[Cite as *State v. Ashcraft*, 2009-Ohio-5281.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-12-305
	:	O P I N I O N
- vs -		10/5/2009
	:	
KENNETH L. ASHCRAFT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-07-1253

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POWELL, J.

{¶1} Defendant-appellant, Kenneth L. Ashcraft, appeals his convictions in the Butler County Court of Common Pleas on 11 first-degree felony counts of rape, in violation of R.C. 2907.02(A)(1)(b), three third-degree felony counts of corruption of a minor, in violation of R.C. 2907.04(A), one first-degree felony count of felonious sexual penetration, in violation of R.C. 2907.12(A)(1)(b), and one third-degree felony count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A). For the reasons set forth herein, we affirm appellant's

convictions.

{¶2} This case arises out of appellant's alleged sexual abuse of five female minors over the course of 15 years, from 1989 to 2004. In August 2008, appellant was charged under a 16-count indictment with the following felony sex offenses: one count of corruption of a minor against C.M. during the time period of 1989 to 1990; one count of rape against R.T. in 1991; two counts of rape against K.D. during the time period of 1993 to 1994; two counts of corruption of a minor against K.D. during the time periods of 1994 to 1995 and 1995 to 1996; one count of felonious sexual penetration against C.S. in 1995; six counts of rape against C.S. during the time period of 1996 to 2001; one count of unlawful sexual conduct with a minor against C.S. during the time period of 2001 to 2003; and two counts of rape against A.M. during the time period of 2003 to 2004.

{¶3} On September 16, 2008, appellant filed a motion to sever the counts as to each victim, as well as a motion in limine to exclude the introduction of evidence of other crimes or acts at trial. The trial court denied appellant's motions on October 14, 2008, and a jury trial subsequently commenced on October 15, 2008.

{¶4} During its case in chief, the state called each of the five alleged victims to testify. First, K.D. testified that she met appellant in 1993 when appellant rented a room from her friend's mother. K.D. indicated she was 11 years old at the time, and that appellant was 27 years old. According to K.D., appellant began socializing with her and later asked her to be his girlfriend. K.D. indicated that the "relationship became more intimate," and that the two engaged in oral sex, as well as vaginal intercourse. K.D. testified that she and appellant continued to engage in such sexual acts until she turned 15 years old and the "relationship" ended.

{¶5} Second, R.T. testified that she met appellant through her sister's friend when she was nine years old. She indicated that appellant was "an adult" at the time. R.T.

testified that in 1991, when she was ten years old, she accompanied appellant, along with a friend and her boyfriend, on a swimming and paddle boating excursion. According to R.T., a "truth or dare" game later ensued in appellant's vehicle, during which appellant forcibly engaged in vaginal intercourse with her. R.T. indicated that she did not see appellant after the incident.

{¶6} Third, A.M. testified that she met appellant when she was six years old, through appellant's daughter with whom she was friends. A.M. indicated that when she was 11 or 12 years old, she, along with her mother and two brothers, moved in with appellant. According to A.M., appellant began "touching" her at that time. Specifically, A.M. testified that on a number of occasions, appellant touched her vagina when he thought she was sleeping. A.M. also testified that she frequently slept in appellant's bed with him, and that appellant regularly engaged in vaginal intercourse with her. She testified that she began to sleep in pants and a belt to prevent the incidents, but that appellant would take them off and tell her the garments would "irritate her burns."[1] A.M. testified that appellant threatened to hurt her family if she told anyone about the incidents.

{¶7} Fourth, C.S. testified that appellant is her biological father, but that she had no contact with him until she was seven years old, at which time she moved in with appellant. C.S. testified that appellant began to touch her "inappropriately" by placing his hands down her pants, and that appellant digitally penetrated her vagina. C.S. indicated that appellant later engaged in vaginal intercourse with her when she was eight years old. C.S. testified that on one occasion, appellant tied her to a night stand and forcibly engaged in vaginal intercourse with her. C.S. testified that appellant engaged in vaginal intercourse with her on a regular basis from 1996 to 2003, when she disclosed the incidents to other household

1. A.M. indicated that she experienced third-degree burns over 37 percent of her body when she was two years old.

members.

