[Cite as *State v. Freeland*, 2015-Ohio-3410.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 12CA3352
vs.	:	
GARY FREELAND,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Valerie Kunze, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Michael DeWine, Ohio Attorney General, and Jocelyn S. Kelly, Ohio Assistant Attorney General, Columbus, Ohio, for appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-11-15
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. The jury found Gary Freeland, defendant below and appellant herein, guilty of: (1) three counts of gross sexual imposition in violation of R.C. 2907.05(A)(4); (2) two counts of felonious sexual penetration in violation of R.C. 2907.12(A)(1)(b); and four counts of rape in violation of R.C. 2907.02(A)(1)(b).

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"TRIAL COUNSEL DENIED GARY FREELAND RELIEF FROM IMPROPER JOINDER, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, BY FAILING TO SEVER THE CHARGES INVOLVING DIFFERENT ALLEGED VICTIMS PURSUANT TO CRIMINAL RULE 14."

SECOND ASSIGNMENT OF ERROR:

"GARY FREELAND WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN COUNSEL FAILED TO FAILED TO [SIC] FILE HIS PRE-TRIAL MOTION TO SEVER COUNTS BY THE MOTION DATE REQUIRED BY CRIMINAL RULE 12(D)."

{¶ 3} Between 2007 and 2009, law enforcement officers received reports that during the mid 1990s, appellant sexually abused J.B. and J.F., his step-children, and D.T., a young child whom appellant had tutored.

{¶ 4} On April 27, 2012, the Ross County Grand Jury returned an indictment that charged appellant with six counts of gross sexual imposition, three counts of felonious sexual penetration, and five counts of rape. On September 13, 2012, appellant filed a motion to sever the offenses. The trial court subsequently overruled the motion.

{¶ 5} From September 18, 2012 to September 21, 2012 the trial court held a jury trial. At the trial, J.B. testified that after appellant and his mother married, appellant frequently took care of him and his sister (J.F.) while their mother worked. J.B. stated that when he was around

seven or eight years old, appellant helped him bathe and, during his bath, appellant rubbed J.B.'s penis. J.B. testified that he recalled another occasion when appellant sent J.B. to his bedroom as punishment. J.B. stated that appellant then entered his room, sat on top of J.B. and grabbed J.B.'s penis.

{¶ 6} J.F. testified that appellant sexually abused her nearly every time she took a bath. She explained that appellant rubbed her clitoris and placed his fingers inside her vagina. J.F. stated that one time, he inserted a toilet plunger handle inside her vagina. J.F. further testified that on another occasion, appellant entered her bedroom, made her remove her clothes, and then placed his penis inside her vagina.

{¶ 7} D.T. testified that during the summer of 1994, appellant was his math tutor. D.T. stated that appellant forced him to perform fellatio on more than one occasion. D.T. explained that during one incident, D.T. scraped appellant with his teeth, and appellant told him not to do that. D.T. stated that appellant then inserted his penis in D.T.'s rectum.

{¶ 8} After the three victims testified, appellant renewed his motion to sever the offenses. The court, however, agreed with the state that the joinder of the offenses did not prejudice appellant because the evidence is simple and direct. The court explained that "the evidence has been pretty discrete as to each alleged victim and I don't think it's going to be too hard to instruct the jury to say consider the evidence only as to each victim on the charges in which those victims are listed."

{¶ 9} On September 25, 2012, the jury found appellant guilty of three counts of gross sexual imposition, two counts of felonious sexual penetration, and four counts of rape. The trial

court dismissed the remaining counts. On October 11, 2012, the trial court sentenced appellant to life in prison. This appeal followed.

