons, the State's motion is granted in part and denied in part, and the Court will sever the offenses into three separate trials as outlined in its prior order.

Analysis

I. General standards for evaluating motions to sever

Under Crim. R. 8(A), offenses that "are of the same or similar character, or 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," may be joined in the same indictment.

Even if there is no misjoinder in the indictment, "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses...in an indictment...or by such joinder for trial together of indictments the court shall

order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires." Crim. R. 14. "In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial." Id.

"But even if the equities appear to support severance, the state can overcome a defendant's claim of prejudicial joinder by showing either that (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. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 104 (citing *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990)). "When the evidence is simple and direct, an accused is not prejudiced by joinder regardless of the non-admissibility of evidence of the crimes as other acts under Evid. R. 404(B)." *State v. Evans*, 8th Dist. Cuyahoga No. 108648, 2020-Ohio-3968, ¶ 29 (citing *Lott* at 163 (quotations omitted). "Thus, if the state can meet the requirements of the joinder test, it need not meet the requirements of the stricter other acts test." *Id.* (quotations omitted).

"Severance may be warranted if the trial court finds a serious risk that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence." *State v. Jackson*, 8th Dist. Cuyahoga No. 102394, 2015-Ohio-4274, ¶ 12, (citing *United States v. Zafiro*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)).

II. Would the evidence be admissible under Evid. R. 404(B)?

Kline contends that if he were only being charged with counts related to one alleged victim, the State would not be able to introduce the testimony of any other alleged victims because such testimony would be impermissible "propensity" evidence under Evid. R. 404(B). The State argues that the testimony of other victims would be admissible for one of the other purposes listed in 404(B). The rule states that: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." While the list is illustrative, it is not exhaustive.

In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20 the Ohio Supreme Court outlined a three part test to determine if "other acts" evidence is admissible. The Court considers admissibility in three steps by looking at whether:

1. 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.
2. 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).

3. The probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.

Recently, in *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651 and *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, the Court sought to "provide trial courts with a road map for analyzing the admission of other-acts evidence and guidance as to appropriate instructions for the jury when such evidence is admitted." *Hartman* at ¶19.

Here, there is no question that the potential testimony of other alleged victims would be relevant and probative. As the Court in *Hartman* noted, propensity evidence is excluded, "not because it has no appreciable probative value but because it has too much." *Id.* at ¶ 25 (quoting 1A Wigmore, Evidence, Section 58.2, at 1212 (Tillers Rev.1983)).

Therefore, the Court turns to whether the testimony of other alleged victims would be admissible for any of the permissible non-propensity purposes.

A. Motive

Kline is correct that testimony from other alleged victims would not be admissible to demonstrate that Kline had a motive of sexual gratification. When the offense charged is a sex offense, the motive of sexual gratification is self-evident, and it is impermissible to introduce other acts evidence simply to prove motive. *Id.* at ¶ 49.

B. Identity or Modus Operandi

Kline is also correct that testimony from other alleged victims would not be admissible for the purposes of demonstrating identity or modus operandi. Identity is not an issue in this case. Modus operandi evidence relates to determining the particular "fingerprint" associated with a crime, and is used to demonstrate the identity of the defendant. *Id.* at ¶19. In fact, the State agrees that the evidence would not be admissible for this purpose.

C. Common Scheme or Plan

The State asserts that its evidence is admissible under the common scheme or plan exception. Kline contends that this kind of evidence is excluded under the rules announced in *Hartman*. The State responds that Kline is reading *Hartman* too narrowly and that this case is factually similar to *Williams*. While laying out guidance for future cases, the Court did not disavow Williams and sought to distinguish it on its own facts.

In both *Hartman* and *Williams*, the Court indicated that "plan evidence" should support one of the following conclusions: "(1) the occurrence of the act in issue; (2) the identity of the person who committed the act; or (3) the existence of the required mental state in the actor." *Hartman* at ¶ 41(quoting Leonard, T*he New Wigmore: Evidence of Other Misconduct and Similar Events*, Section 9.1 (2d Ed.2019)).

