**0COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**

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| **STATE OF OHIO** | : | |
| Plaintiff | : | **CASE NO. 2016 CR 00102** |
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| vs. | | **Judge McBride** |
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| **MICHAEL WORKMAN** | | **DECISION/ENTRY** |
| | : | |
| Defendant | | |
| | : | |

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| **STATE OF OHIO** | : | |
| Plaintiff | : | **CASE NO. 2016 CR 00170** |
| | : | |
| vs. | | **Judge McBride** |
| | : | |
| **MICHAEL WORKMAN** | | **DECISION/ENTRY** |
| | : | |
| Defendant | | |
| | : | |

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This cause is before the court for consideration of the state's motion to consolidate filed in each case on May 11, 2016. The court heard oral argument on the motions on June 23, 2016. At the conclusion of the arguments of counsel, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE

In Case Number 2016 CR -00102, the defendant Michael S. Workman is charged with two counts of rape under R.C. 2907.02(A)(2) and R.C. 2907.02(A)(1)(c), felonies of the first degree, and two counts of gross sexual imposition under R.C. 2907.05(A)(1) and R.C. 2907.05(A)(5), felonies of the fourth degree.

These offenses are alleged to have occurred on November 15, 2015 at the defendant's home. The victim, R.C., was 13 years old at the time and had spent time at the defendant's home along with other neighborhood children. The defendant allegedly touched R.C.'s penis and performed oral sex on R.C. while he slept. R.C. was very upset and went to his aunt's home where he disclosed the alleged abuse. R.C. then went to Cincinnati Children's Hospital where DNA tests confirmed the presence of components of the defendant's saliva in R.C.'s underwear.

In Case Number 2016 CR 00170 the defendant is charged with 15 counts of rape under R.C. 2907.02(A)(1)(a), R.C. 2907.02(A)(1)(b), and R.C. 2907.02(A)(2), felonies of

the first degree, and two counts of corrupting another with drugs under R.C. 2925.02(A)(1), felonies of the second degree. These charges stem from allegations that the defendant sexually abused the son of his girlfriend, E.Z., who lived with him. The abuse allegedly occurred from approximately 1999 until September 2007, and E.Z. was born on February 1, 1993. The defendant is alleged to have engaged in oral and anal sex with E.Z. These events occurred in E.Z.'s bedroom, the defendant's bedroom, E.Z.'s brother's bedroom, the bathroom, the living room, and a vacant apartment below the defendant's apartment.

The state alleges that, after one episode of anal intercourse in March 2000, E.Z. suffered anal bleeding that required the defendant to take him to Cincinnati Primary Health Care System for treatment. On another occasion that year, the defendant allegedly permitted E.Z. to play video games as a condition subsequent to anal intercourse.

The state further alleges that, In 2007, the defendant provided E.Z. with controlled substances and narcotics so that E.Z. would become drowsy in order to facilitate anal sex with E.Z. During one incident occurring that year, the defendant allegedly punished E.Z. for back-talking to him in front of the other children in the household by forcing E.Z. to engage in anal intercourse. In another incident that year, the defendant allegedly forced E.Z. to view pornography before engaging in anal intercourse. In a separate incident, E.Z. allegedly fell asleep in the defendant's room while reading comic books, and awoke to the defendant forcing him to have anal intercourse. By 2008, the defendant is alleged to have forced E.Z. to engage in anal intercourse hundreds of times while E.Z. was between the ages of seven and 15.

## LEGAL ANALYSIS

Crim.R. 13 "concerns when cases may be tried together."[1] It provides that the "court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information. * * *"[2] In turn, Crim.R. 8(A) governs the joinder of offenses:

> "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, whether felonies or misdemeanors or both, 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."[3]

Courts have found that, although the offenses of rape and gross sexual imposition are not the same, "they are of a similar character, and are properly joined in the same indictment under Crim.R. 8(A)."[4] Joinder of multiple offenses in a single trial is favored[5] and liberally permitted in order to "conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to witnesses."[6]