I

{¶ 10} In his first assignment of error, appellant asserts that the trial court abused its discretion by overruling his motion to sever the offenses charged in the indictment.[1]

{¶ 11} Crim.R. 8(A) permits an indictment to charge two or more offenses "in a separate count for each offense if the offenses charged * * * 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." The law favors joining same or similar offenses in order to "conserve[] judicial and prosecutorial time, lessen[] the not inconsiderable expenses of multiple trials, diminish[] inconvenience to witnesses, and minimize[] the possibility of incongruous results in successive trials before different juries." State v. Thomas, 61 Ohio St.2d 223, 225, 400 N.E.2d 401 (1991); State v. Lott, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990); accord State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶196.

[1] We observe that appellant's first assignment of error states that "trial counsel denied [him] relief from improper joinder." Appellant's argument contained under his first assignment of error focuses on the trial court's decision to overrule his motion to sever, and not on any action or inaction of his trial counsel. Appellant's second assignment of error claims that trial counsel rendered ineffective assistance of counsel by failing to timely file a motion to sever the offenses. We thus believe that even though appellant's first assignment of error references "trial counsel," appellant's first assignment of error challenges the trial court's decision to overrule appellant's motion to sever, and does not challenge any alleged deficiency that trial counsel may have committed. Instead, appellant's second assignment of error challenges trial counsel's actions. We have therefore construed appellant's first assignment of error to mean that the trial court abused its discretion by overruling his motion to sever the offenses.

{¶ 12} Although the law favors joining same or similar offenses for trial, a defendant may nevertheless request a trial court to sever the offenses. Fry at ¶197; State v. LaMar, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶49. Crim.R. 14 states: "If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * the court shall order * * * separate trial of counts * * * or provide such other relief as justice requires." A defendant who claims that a trial court erred by refusing a Crim.R. 14 request for separate trials of multiple offenses must (1) affirmatively demonstrate that his rights were prejudiced and (2) establish "that the court abused its discretion in refusing to separate the charges for trial." State v. Torres, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus; accord Fry at ¶197; State v. Hand, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶166; State v. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶33. Thus, a reviewing court will not reverse a trial court's decision regarding a motion to sever unless the defendant shows that the trial court abused its discretion. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); accord State v. Herring, 142 Ohio St.3d 165, 197, 2014-Ohio-5228, 28 N.E.3d 1217, 1245, ¶39; State v. White, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶46. Generally, an abuse of discretion includes a situation in which a trial court did not engage in a "'sound reasoning process.'" State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). We further observe that "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply

substitute its judgment for that of the trial court." State v. Darmond, 135 Ohio St.3d 343, 351, 2013-Ohio-966, 986 N.E.2d 971, 978, ¶34.

{¶ 13} The state may negate claims of prejudicial joinder in two ways. Fry at ¶198. Under the first method, known as the "other acts" test, joinder is not prejudicial if the joined offenses would be admissible in separate trials as "other acts" under Evid.R. 404(B). Id.; Lott, 51 Ohio St.3d at 163. Under the second method, known as the "joinder" test, the state is not required to meet the stricter "other acts" admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct. State v. Roberts, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980); State v. Torres, 66 Ohio St.2d at 344. "The purpose of the 'joinder test' is to prevent the finder of fact from confusing the offenses," State v. Varney, 4th Dist. Hocking No. 07CA18, 2008-Ohio-5283, ¶19, and "to prevent juries from combining the evidence to convict" the defendant of multiple crimes, "instead of carefully considering the proof offered for each separate offense." State v. Mills, 62 Ohio St.3d 357, 362, 582 N.E.2d 972 (1992). "The two tests are disjunctive, so that the satisfaction of one negates a defendant's claim of prejudice without consideration of the other." State v. Sullivan, 10th Dist. Franklin No. 10AP-997, 2011-Ohio-6384, ¶23; accord Mills, 62 Ohio St.3d at 362 (stating that "if the state can meet the joinder test, it need not meet the stricter 'other acts' test"). "Thus, when 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)." Lott, 51 Ohio St.3d at 163-64; State v. Franklin, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991) (stating that "an accused is not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B)").