{¶8} Finally, C.M. testified that she met appellant in 1989, when she was 12 years old. C.M. testified that she met appellant at a gas station and that he began "flirting" with her. The two began socializing, and eventually engaged in vaginal intercourse at a local motel. C.M. indicated that she and appellant engaged in vaginal intercourse on several other occasions, and that she became pregnant by appellant when she was 13 years old. C.M. testified that she gave birth to a son on November 30, 1990, and that she and appellant "split up" after the child's birth.

{¶9} Appellant testified in his own defense at trial, disputing that he engaged in any inappropriate sexual behavior with any of the victims. Specifically, appellant denied engaging in any sexual acts with R.T., K.D., C.S. and A.M. With respect to C.M., appellant admitted having sexual intercourse with her and fathering her child, but maintained that C.M. had a "fake I.D." at the time he met her indicating she was 18 years old.

{¶10} At the conclusion of trial, the jury returned guilty verdicts as to all 16 counts. Appellant was subsequently sentenced to an aggregate prison term in excess of 100 years, and classified a Tier III sex offender. Appellant now appeals his convictions, advancing two assignments of error for review.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER AND IN DENYING APPELLANT SEPARATE TRIALS AS TO SEPARATE VICTIMS FROM DIFFERENT TIME PERIODS."

{¶13} In his first assignment of error, appellant challenges the trial court's ruling denying his motion to sever. Appellant contends the cumulative effect of joining multiple offenses involving multiple victims at trial was to create an impermissible inference that he is the type of person predisposed to molesting young girls. We find appellant's argument as to

this issue without merit.

{¶14} 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.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340. "Joinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses." *State v. Schaim*, 65 Ohio St.3d 51, 58, 1992-Ohio-31. Pursuant to Crim.R. 14, however, a defendant may move to sever offenses that have otherwise been properly joined where it appears that joinder would be prejudicial. Id.

{¶15} To prevail on a claim that the trial court erred in denying severance, the defendant bears the burden of affirmatively demonstrating that (1) his rights were prejudiced, (2) he provided the trial court with sufficient information enabling it to weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) the trial court abused its discretion in refusing to separate the charges for trial. Id. at 59, citing *Torres* at syllabus.

{¶16} The state may negate a defendant's claim of prejudice utilizing one of two methods. *Lott* at 163. The first method is termed the "other acts" test, under which the state must demonstrate it could have introduced evidence of the joined offenses at separate trials, pursuant to the "other acts" provision of Evid.R. 404(B). Id., citing *Bradley v. United States* (C.A.D.C.1969), 433 F.2d 1113, 1118-1119. The second method is termed the "joinder" test, under which the state is merely required to demonstrate that evidence of each offense joined at trial is "simple and direct." Id., citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175 and *Torres* at 344. "[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under

Evid.R. 404(B)." Id., citing *Roberts*, *Torres*, and *United States v. Catena* (C.A.3, 1974), 500 F.2d 1319, 1325-1326.

{¶17} In this case, the trial court determined that joinder was permissible under both the "other acts" and "joinder" tests. As detailed below, we find no abuse of discretion in the trial court's determination that the evidence of each offense was simple and direct such that appellant was not prejudiced by the joinder of said offenses at trial. Because our analysis as to this issue is determinative of appellant's assignment of error, we need not address the issue of whether the trial court erred in finding that evidence of each offense would have been admissible at separate trials pursuant to Evid.R. 404(B). See *Lott*, 51 Ohio St.3d at 163.

{¶18} The "joinder" test permits the joint trial of multiple offenses when evidence of each offense is "simple and direct." Id. Under this theory, it is assumed 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." *Drew v. United States* (C.A.D.C.1964), 331 F.2d 85, 91. Nevertheless, because there is always some danger that the jury 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 the ordinary trial." Id. at 94.