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[1] *State v. Marshall*, 5th Dist. No. 03-CA-106, 2005-Ohio-931, ¶ 14.
[2] Crim.R. 13; *State v. Gilbert*, 12th Dist. No. CA2010-09-240, 2011-Ohio-4340, ¶ 75.
[3] Crim.R. 8(B).
[4] *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). *See State v. Jackson*, 8th Dist. Cuyahoga No. 102394, 2015-Ohio-4274, ¶ 11 ("As the language of the rule suggests, the word 'offenses' is applied broadly to include not only those acts stemming from a single criminal transaction, but to criminal transactions that may not be tied by time and place.").
[5] *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981).
[6] *Schaim*, 65 Ohio St.3d at 58. *See State v. Morsie*, 12th Dist. Warren No. CA2012-07-064, 2014-Ohio-172, ¶ 28 (Citations omitted.) ("It is well-established that '[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.' As a result, '[j]oinder is liberally permitted to conserve judicial resources,

The Ohio Supreme Court has observed that "joinder of offenses solely because they are of the same or similar character creates a risk of prejudice to the defendant, while the benefits from consolidation are reduced because 'unrelated offenses normally involve different times, separate locations, and distinct sets of witnesses and victims.'"[7] Indeed, this concern is reflected in the defendant's response in opposition to consolidation. Although the Court "recognizes the problems inherent in this form of joinder, we believe that the defendant's opportunity to object pursuant to Crim.R. 14 is adequate to protect his rights * * *."[8]

Thus, even when similar offenses are properly joined pursuant to Crim.R. 8(A), the defendant "can still move to sever the charges pursuant to Crim.R. 14 if their consideration will prejudice her or her rights."[9] Specifically, Crim.R. 14 provides:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

Whether offenses should be joined or remain severed is "a matter in the trial court's discretion."[10] Moreover, the defendant "bears the burden of proving prejudicial joinder."[11] "A claim of prejudice depends on whether the advantages of joinder and

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reduce the change of incongruous results in successive trials, and diminish inconvenience to the witnesses.'").

[7] *Schaim*, 65 Ohio St.3d at 58, fn. 6, citing 2 ABA Standards for Criminal Justice (2 Ed. 1980) 13.13, Section 13-2.1, Commentary (criticizing joinder of similar offenses).

[8] *Schaim*, 65 Ohio St.3d at 58, fn. 6.

[9] Id. at 58.

[10] *Morsie*, 2014-Ohio-172 at ¶ 27, citing *State v. Matthews*, 12th Dist. Butler No. CA2012-09-175, 2013-Ohio-3482, ¶ 35.

[11] *Morsie*, 2014-Ohio-172 at ¶ 29, citing *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, ¶ 79. *See State v. Robinson*, 6th Dist. Lucas No. L-09-1001, 2010-Ohio-4713,

avoidance of multiple trials are outweighed by the right of a defendant to be fairly tried on each charge."[12]

If the defendant shows that joinder would cause prejudice, the state has two methods available to rebut the prejudice claim- the "other acts" test and the "joinder" test.[13] The "court must determine (1) whether evidence of other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct."[14]

Under the first test, the "other acts" test, if "evidence of other crimes would be admissible at separate trials, any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further."[15] Thus, if the state can show that Evid.R. 404(B) would have permitted it to introduce the "other acts" evidence in separate trials, then the state has rebutted the defendant's claim that he or she is prejudiced.[16]

The second test, the "joinder" test, does not require the state to meet the "stricter" other acts test.[17] Instead, the state is "merely required to show that evidence of each crime joined at trial is simple and direct."[18] If this test is satisfied, the defendant

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¶ 22 ("When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced.").

[12] *Robinson*, 2010-Ohio-4713 at ¶ 24, citing *Torres*, 66 Ohio St.2d at 343.

[13] *Lott*, 51 Ohio St.3d at 163. *See Matthews*, 2013-Ohio-3482 at ¶ 38 (explaining that the state may negate the defendant's claim of prejudice through either the other acts test or the joinder test).

[14] *Schaim*, 65 Ohio St.3d at 59, citing *State v. Hamblin*, 27 Ohio St.3d 153, 158-59, 524 N.E.2d 476, 481-82 (1988).

[15] *Schaim*, 65 Ohio St.3d at 59, quoting *Drew v. United States*, (C.A.D.C.1964), 331 F.2d 85, 90.

[16] *Morsie*, 2014-Ohio-172 at ¶ 29, citing *State v. Coley*, 93 Ohio St.3d 231, 259 (2001).