In *Hartman*, the defendant was accused of raping an adult female acquaintance *Id.* at ¶ 1. To counter Hartman's claim that the sexual encounter with the rape victim was consensual, the State presented evidence establishing

that Hartman had sexually abused his stepdaughter when she was a child, which the Court held did not fit into any of the exceptions under Evid. R. 404(B).

In *Williams*, "[t]he state offered the testimony of the victim to demonstrate the motive, preparation, and plan of the accused to target teenage males who had no father figure and to gain their trust and confidence for the purpose of grooming them for sexual activity with the intent to be sexually gratified." *Williams* at ¶ 21. The Court permitted this evidence to be admitted.

In distinguishing the holding in *Williams*, the Court in *Hartman* reiterated that "plan" evidence is not limited to demonstrating the immediate background of the crime charged or to identify the perpetrator. *Hartman* at ¶ 44 (citing *Williams* at ¶19). It stated, that,

> "[w]hile the other-acts evidence in Williams tended to show that the defendant, who had been charged with the rape of a 14-year-old boy, had a pattern of grooming teenage boys to take advantage of them sexually, that fact alone is not what overcame the propensity bar. Rather, the result in Williams turned on the state's use of the other-acts evidence for the purpose of refuting the defendant's claims that he was not sexually attracted to teenage boys and establishing that the defendant had acted with the specific intent of achieving sexual gratification." *Id.* at ¶ 45.

The State argues that this case is more similar to *Williams* than *Hartman*, because it is alleging that Kline essentially groomed certain students by assigning them leadership positions and office tasks and then took advantage of that for sexual gratification. This conception of the case is also similar to the one in *State v. Pate*, 2d Dist. Montgomery No. 28702, 2021-Ohio-1838,

which reached a similar conclusion regarding plan evidence of a defendant who had a position of trust with the four victims he raped.

The Court agrees that the proposed other acts would be admissible in this case as plan or common scheme evidence as it was in *Williams* and *Pate*. Here, the State's other acts evidence could be used to demonstrate that Kline had a plan to use his position as band director to select certain students with the specific intent of placing them in positions where he could then compel unwanted sexual contact for sexual gratification.

It should be noted that this is different than simply demonstrating a motive of sexual gratification which would not be admissible. The motive is the "why" which need not be explained. The plan, however, is the "how" which the State needs to explain to meet the specific intent requirement of R.C. 2907.05(A)(1). See *State v. Brown*, 10th Dist. Franklin No. 14AP-101, 2014-Ohio-5043, ¶ 13 (purpose element of gross sexual imposition requires a showing that it is the "specific intent" to achieve the result of sexual touching).

D. Intent, knowledge, lack of mistake or accident

Finally, while the State does not press this exception as much, this testimony could potentially be admissible to demonstrate Kline's intent, lack of mistake or accident. Since the identity of the defendant is not at issue, the possible defenses are that the events alleged did not happen at all, or that they did not happen in the way the alleged victims say they did. The Court in *Pate*, reached a similar conclusion when determining that the "plan" evidence could also be used to demonstrate lack of mistake or accident. To the extent

that Kline argues that the events alleged by the victims did not happen the way they suggested it would, the other acts evidence offered by the State could demonstrate intent, lack of mistake or accident.

III. Would introduction of the proposed evidence be "unfairly prejudicial?"

While the Court concludes that this testimony is admissible under Evid. R. 404(B), it next must assess whether its introduction is unfairly prejudicial.

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)(citing generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence P403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403)). "So, the Committee Notes to Rule 403 explain, 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (quoting Advisory Committee's Notes on Fed. R. Evid. 403, 28 U.S.C. App., p. 860.)