{¶19} 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 offenses. See *State v. Eads*, Cuyahoga App. No. 87636, 2007-Ohio-539, ¶50-53; *State v. Campbell*, Lake App. No. 2004-L-126, 2005-Ohio-6147, *5-6 (reversed on other grounds); *State v. Owens* (Feb. 25, 2000), Montgomery App. No. 17394, 2000 WL 217219, *10-11; *State v. Strobel* (1988), 51 Ohio App.3d 31, 32-33. See, also, *State v. Wyatt* (Jan. 10, 1994), Butler

App. No. CA93-03-050, 11-12. After a careful review of the record in this case we find that the trial court did not abuse its discretion in finding the evidence as to each offense was simple and direct such that appellant was not prejudiced by the joinder of offenses at trial.

{¶20} As an initial matter, the record demonstrates that during its opening statement, the state presented an organized, chronological overview of the facts as to each offense and each victim. The state thereafter presented the testimony of each victim, who provided detailed testimony as to her own sexual encounters with appellant. During summation, the state again presented the jury with an organized recitation of the facts presented at trial, and discussed the facts concerning each victim and each count individually.

{¶21} The record also demonstrates that sufficient evidence was presented as to each offense without necessitating the use of evidence from one occurrence to prove the other. As detailed above, each victim provided testimony concerning the alleged acts of sexual abuse appellant committed against her, including the circumstances under which and the timeframe during which such acts occurred. While there were several instances of alleged sexual abuse involved, and a number of years over which said abuse occurred, the record demonstrates that the evidence pertaining to each victim and each offense could easily be segregated.

{¶22} For instance, the first victim, C.M., testified that she had a brief "relationship" with appellant after meeting him at a gas station, and later became pregnant with appellant's child. The second victim, R.T., however, indicated that she was merely acquainted with appellant at the time of her sole sexual encounter with him, and that she never saw appellant thereafter. Appellant's third victim, K.D., testified that she lived with appellant as "boyfriend and girlfriend" during much of the time that appellant sexually abused her. Appellant's fourth victim, C.S., indicated that she is appellant's biological daughter and that appellant began sexually abusing her after she established contact with him when she was seven years old.

Appellant's final victim, A.M., indicated that she was friends with appellant's daughter, C.S., and that appellant began sexually abusing her after she and her family moved in with appellant.

{¶23} The record demonstrates that the other witnesses who testified at trial were "victim-specific" in their testimony. *Owens* at *10. For instance, Jacqueline Rouse testified that she and her family lived with appellant for a period of time, during which she observed K.D. living with appellant as "boyfriend and girlfriend." Rouse also testified that she was present in appellant's vehicle during the "truth or dare" game involving R.T.

{¶24} Tonya Reid testified that she and her family also lived with appellant for a period of time, during which she observed appellant sharing a room with A.M. Reid's son, Jeremy Reid, likewise testified that he observed appellant sharing a room with A.M. and often heard "moaning noises" coming from appellant's room late at night. He also indicated that on one occasion, he observed appellant pull down A.M.'s bathing suit and "grab her butt" during a swimming excursion.

{¶25} Notably, there is no indication in the record that appellant would have defended the charges differently had they been tried separately. See *State v. Franklin* (1991), 62 Ohio St.3d 118, 123. Rather, appellant's trial testimony demonstrates that his defense theory involved a general denial that he engaged in any inappropriate sexual behavior with any of the alleged victims. Specifically, appellant denied engaging in any sexual acts with R.T., K.D., C.S. and A.M. With respect to C.M., with whom appellant admitting having a child, appellant maintained that C.M. had a "fake I.D." at the time he met her indicating she was 18 years old.