[17] *Moshos*, 2010-Ohio-735 at ¶ 80.

[18] *Lott*, 51 Ohio St.3d at 163, citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980).

"is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B)."[19] "Simply stated, '[t]he joinder test only requires that the evidence of each joined offense is simple and distinct and ensures that a jury would be capable of segregating the proof for each test."[20]

In the instant case, joinder is proper under Crim.R. 8(A). As discussed, rape and gross sexual imposition are of a similar character. Moreover, the two counts of corrupting another with drugs relates to the defendant's counts of rape against E.Z., as he is accused of using drugs to facilitate the rapes.

Moreover, under Crim.R. 14, the defendant has met his burden of showing prejudice. Although the crimes are of a same or similar character, the defendant argues that the highly incendiary nature of each case will add increased prejudice without the many of the benefits that joinder normally confers. The defendant highlights that the purpose of diminishing inconvenience to witnesses is not served by joinder here because the cases involve different witnesses and victims. Additionally, he argues that the purpose of reducing incongruous results by having more than one trial is not served because that risk applies more so to joining cases involving multiple defendants, not multiple offenses. The court finds the defendant has met his burden of showing prejudice, and thus the cases may only be tried jointly if the state can rebut the claim of prejudice under the other acts or joinder tests.

[19] *Lott*, 51 Ohio St.3d at 163, citing *Roberts*, 62 Ohio St.2d at 170.
[20] *Morsie*, 2014-Ohio-172 at ¶ 29, quoting *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1535, ¶ 180 (7th Dist.).

## (I) JOINDER UNDER THE "OTHER ACTS" TEST

The trial court has broad discretion to decide whether to admit or exclude "other acts" evidence.[21] As a general rule, evidence that a defendant "committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character."[22]

Admissibility of such evidence is "carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment."[23] Because of these risks, exceptions established by rule or statute must be "strictly construed against admissibility."[24]

The defendant has been charged with multiple of offenses of rape under R.C. 2907.02 and gross sexual imposition under R.C. 2907.05, among other charges. When the defendant's prior sexual activity does not involve "the origin of semen, pregnancy, or

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[21] *State v. Ward*, 12th Dist. Clermont No. CA2013-07-059, 2014-Ohio-990, ¶ 16. *See State v. Powers*, 12th Dist. Clinton No. CA2006-01-002, 2006-Ohio-6547, ¶ 7, citing *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶ 43 ("The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.").

[22] *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15. *See State v. Crotts*, 104 Ohio St.33d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 18, citing Evid.R. 404(B) ("Generally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner."); *Ward*, 2014-Ohio-990 at ¶ 19 (holding same).

[23] *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). *See State v. Dove*, 8th Dist. Cuyahoga No. 101809, 2015-Ohio-2761, ¶ 21 (Citation omitted.) ("A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime.").

[24] *State v. Clemens*, 94 Ohio App.3d 701, 707, 641 N.E.2d 778 (12th Dist. 1994); R.C. 2907.05(E).

disease, [or] the defendant's past sexual activity with the victim," both the rape[25] and gross sexual imposition[26] statutes prohibit such evidence unless it is permitted under R.C. 2945.59.[27] R.C. 2945.59 provides:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Evid.R. 404(B) similarly provides, in pertinent part:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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."

The Ohio Supreme Court recognizes that Evid.R. 404(B) is in accord with R.C. 2945.59, and both represent codifications of the common law prohibiting evidence of "other acts of evidence to prove a character trait in order to demonstrate that the defendant acted in conformity with that trait."[28] Both the statute and the rule provide exceptions to the general prohibition against "other acts."[29] Neither the rule nor the statute require the "other act to be 'like' or 'similar' to the crime charged, as long as the prior act tends to show one of the enumerated factors."[30]

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[25] R.C. 2907.02(D).
[26] R.C. 2907.05(E).
[27] *Clemens*, 94 Ohio App.3d at 707.
[28] *Williams*, 2012-Ohio-5695 at ¶ 16, citing *State v. Brown*, 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (1988).
[29] *Williams*, 2012-Ohio-5695 at ¶ 16.
[30] *Ward*, 2014-Ohio-990 at ¶ 20.

