NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-K-1110**
VERSUS	*	**COURT OF APPEAL**
CLARENCE SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 428-225, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Dennis R. Bagneris, Sr.)

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APPLICATION FOR SUPERVISORY WRITS GRANTED. JUDGMENT OF THE TRIAL COURT AFFIRMED.

The State of Louisiana invokes our supervisory jurisdiction alleging that the trial court erred in granting defendant's motion to sever his charges of aggravated rape, a violation of La.R.S. 14:42, and aggravated incest, a violation of La. R.S. 14:78.1.

FACTS

The State has failed to provide any pleadings, transcripts, or police reports which might indicate the facts of this case. In its writ application, the State avers that the defendant engaged in sexual intercourse with his stepdaughter B.W. from May 1995 until approximately May 1998; B.W. was age thirteen when the sexual abuse began and sixteen when it ceased. The defendant's conduct forms the basis of the single count of aggravated rape. The State has not provided any recitation of the circumstances surrounding the sexual intercourse.

The aggravated incest allegedly occurred three years later, in September 2001, and involves the defendant's younger stepdaughter R.W. (who according to the statement of the facts in the defense writ, 2002-K-0903, was seventeen years old at the time of the alleged incest, and thus was

actually older at the time of the incest offense than her sister was when the alleged rapes ceased). The State avers that the incest occurred when the defendant told R.W. he had dreamed of having sex with her and that his dreams always come true. The defendant subsequently entered R.W.'s bedroom, climbed into bed with her, began to kiss her on the neck and stroke her legs. When the defendant asked R.W. if she wanted him to stop, she said yes, and he left the room.

DISCUSSION

The State has not provided this Court with a copy of the defendant's motion to sever. The written judgment of the trial court shows that the court granted the severance on the grounds that the defendant would be deprived of his right to a fair trial by a joint trial because there is a strong likelihood "that the jury would believe that if the defendant is accused of committing aggravated rape than (sic) surely he could commit aggravated incest, or vice versa. Moreover, the nature of the charges could easily make any jury hostile given the facts of this case, especially considering the defendant's position in the community." (The defendant is a minister.) The court further noted that the Louisiana Supreme Court held in State v. Kennedy, 2000-1554 (La. 4/3/01), 803 So. 2d 916, that evidence of other sexual crimes was inadmissible to show intent in an aggravated rape case. Finally, the trial

court determined that the joinder of the offenses created "a substantial risk of grave prejudice to the defendant in this case."

The State argues to this Court that the trial court erred in its reliance on Kennedy because that case was "legislatively overruled" by the enactment of La. C.E. Art. 412.2 which states:

> Art. 412.2. Evidence of similar crimes in sex offense cases
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> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another sexual offense may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
>
> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

In Kennedy the Supreme Court reaffirmed the long-standing rule that evidence of other crimes, wrongs, or acts is not admissible "to prove that the accused committed the charged crime because he has committed other such crimes in the past." Id. p. 4, 803 So. 2d at 919. The court also recognized that La. C.E. Art. 404(B)(1) maintained the general rule, while permitting the admission of such evidence for other purposes such as proof of motive,

opportunity, intent, preparation, plan, and identity, and that Art. 404(B) requires that the evidence must "have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible." Id. p. 5, 920. Furthermore, the court affirmed that, even if admissible, evidence of other acts "must be excluded if its probative value is substantially outweighed by the dangers of unfair, prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or waste of time," citing La. C.E. art. 403. Id. p. 6, 921. The court then discussed the particular line of jurisprudence allowing evidence of prior sexual assaults against children to show a "lustful disposition" and clearly stated that the admissibility of such evidence in prior cases had "complied fully with the requirements of Article 404(B), as well as the aforementioned statutory and jurisprudential rules governing the admission of other crimes evidence. . . The law governing the introduction of other crimes evidence in child sexual assault cases thus remains unchanged from that set forth in La. Code Evid. art. 404(B), in which our `legislature prohibits the use of other crimes evidence `to prove the character of a person in order to show that he acted in conformity therewith' unless it meets one of the exceptions stated in Article 404(B) or is otherwise recognized by law.'" Kennedy, pp. 9-10, 803 So. 2d at 922-23.