{¶ 14} Evidence is "simple and direct" if the jury is capable of readily separating the proof required for each offense, if the evidence is unlikely to confuse jurors, if the evidence is straightforward, and if there is little danger that the jury would "improperly consider testimony on one offense as corroborative of the other." Skatzes at ¶34, citing State v. LaMar, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶¶50-51; State v. Brinkley, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶37; Varney at ¶19. Thus, a defendant does not suffer prejudice from joinder of offenses when the offenses charged in an indictment are "simple and distinct," when "[t]he factual situation of each crime was easy to understand and was capable of segregation, and when "[t]he crimes involved different victims, different factual situations and different witnesses." State v. Clifford, 135 Ohio App.3d 207, 212, 733 N.E.2d 621 (1st Dist. Hamilton County 1999).

{¶ 15} In the case sub judice, we believe that the state satisfied the elements of the joinder test. In the case sub judice, the state presented simple and direct testimony from three different individuals who described distinct and separate acts that appellant allegedly committed against them. J.F., a twenty-two year old female, described sexual acts that occurred when she was a young child living with appellant, who was her step-father. She stated that appellant placed his fingers inside her vagina, rubbed the area surrounding her vagina, inserted a toilet plunger inside her vagina, and inserted his penis inside her vagina. J.B., J.F.'s twenty–four year old brother, testified that when J.B. was around seven or eight years old, appellant rubbed his penis during bath-time. J.B. stated that on another occasion, appellant touched his penis. D.T., a twenty-nine year old male who was unrelated to the other two witnesses, stated that appellant, his math tutor, engaged in sexual acts with him when he was around ten or eleven years old.

D.T. described several incidents of fellatio and anal sex. Each witness thus provided a different account of the acts appellant allegedly committed against them and there was no overlap in the testimony. State v. Clyde, 6th Dist. Erie No. E-14-006, 2015-Ohio-1859, ¶38, quoting State v. Lewis, 6th Dist. Lucas Nos. L–09-1224, L-09-1225, 2010-Ohio-4202, ¶33 (concluding that evidence simple and direct when "each victim testified as to his or her own experiences with [the defendant]" and stating joinder is not prejudicial when "'the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof'"); State v. Meeks, 5th Dist. Stark No. 2014CA17, 2015-Ohio-1527, ¶99 (finding that evidence simple and direct when state "clearly laid out [the offenses] for the jury" and "[e]ach victim testified separately"); State v. Moshos, 12th Dist. Clinton No. CA2009-0608, 2010-Ohio-735, ¶82 (concluding that evidence was simple and direct when each victim "provided a detailed description of her own unwanted sexual encounters with appellant"); State v. Hillman, 10th Dist. Franklin Nos. 14AP-252 and 14AP-253, 2014-Ohio-5760, 26 N.E.2d 1236, ¶40 (determining that evidence was simple and direct when the incidents "involved a simple set of facts and a limited number of witnesses whose testimony was straightforward"); State v. Kissberth, 2nd Dist. Montgomery No. 20500, 2005-Ohio-3059, ¶62 (finding that evidence was simple and direct when witnesses "testified only to their own experiences with" the defendant); State v. Ahmed, 8th Dist. Cuyahoga No. 84220, 2005-Ohio-2999, ¶26 (stating that evidence was simple and direct when "[e]ach victim testified as to the specific facts giving rise to her separate charges against" the defendant). Although the acts may have occurred around the same approximate time, the state presented each witness's testimony separately so that there was no danger of confusing the evidence. Furthermore, the state presented more than sufficient

evidence with respect to each victim so that there is no danger that the jury convicted appellant based upon a cumulation of evidence. Hand at ¶170, quoting Torres, 66 Ohio St.2d at 344, and State v. Jamison, 49 Ohio St.3d 182, 187, 552 N.E.2d 180 (1991) (concluding that joinder not prejudicial when evidence presented was "'amply sufficient to sustain each verdict, whether or not the indictments were tried together'" and when "the strength of the state's proof 'establishes that the prosecution did not attempt to prove one case simply by questionable evidence of other offenses'"); see State v. Roberts, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980) (explaining that joinder is prejudicial "when the evidence is considered separately would be insufficient to sustain all the convictions"); State v. Frazier, 8th Dist. Cuyahoga No. 83024, 2004-Ohio-1121, ¶20 (concluding that joinder prejudicial when "each of the victims' testimony [was] used to bolster the other's").