Notwithstanding their similarities, the rule and statute contain subtle but significant differences.[31] For the trial court to exercise its discretion under the statute, the other acts evidence must be "material," whereas the acts need not be under Evid.R. 404(B).[32] Notably, evidence of a scheme or plan is always material.[33]

A second distinction is that Evid.R. 404(B) affords the trial court the discretion to admit evidence of "other acts" that are used for "other purposes" that are not specifically delineated in the rule.[34] The Ohio Supreme Court has explained that the "standard for admitting other-acts evidence is not whether the evidence is necessary to prove an element of the offense."[35] Rather, the standard is whether the evidence pertains to one of the excepted reasons for using other acts evidence.[36]

In the seminal case *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Ohio Supreme Court enunciated a three part analysis to determine admissibility of "other acts" evidence.[37] Since then, the *Williams* test is "routinely applied in addressing challenges to the admissibility of 'other acts' evidence."[38]

First, courts 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" under Evid.R. 401.[39] Second, courts determine "whether evidence of the other crimes, wrongs, or acts is presented to prove the

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[31] *Williams*, 2012-Ohio-5695 at ¶ 16.
[32] Id. R.C. 2945.59.
[33] *Crotts*, 2004-Ohio-6550 at ¶ 18.
[34] *Williams*, 2012-Ohio-5695 at ¶ 17.
[35] *Crotts*, 2004-Ohio-6550 at ¶ 18.
[36] Id.
[37] *Williams*, 2012-Ohio-5695 at ¶ 19.
[38] *Ward*, 2014-Ohio-990 at ¶ 17, citing *State v. Freeze*, 12th Dist. Butler No. CA2011-11-209, 2012-Ohio-5840, ¶ 33.
[39] *Williams*, 2012-Ohio-5695 at ¶ 19.

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)."[40] Finally, courts consider "whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice" under Evid.R 403.[41]

In *Williams* the defendant was convicted of rape, gross sexual imposition, and unlawful sexual conduct with a minor.[42] The victim was a 14 year old boy that the defendant mentored at his church.[43] The trial court admitted evidence that the defendant had a similar relationship with a 16 year old boy.[44] With respect to the 16 year old, the defendant had coached him on the swim team.[45]

Regarding the first prong of the analysis, relevancy, the Court found the testimony relevant because it tended to show the defendant's preparation and plan to target and groom teenage boys so that he could sexually abuse them.[46] The evidence showed that the defendant targeted teenage males who had no father figure in order to gain the boys' trust and confidence and prepare them for sexual activity.[47]

As to the second step, without much additional explanation the Court found that the evidence served a purpose other than showing the defendant acted in conformity

[40] *Williams*, 2012-Ohio-5695 at ¶ 19.
[41] Id. "Unfairly prejudicial evidence is that which might result in an improper basis for a jury decision." *Ward*, 2014-Ohio-990 at ¶ 37, citing *State v. Bowman*, 144 Ohio App.3d 179, 286, 759 N.E.2d 856 (12th Dist. 2001).
[42] *Williams*, 2012-Ohio-5695 at ¶ 9.
[43] Id.
[44] Id. at ¶ 5.
[45] Id.
[46] Id. at ¶¶ 22, 25.
[47] Id. at ¶ 25.

with his character.[48] In so finding, the Court noted that the jury received a limiting instruction not to use the evidence to conclude the defendant acted in conformity with his character.[49] When a limiting instruction is given, the court presumes that "the jury has followed the instructions given to it by the trial court."[50]

The final inquiry is whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.[51] Without much analysis, the Court determined that the trial court's instruction to the jury lessened the effect of the other acts testimony.[52]

Numerous other cases have dealt with other acts evidence that is offered in cases involving sexual abuse of minors, which is proffered for the purpose of showing the defendant's preparation, plan, or scheme. The recently decided case of *State v. Meeks*, 34 N.E.3d 382, 2015-Ohio-1527, (5th Dist. 2015), provides a helpful illustration of "other acts" probative of a defendant's preparation or plan. In *Meeks*, the defendant had vaginal intercourse with two minors while he was sober, and they were highly intoxicated.[53] Furthermore, in both assaults the defendant helped facilitate the victims' intoxication, he separated and isolated the victims, and he engaged in vaginal intercourse with them when they were in and out of consciousness.[54] As such, the court found that the circumstances surrounding each rape "are relevant in making it more