{¶26} Finally, the record demonstrates that the trial judge instructed the jury that it was required to consider the charges as separate matters: "The charges set forth in each count in the indictment constitute separate and distinct matters. You must consider each

count and the evidence applicable to each separately, and you must state your verdict finding as to each count uninfluenced by your verdict as to any other count." As Ohio courts have previously recognized, a jury is presumed to have followed the trial court's instructions. *State v. Dunkins* (1983), 10 Ohio App.3d 72, 73. Moreover, the record in this case yields no indication that the jury disregarded the trial court's instruction, or demonstrated confusion concerning the offenses and evidence presented.

{¶27} Based upon the foregoing, and after a thorough review of the record, we find the trial court did not err in denying appellant's request for severance where the evidence concerning each offense was separate and distinct and therefore simple and direct. Appellant's first assignment of error is therefore without merit, and is overruled accordingly.

{¶28} Assignment of Error No. 2:

{¶29} "PROSECUTION OF APPELLANT IN COUNTS ONE THROUGH TEN WAS BARRED BY THE STATUTE OF LIMITATIONS."

{¶30} In his second assignment of error, appellant argues his prosecution for counts one through ten, involving offenses alleged to have occurred during the time period of 1989 to 1998, is time barred. The offenses set forth in said counts include: corruption of a minor against C.M. during the time period of 1989 to 1990; rape against R.T. in 1991; rape against K.D. during the time period of 1993 to 1994; corruption of a minor against K.D. during the time periods of 1994 to 1995 and 1995 to 1996; felonious sexual penetration against C.S. in 1995; and rape against C.S. during the time period of 1996 to 1998.

{¶31} Appellant argues that at the time he allegedly committed the offenses in question, the applicable statute of limitations was six years pursuant to R.C. 2901.13(A)(1). Effective March 9, 1999, however, the General Assembly amended R.C. 2901.13 to provide a 20-year time period within which to prosecute an offender for certain felony offenses, including the sex offenses set forth in counts one through ten. R.C. 2901.13(A)(3)(a). Ohio

appellate courts have since held that an offender is subject to prosecution under the amended version of R.C. 2901.13 if the six-year statute of limitations applicable to his offenses pursuant to the previous version of R.C. 2901.13 had not expired as of March 9, 1999. *State v. Rogers*, Butler App. No. CA2006-03-055, 2007-Ohio-1890, ¶8-9; *State v. Massey*, Stark App. No. 2004 CA 00291, 2005-Ohio-5819, ¶10-12; *State v. Diaz*, Cuyahoga App. No. 81857, 2004-Ohio-3954, ¶4-7. Moreover, Ohio appellate courts have held that application of amended R.C. 2901.13 does not violate retroactivity or ex post facto principles. See, e.g., *State v. Aubrey*, 175 Ohio App.3d 47, 2008-Ohio-125; *State v. Bentley,* Ashtabula App. No. 2005-A-0026, 2006-Ohio-2503; *State v. Dycus,* Franklin App. No. 04AP-751, 2005-Ohio-3990; *Massey*; *Diaz*.

{¶32} With respect to sex offenses involving children, the statute of limitations is tolled until the victim reaches the age of majority, where the corpus delicti of the offenses has not previously been discovered by a responsible adult as listed in R.C. 2151.421. *State v. Hughes* (1994), 92 Ohio App.3d 26, 29; R.C. 2901.13(F). In this case, the record demonstrates that C.M., R.T., K.D., and C.S. turned 18 years old on November 29, 1994, September 5, 1999, August 11, 1999, and August 16, 2006, respectively. Accordingly, as of March 9, 1999, the six-year statute of limitations applicable to the offenses in counts one through ten had not expired. Appellant is therefore subject to prosecution for said offenses pursuant to the amended version of R.C. 2901.13.

{¶33} The indictment, filed by the state in August 2008, was timely filed within the 20-year statute of limitations set forth in R.C. 2901.13(A)(3)(a). Appellant's second assignment of error is therefore without merit and is hereby overruled.

{¶34} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

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