{¶ 16} Courts have held that any prejudice that results from the joinder of offenses is minimized when a trial court cautions a jury before deliberations to consider each count, and the evidence applicable to each count separately, and to state its findings as to each count uninfluenced by its verdict on any other counts. State v. Gibson, 6th Dist. Lucas No. L-13-1223 and L-13-1222, 2015-Ohio-1679, ¶30; Meeks at ¶99; Hillman at ¶40. In the case at bar, the trial court instructed the jury to consider each count and the evidence applicable to each count separately. Specifically, the trial court stated:

> "The charges set forth in each count in the indictment constitute a separate and distinct matter. You must consider each count and the evidence applicable to each count separately, and you must state your finding as to each count uninfluenced by your verdict as to any other count[;] evidence applicable to one count may not be considered by you as establishing a propensity on the part of the defendant to commit the crime charged in any other count."

After our review of the record, we see nothing to indicate that the jury failed to follow the trial court's instructions. Gibson at ¶30 ("Absent evidence to the contrary, we indulge the presumption that the jury followed the instructions of the trial court.").

{¶ 17} Appellant nevertheless asserts that the state failed to satisfy the "other acts" test, and, thus, joinder of the offenses prejudiced him. We determined, however, that the state negated appellant's claimed prejudice by showing that the evidence regarding each offense is simple and direct. The Ohio Supreme Court held that "when 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)." Lott, 51 Ohio St.3d at 163. Consequently, even if we agreed with appellant that evidence regarding the "other acts" would not have been admissible were the offenses tried separately, the evidence adduced at trial is simple and direct. Thus, joinder of the offense was not prejudicial and we disagree with appellant that the trial court abused its discretion by overruling his motion to sever the offenses.

{¶ 18} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 19} In his second assignment of error, appellant asserts that his trial counsel rendered ineffective assistance of counsel by failing to timely request severance of the offenses.

{¶ 20} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective

assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Creech, 188 Ohio App.3d 513, 2010–Ohio–2553, 936 N.E.2d 79, ¶39 (4th Dist.).

{¶ 21} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. Strickland, 466 U.S. at 687; State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶85. "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Conway, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); accord State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81. "Failure to establish either element is fatal to the claim." State v. Jones, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. State v. Madrigal, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶ 22} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to

execute his duties in an ethical and competent manner." State v. Taylor, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. State v. Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; State v. Hamblin, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 23} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. State v. Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; State v. White, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. State v. Clark, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; State v. Tucker, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002).

{¶ 24} In the case at bar, appellant's trial counsel did file a motion to sever the offenses, but, according to the trial court, counsel did not file it in accordance with the correct time limits. The trial court nonetheless considered the merits of appellant's motion to sever and cited trial counsel's failure to timely file the motion as one reason, in addition to others, for denying the motion. We, however, determined in our discussion of appellant's first assignment of error that the trial court did not abuse its discretion by overruling the motion to sever. Thus, because the trial court ultimately ruled on the merits of appellant's motion, we fail to see how appellant suffered prejudice as a result of any deficiency associated with trial counsel's failure to timely

file the motion to sever. State v. Carr, 9th Dist. Summit No. 26661, 2014-Ohio-806, ¶25 (rejecting ineffective assistance of counsel claim due to trial counsel's failure to renew motion to sever at the close of the evidence when no evidence that joinder of offenses prejudiced defendant).

{¶ 25} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.