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[48] Id. at ¶ 23.
[49] Id.
[50] *Ward*, 2014-Ohio-990 at ¶ 36, quoting *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 194.
[51] *Williams*, 2012-Ohio-5695 at ¶ 24. The term "prejudice" means "simply to '[d]amage or detriment one's legal rights or claims." *Crotts*, 2004-Ohio-6550 at ¶ 23, quoting Black's Law Dictionary (8th Ed. 1999) 1218.
[52] *Williams*, 2012-Ohio-5695 at ¶ 24.
[53] *Meeks*, 2015-Ohio-1527 at ¶¶ 95-96.
[54] Id.

likely appellant had sex with an unwilling intoxicated victim."[55] Consequently, evidence that the defendant had non-consensual, intoxicated sex with a girl prior to the alleged rape he was charged for was admissible to show the defendant's plan or scheme.[56]

Another instance in which "other acts" evidence of sex offenses has been permitted to show a plan or scheme is in *State v. Ward*, 12th Dist. Clermont No. CA2013-07-059, 2014-Ohio-990. In *Ward* the appellant claimed that the trial court erred in allowing other acts evidence during his trial on a gross sexual imposition charge.[57] The charge stemmed from the appellant's sexual abuse of his daughter's minor friend while she spent the night at his ex-wife's house while he supervised.[58] The victim testified that in the middle of the night she awoke to the appellant touching her breasts, stomach, and buttocks while she was in bed next to his daughter[59]

The state introduced witness testimony from another minor and friend of the appellant's daughter who attested to a similar incident four years prior while she was an overnight guest at the appellant's apartment and slept beside his daughter.[60] Accordingly, the testimony spoke to, *inter alia*, whether the appellant had a common scheme, plan, or system.[61] As such, the court found that the appellant had not been unfairly prejudiced.[62] The Twelfth District Court of Appeals reasoned that the testimony

[55] Id. at ¶ 95.
[56] Id. at ¶ 97.
[57] *Ward*, 2014-Ohio-990 at ¶ 2.
[58] Id. at ¶ 3.
[59] Id. at ¶ 6.
[60] Id. at ¶ 12,
[61] Id.
[62] Id. at ¶ 39.

regarding the prior sexual abuse "clearly indicates Ward had a history of targeting his daughter's teenage friends under his supervision while they slept."[63]

Turning to the case at bar, in order to survive the first and second prongs of *Williams*, which are often reviewed in tandem, the sexual abuse of each minor, R.C. and E.Z., must be relevant to the sex offenses involving the other child in one or more of the exceptions enumerated in Evid.R. 404(B), namely "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or another purpose other than to show that the defendant acted in conformity therewith his pedophilic, predatory character.

The state argued in its briefing and at oral argument that the sexual abuse of both children is probative of the defendant's "behavioral fingerprint" of manipulating and grooming the victims, who were seven to 15 years old and 13 years old at the time of abuse.[64] At oral argument the state elaborated that the defendant used video games to encourage and isolate the victims. Additionally, the incident involving R.C. occurred while he was sleeping, and the defendant sometimes abused E.Z. while he was sleeping.

[63] Id. at ¶ 35. *See State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, 966 N.E.2d 958, ¶ 88 (12th Dist.) (finding that other acts evidence was admissible on the basis that it provided "background" in a case involving multiple counts of gross sexual imposition involving multiple minors in which the appellant, who was a doctor, engaged in sexual activity with minor boys during examinations after a parent or guardian did not accompany them to the examination room); *Robinson*, 2010-Ohio-4713, ¶ 41 (finding that other acts evidence of sexual battery against one minor "clearly demonstrates a unique, identifiable plan of criminal activity" with respect to the sexual battery of another minor, where the fingerprint showed the appellant takes advantage of a position of trust, with vulnerable young girls who live with him, isolating them, and having ongoing sexual conduct with them at their home and other locations).

[64] Pls. Mot., pg. 3.

Evidence of a plan or a scheme is "always material."[65] However, the court finds that, in this case, the evidence does not demonstrate a behavioral fingerprint that illuminate's the defendant's plan or scheme to sexually abuse teenage boys. The two sexual abuse incidents have multiple, marked differences. The sexual abuse of R.C. occurred one time, while he was 13 years old, and while he was sleeping in the defendant's home after playing video games.