With regard to the particular facts in Kennedy, because he was charged with aggravated rape which is not a specific intent crime, and general intent was not a genuine issue because the defendant had unequivocally denied the charge against him, the court found that the evidence of sexual assaults sixteen years earlier against a single minor female was not admissible to show the defendant's lustful disposition towards prepubescent girls.

As noted above, the legislature enacted La. C.E. art. 412.2 after the Supreme Court's decision in Kennedy in an apparent response to the suggestion made by Justice Victory in his concurring opinion that the law could be changed to allow such evidence, as had already been done in the federal system and many state jurisdictions. However, as is discussed in the Official Comments to Art. 412.2, the final version of Art. 412.2 was much less broad in scope than the version originally proposed. Specifically Art. 412.2(A) originally provided that in a prosecution for a crime involving any sexually assaultive behavior or acts constituting sex offenses with a victim under the age of seventeen, "evidence of the accused's commission of another sexual offense **is admissible** and may be considered for its bearing on any matter to which it is relevant." [Emphasis added] Official Comments, para (2). After the proposed bill went to a House-Senate conference

committee, the language "is admissible" was changed to "may be admissible," and the specific reference to the balancing test of Article 403 was added and in that form was enacted. Thus, in the opinion of the official commentators, "the fact that the legislature substituted `may' . . . and specifically prescribed application of the balancing test demonstrates that the legislature recognizes the great danger that the admission of such evidence may present and the need for the court to exercise discretion in its admissibility." Id.

La. C.E. art. 412.2 as written in fact does not undermine the court's ruling in Kennedy at all, considering that the court recognized that evidence of other sexual assaults may be admitted if relevant to a genuine issue or element of the crime and its probative value is not outweighed by the prejudicial impact.

The State cites State v. Zornes, 34,070 (La. App. 2 Cir. 4/3/02), 814 So. 2d 113, for its position that Kennedy no longer can be applied. In Zornes the Second Circuit initially affirmed the defendant's aggravated rape conviction, but the Louisiana Supreme Court granted the defendant's writ application and remanded the matter to the appellate court for reconsideration of the issue of whether the trial court had erred in admitting evidence of the defendant's sexual assault of another minor family member

in light of Kennedy; see Zornes, 01-0112 (La. 1/12/01), 801 So. 2d 1082. After the remand but before the Second Circuit issued a new opinion, Art. 412.2 was enacted. The appellate court concluded that under the facts of the case, the evidence was admissible to show a common design because of the similarity in the two patterns of conduct, noting that the defendant had alleged that the entire incident was fabricated. However, the court also noted, without further discussion, that if it were to grant a new trial, the evidence would be admissible under Art. 412.2 at a retrial.

In contrast to Zornes, in State v. Morgan 99-2685 (La. App. 4 Cir. 5/29/02), ___ So. 2d ___, after a similar remand for reconsideration of the issue of the admissibility of evidence of another sexual assault in a prosecution for aggravated rape in light of Kennedy, this Court concluded that the evidence should not have been admitted and a new trial was required. Notably, the Supreme Court order granting the writ and remanding for reconsideration was issued **after** the legislature had enacted Art. 412.2. State v. Morgan, 2001-0418 (La. 1/25/02), 806 So. 2d 662.

Additionally, in the instant case the record does not indicate the age of the victim of the incest. The defense counsel in 2002-K-0903 averred that she was seventeen at the time of the offense. La. C.E. art. 412.2 expressly applies to evidence of non-assaultive sexual offenses only when the victim is

under seventeen. If the defense counsel is correct, Art. 412.2 would not apply here.

In any event, La. C.E. art. 412.2 and Kennedy pertain to the admission of other crimes or acts at a trial. Technically, the issue presented in this writ is whether the trial court was in error when it granted the defendant's motion to sever the counts for trial. La. C.Cr.P. article 493 provides the general rule for joinder of offenses:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character, or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, provided that the offenses joined must be triable by the same mode of trial.

The requirement that the offenses be triable by the same mode of trial has been modified by La. C.Cr.P. art. 493.2 which provides:

> Notwithstanding the provisions of Article 493, offenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement at hard labor, provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

Here, the offenses with which the defendant is charged are both

felonies; the aggravated rape charge, La. R.S. 14:42, is necessarily punishable by imprisonment at hard labor while the aggravated incest charge, La. R.S. 14:78.1, is punishable by up to twenty years with or without hard labor. Thus, in order to be joined for trial, the offenses must be part of a common scheme or plan, of the same or similar character, or based on the same act of transaction. Considering that the alleged offenses are separated by three years, it does not appear that they can be said to be part of the same transaction. The State argues that they are similar in nature because they both involve sex offenses against a juvenile female family member. To that extent, it appears they arguably were properly joined.