The Court concludes that with appropriate limiting instructions, this testimony would not be unfairly prejudicial. Appropriate limiting instructions on the narrow purpose for which the State's offered testimony can be used "reduces the chance that a defendant would have been materially prejudiced by the admission of testimony." *State v. S.A.A.*, 10th Dist. Franklin No. 17AP-

685, 2020-Ohio-4650, ¶ 28 (citing Williams at ¶ 24); *State v. Bey*, 85 Ohio St.3d 487, 491, 1999- Ohio 283, 709 N.E.2d 484 (1999) (same).

IV. Is the proposed evidence simple and direct?

Even if a defendant can demonstrate that the evidence would be inadmissible under Evid. R. 404(B), the State may still negate a finding of unfair prejudice by demonstrating that the evidence it seeks to present to the jury is "simple and direct" and will not unduly confuse the jury. "Where the evidence of the joined offenses is 'uncomplicated,' such that the factfinder is 'capable of segregating the proof' required to prove each offense, a defendant is not prejudiced by joinder of the offenses." *State v. Burns*, 8th Dist. Cuyahoga No. 108468, 2020-Ohio-3966, ¶ 40 (quoting *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 33.)

"'Simple and direct' evidence means that the evidence of each crime is 'so clearly separate and distinct as to prevent the jury from considering evidence of [some crimes] as corroborative of the other.'" *State v. Belle*, 8th Dist. Cuyahoga Nos. 107046 and 107300, 2019-Ohio-787, ¶ 25 (quoting *State v. Quinones*, 11th Dist. Lake No. 2003-L-015, 2005-Ohio-6576, ¶ 48). "Evidence is 'simple and direct' if the trier of fact is capable of segregating the proof required for each offense. *Id.* (citing *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, 937 N.E.2d 136, ¶ 39 (10th Dist.). "Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof." *State v. Echols*, 8th Dist. Cuyahoga No. 102504,

2015-Ohio-5138, ¶ 16 (quoting *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224 and L-09-1225, 2010-Ohio-4202, ¶ 33).

Courts have identified four factors to determine if evidence is simple and direct: (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. Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907, ¶ 42.

The courts of appeals are in agreement that the "simple and direct" test is an easier burden for the State to meet. Courts of appeals, of course, have the benefit of hindsight and a full record to determine whether the State presented their case in an orderly and direct fashion that could be characterized as simple and direct.

Looking at the problem *ex ante* in this particular case, this Court concludes that it is actually more difficult for the State to meet the simple and direct test than it is to meet the other acts test, when it comes to the jury's ability to segregate the offenses.

If at the first trial involving three Jane Does the State ultimately introduces testimony from all other alleged victims to demonstrate one of the other purposes listed in Evid. R. 404(B), the Court can issue appropriate limiting instructions to the jury, and emphasize the limited purpose for which the jury can consider that testimony. In instructing the jury prior to deliberations, it can focus their attention on the subset of offenses charged and

what the state had to prove to obtain a conviction, including the limited non-propensity purposes that the other acts evidence might show.

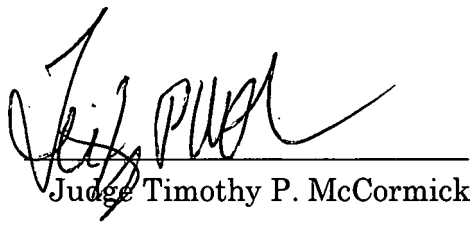
By contrast, if all the offenses charged are presented to the jury at one trial, the Court concludes there is a danger that there will be a danger of jury confusion in segregating the offenses for all ten alleged victims when deliberations begin. Even with appropriate instructions, the Court concludes there is a risk that the jury will conflate and confuse offenses and alleged victims. By severing the offenses into three trials, the parties and the Court can focus the jury's attention on a more manageable and narrow task which will reduce the risk of unfair prejudice to Kline.

The Court therefore exercises its discretion to partially sever the offenses in this case by conducting three trials instead of one.

Conclusion and Order

The State's motion to reconsider is granted in part and denied in part. The offenses will be tried in the manner indicated by the Court's prior order.

It is so ordered.



Judge Timothy P. McCormick