By contrast, the alleged facts regarding E.Z. demonstrate that he endured many years of sexual abuse, not by a neighbor, but by an authority figure with whom he cohabitated. E.Z. was allegedly sexually abused hundreds of times from age seven to 15 years old. The defendant allegedly used video games to gain the trust of R.C., and at least once video games were used to reward E.Z. for anal intercourse. However, the defendant facilitated the sexual abuse of E.Z. in numerous other ways as well, such as using it as a punishment for challenging the defendant's authority and using drugs to cause E.Z. to become drowsy. Moreover, the sexual abuse of R.C. occurred seven years after the last abuse of E.Z., and E.Z.'s abuse took place in many different settings.

The cases of *Williams*, *Meeks*, and *Ward*, among others, all demonstrate much clearer patterns, plans, or schemes of sexual abuse than the present case.[66] Based on the facts presented to the court, the sexually abusive relationship that the defendant cultivated with E.Z. is not probative of a behavioral fingerprint demonstrating his plan or

[65] *Crotts*, 2004-Ohio-6550 at ¶ 18.
[66] *See Blankenburg*, 2012-Ohio-1289 at ¶ 88; *Robinson*, 2010-Ohio-4713, ¶ 41.

scheme for sexually abusing R.C., and vice versa. "Very seldom is evidence of different crimes sufficiently similar to be a behavioral fingerprint," which is the case here.[67]

For these reasons, the court finds that evidence of each victim's abuse does not satisfy the requirements of Evid.R. 404(B) such that the evidence could be introduced in each trial if the cases are tried separately. Accordingly, the state has been unable to successfully rebut the defendant's showing of prejudice using the other acts test.

## (II) JOINDER UNDER THE "JOINDER" TEST

Under the joinder test, evidence is simple and direct "where the evidence relative to the various charges is direct and uncomplicated, so that the jury is believed capable of segregating the proof on each charge."[68] Indeed, "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."[69]

"A showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper."[70] Courts presume that "with a proper charge, the jury can easily keep such evidence separate during * * * deliberations and, therefore, the danger of the jury's cumulating the evidence is substantially reduced."[71] Even so, "because there is always some danger that the jury

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[67] *State v. Echols*, 128 Ohio App.3d 677, 693, 716 N.E.2d 728 (1st Dist. 1998).
[68] *Roberts*, 405 N.E.2d at 251.
[69] *Robinson*, 2010-Ohio-4713 at ¶ 51, quoting *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33.
[70] *Morsie*, 2014-Ohio-172 at ¶ 30, quoting *State v. Bice*, 12th Dist. Clermont No. CA2008-10-098, 2009-Ohio-4672, ¶ 53.
[71] *State v. Ashcraft*, 12th Dist. Butler No. CA2008-12-305, 2009-Ohio-5281, ¶ 18, quoting *Drew*, 331 F.2d at 90.

may cumulate evidence of offenses that are tried jointly, both the trial court and counsel must conduct such a trial with 'vigilant precision in speech and action far beyond that required in an ordinary trial.'"[72]

"Ohio appellate courts have upheld joinder in sex abuse cases involving multiple child victims where the evidence as to each offense is separate, uncomplicated and sufficient to support a conviction without necessitating the use of evidence relating to other cases."[73]

In *State v. Morsie*, 12th Dist. Warren No. CA2012-07-064, 2014-Ohio-172, the defendant moved to sever two counts of rape, two counts of attempted rape, and three counts of sexual battery, which stemmed from the defendant's sexually predatory encounters with four different women.[74] The trial court denied the defendant's motion to sever, and on appeal the Twelfth District Court of Appeals affirmed the conviction.[75] The appellate court found that the state satisfied the joinder test because of the separate and distinct nature of the evidence for each crime.[76] The court surveyed the evidence as follows:

> "In this case, the state presented an organized, chronological overview of the facts and charges alleged against Morsie by the four women. Moreover, the witnesses were all 'victim specific' in their testimony. This included extensive testimony from each of the alleged victims detailing their own alleged unwanted sexual encounters with Morsie, as well as testimony from Detective Holbrook regarding his investigation into Morsie's conduct as it relates to each of the four alleged victims. The evidence pertaining

[72] *Ashcraft*, 2009-Ohio-5281 at ¶ 18 quoting *Drew*, 331 F.2d at 94.
[73] *Matthews*, 2013-Ohio-3482 at ¶ 40 quoting *Ashcraft*, 2009-Ohio-5281 at ¶ 19.
[74] *Morsie*, 2014-Ohio-172 at ¶ 2.
[75] Id. at ¶ 34.
[76] Id. at ¶ 32.