In State v. Porche, pp. 6-7, 01-2086 (La. App. 4 Cir. 5/22/02), ___ So. 2d ___, ___, 2002 WL 1160116, this Court discussed the considerations in severing counts which were initially properly joined in a bill of information:

> LSA-C.Cr. P. article 495.1 provides more specifically for objections to misjoinder of offenses;
>
> > If it appears that a defendant or the state is prejudiced by the joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court **may** order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.
>
> (Emphasis added.)
>
> The trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. *State v.*

> *Lee*, 99-1404, p. 6 (La.App. 4 Cir. 5/17/00), 764 So. 2d 1122, 1126, *citing State v. Washington*, 386 So. 2d 1368 (La. 1980). Prior to the enactment of the 1978 amendment to LSA-C.Cr.P. article 495.1, Louisiana courts consistently held that, simultaneous trial of crimes of the same or similar character offenses may be joined only where the multiple offenses are mutually admissible as "other crimes" evidence. *Lee*, 99-1404, at p. 6-7, 764 So. 2d at 1126, *citing State v. Harris*, 383 So. 2d 1 (La. 1980). However, under the new article severance of offenses is not mandated simply on the ground that the offenses would not be admissible at separate trials if the defendant is not prejudiced by the joinder. *State v. Celestine*, 452 So. 2d 676, 680 (La. 1984).
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> Generally, "there is no prejudice and severance is not required if the facts of each offense are not complex, and there is little likelihood that the jury will be confused by the evidence of more than one crime." *State v. Carter*, 99-2234 (La.App. 4 Cir. 1/24/01), 779 So. 2d 125, 145, *citing State v. Lewis*, 557 So. 2d 980, 984 (La.App. 4 Cir. 1990). The defendant has a heavy burden of proof when alleging prejudicial joinder of offenses, and he must make a clear showing of prejudice. *Id*. In determining whether joinder of two or more offenses would result in prejudice, a court should consider: (1) whether the jury would be confused by the various counts; (2) whether the jury would be able to segregate the various charges and evidence; (3) whether the defendant would be confounded in presenting various defenses; (4) whether the crimes charged would be used by the jury to infer a criminal disposition; and (5) whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. *State v. Coston*, 2000-1132 p.9 (La.App. 4 Cir. 9/5/01), 800 So. 2d 907, 914.

The trial court in its written judgment determined that the defendant would be unduly prejudiced by a joint trial citing the fourth and fifth factors above. The State responds by arguing that any prejudice could be

"effectively mitigated by several safeguards." The State suggests that questioning during voir dire could eliminate jurors who would be confused; however the trial court may not wish to have extensive voir dire on a matter which could easily be avoided by a separate trial. The State further suggests that it would present its witnesses in a logical and chronological fashion, and that during closing arguments and jury instructions the jury will be reminded to keep each count separate and distinct.

Ironically, the State admits that the offenses are separated by a three year gap and that the elements of the two crimes are "easily distinguishable" especially because the aggravated incest only involves kissing the victim on the neck while rubbing his hands on her legs, and thus a jury will not be confused by a joint trial of the offenses. However, it is this great disparity in the nature of the charges which apparently has caused the trial court concern regarding undue prejudice to the defendant as evidence of an alleged aggravated rape cannot help but unduly prejudice the defendant in the aggravated incest charge which actually involves the most minimal sexual contact possible.

Conversely, under Kennedy evidence of the minimal touching of the seventeen-year old victim of the incest, three years after the alleged aggravated rapes of her sister ended, has no independent relevance. Thus,

after properly using a balancing test expressly retained by La. C.E. art. 412.2, the trial court's conclusion that the prejudicial impact outweighs any probative value is not erroneous.

Accordingly, the trial court's ruling is affirmed. Relator's writ application is denied.

APPLICATION FOR SUPERVISORY WRITS GRANTED. JUDGMENT OF THE TRIAL COURT AFFIRMED.