> to each victim and each offense could easily be segregated."[77]

Because the state presented well organized evidence that separated the crimes by victim, and the detective separated his testimony by victim, the *Morsie* Court was able to conclude that joinder was proper for the many sex offenses involved.

An example in which multiple sex offenses against different children were joined together is found in *State v. Matthews*, 12th Dist. Butler No. CA2012-09-175, 2013-Ohio-3482. The appellant's criminal child enticement charges arose from his attempts from October 2011 until March 2012 to coax four boys, aged eight, 10, 11, and 13, into his car.[78] The appellant was also charged with gross sexual imposition and public indecency because he had touched the penis of one of the boys and exposed his penis as well.[79]

The Twelfth District Court of Appeals held that all counts were properly tried together because the evidence concerning each offense was "separate and distinct, and simple and direct."[80] In so concluding, the court observed that the charges "involved four different victims, occurred at different times, and occurred in different places. Although appellant drove the same vehicle during each offense, he approached different victims at different locations."[81] As such, the appellate court found that the trial court did not err.

As another illustration, in *State v. Ashcraft*, 12th Dist. Butler No. CA2008-12-305, 2009-Ohio-5281, the appellate court upheld a trial court's decision to jointly try the

[77] Id.
[78] *Matthews*, 2013-Ohio-3482 at ¶ 2.
[79] Id.
[80] Id. at ¶ 42.
[81] Id. at ¶ 41.

appellant's eleven counts of rape, three counts of corruption of a minor, one count of felonious sexual penetration, and one count of unlawful sexual contact with a minor.[82] The crimes involved sexual abuse of five female minors spanning 15 years.[83] The counts were jointly tried because the evidence was simple and direct, thus negating the appellant's claim of prejudice.[84] The court highlighted that (1) the state presented an organized and chronological overview of the facts as to each victim in its opening statement, (2) the state presented testimony from each victim, (3) during summation the state presented an organized recitation of the facts as to each victim and each count individually, and (4) sufficient evidence was presented to each offense without necessitating the use of evidence from one occurrence to prove the other.[85]

Furthermore, the trial court instructed the jury that it was required to consider the charges separately.[86] Lastly, the court noted that the defendant did not indicate that he would have tried the case differently if the counts were separately tried.[87] Accordingly, the court was able to conclude that the evidence was "separate and distinct and therefore simple and direct."[88]

As a final illustration, in *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, the Twelfth District Court of Appeals affirmed the joinder of sex offenses, including public indecency, attempted rape, and gross sexual imposition,

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[82] *Ashcraft*, 2009-Ohio-5281 at ¶ 1.
[83] Id. at ¶ 2.
[84] Id. at ¶ 19.
[85] Id. at ¶¶ 20-21.
[86] Id. at ¶ 26.
[87] Id. at ¶ 25.
[88] Id. at ¶ 27. *See Robinson*, 2010-Ohio-4713, ¶ 50 (finding joinder proper in case involving sexual abuse of minor girls where there were two victims, two distinct offenses, and five charges, and there was no confusion or overlap in the testimony, and the prosecutor did not switch attention between the two victims' allegations against the defendant).

which involved two different victims.[89] The court found that the defendant did not suffer undue prejudice because the evidence was simple and direct.[90] In making this determination the court was persuaded by several aspects of the case: (1) the state's opening and closing statements provided an organized, chronological overview of the facts as to each of the four offenses alleged by the two victims, and (2) the witnesses were victim specific in their testimony.[91] The court also noted that the trial court provided a limiting instruction to the jury requiring it to consider the charges against the appellant as separate matters.[92] As such, the court concluded that the evidence relating to each victim and each offense "could be easily segregated and was unlikely to confuse the jury."[93]

In the instant case the court finds that joinder of the defendant's two cases is proper under the "joinder test." As the defendant noted in his brief, the two cases involve different time frames and separate victims and witnesses. Additionally, the case involving R.C. only involves a single incident of abuse, which will be much easier for the jury to separate from the numerous incidents involving E.Z., as opposed to a situation where R.C. also suffered numerous incidents of abuse.

The cases above clearly illustrate that juries are capable of separating victims and offenses, even when there are multiple minors and multiple sex offenses involved. However, as the Twelfth District Court of Appeals has cautioned, "both the trial court and counsel must conduct such a trial with 'vigilant precision in speech and action far

[89] *Moshos*, 2010-Ohio-735 at ¶ 82.
[90] Id. at ¶ 82.
[91] Id.
[92] Id. at ¶ 84.
[93] Id. at ¶ 82. *Cf. Schaim*, 65 Ohio St.3d at 62-62 (holding that evidence was not simple and direct where the testimony from the two victims regarding their father's sexual abuse of them was very similar and even the appellate court judges confused the testimony in their decision).

beyond that required in an ordinary trial.'"[94] Therefore, the state likely needs to utilize a similar approach as those exemplified in *Morsie*, *Matthews*, *Ashcraft*, and *Moshos*. The state should strive to present an organized overview of the facts as to each victim in its opening statement, use witness testimony that is victim specific, and in closing argument present an organized recitation of the facts as to each victim and each count individually.

During oral argument the state represented that the investigating officer would be a witness that would need to testify regarding both victims and offenses. Similarly, in *Morsie*, a detective testified regarding the four victims involved. In order to keep the testimony of the detective simple and direct, his testimony regarding his investigation was specific to each victim. The same specificity would be required in this case. Finally, as the cases above illustrate, the court will likely need to issue a jury instruction requiring the jury to consider the evidence for each victim and offense separately.

Based on the facts presented before the court, the evidence in the present case is as simple and direct as the evidence involved in *Morsie*, *Matthews*, *Ashcraft*, and *Moshos*. For these reasons, the court finds that the state has rebutted the defendant's claim that he will be prejudiced by the joinder of Case Numbers 2016-CR-00102 and 2016-CR-00170.

## CONCLUSION

For the foregoing reasons, the court finds the state's motion to consolidate Case Numbers 2016-CR-00102 and 2016-CR-00170 well-taken and hereby grants it.

[94] *Ashcraft*, 2009-Ohio-5281 at ¶ 18 quoting *Drew*, 331 F.2d at 94.

In order to ensure that the two cases and the counts in each case are considered separately, and to ensure that the jury does not become confused, the following rules shall apply:

- In its opening statement, the state must outline the case separately and must finish with one case before moving on to the second case. References to the anticipated testimony of witnesses must be similarly separated into the testimony involved as to each case.
- If a witness will be testifying as to more than one victim, all testimony as to the case of one victim must be completed before the witness testifies as to the case involving the other victim.
- Similarly, questions must be confined to matters pertaining to the case of one victim before moving on to questioning related to the other victim.
- The testimony as to each separate crime committed against a single victim must be separated similarly so that it is clear to the jury which evidence applies to each crime.
- In argument, the argument as to one case must be completed before the argument of the second case commences. Arguments must be totally separate without reference in the argument of one case to anything relating to the other case.
- Statements, questions and answers, and arguments must be organized such that they refer to each case, each victim, and each count separately.

- At the close of the case, and as necessary throughout the case, the court will emphasize to the jury that the evidence as to each case and as to each charge must be considered separately.
- At any point in the trial, references cannot be made, through questions or answers of witnesses, in opening or closing statements, etc., to similarities in the two cases.

These rules are necessary to ensure that statements, questions, answers, and arguments are organized such that they refer to each case, each victim, and each count separately. If the state has any question as to the application of these rules to particular matters that arise during trial, the state is instructed to seek the court's guidance before proceeding.

Failure to comply with these rules strictly may result in a mistrial being declared by the court.

**IT IS SO ORDERED.**

DATED: _____ _____

Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Decision/Entry were sent by e-mail on this _____ day of August 2016 to Scott O'Reilly, at soreilly@clermontcountyohio.gov, and Thomas W. Scovanner, at tscovanner@clermontcountyohio.gov, assistant prosecuting attorneys for the state of Ohio, and to Gregory A. Moore, attorney for the defendant Michael Workman, at Gregmoorelaw@gmail.com..

Judicial Assistant to Judge McBride