[Cite as *State v. Garrett*, 2009-Ohio-5442.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-08-075
	:	O P I N I O N
- vs -		10/13/2009
	:	
RONALD A. GARRETT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CR00290

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Ronald A. Garrett, appeals his jury trial convictions for two counts each of gross sexual imposition and importuning.[1] We reverse and remand this case for further proceedings consistent with this opinion.

1. This case was consolidated with Case No. CA2008-08-076 by entry dated December 16, 2008. The cases were separated for purposes of issuing separate opinions. See *State v. Garrett*, Clermont App. No. CA2008-08-076, 2009-Ohio-2806.

{¶2} Appellant's convictions are based on two separate indictments consolidated for trial. In Case No. CA2007-CR-000290, appellant was charged with one count of rape (Count 1), one count of sexual battery (Count 2), two counts of gross sexual imposition (Counts 3 and 4), three counts of sexual imposition (Counts 5, 6, and 7), and two counts of importuning (Counts 8 and 9). This indictment was based upon appellant's interactions with two of his daughter's friends, K.H. and J.M. The state later discovered additional allegations by M.M., another friend of appellant's daughter, resulting in a second indictment in Case No. 2008-CR-000255 charging appellant with two counts of rape (Counts 1 and 2), one count of sexual battery (Count 3), two counts of unlawful sexual conduct with a minor (Counts 4 and 5), and two counts of corrupting another with drugs (Counts 6 and 7).

{¶3} Shortly before trial, appellant orally moved to sever the indictments and victims and conduct separate trials. The trial court denied appellant's motion and held a single trial on both indictments. At the conclusion of the state's case, the trial court granted directed verdicts of acquittal on Counts 5, 6, and 7 in Case No. 2007-CR-000290, and Counts 6 and 7 in Case No. 2008-CR-000255. The court also dismissed Count 3 in Case No. 2008-CR-000255 based upon a defective indictment. As to the remaining charges, the jury found appellant guilty of two counts of gross sexual imposition and two counts of importuning (Counts 3, 4, 8 and 9 in Case No. 2007-CR-000290) regarding the victim, J.M. The jury found appellant not guilty of all rape charges, the one count of sexual battery in Case No. 2007-CR-000290, and the two counts of unlawful conduct with a minor in Case No. 2008-CR-000255. Appellant appealed raising four assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY OVERRULING HIS MOTION TO SEVER ALL COUNTS IN CASE NOS. 2007CR290 AND 2008CR255."

{¶6} In his first assignment of error, appellant argues that the trial court erred by overruling his motion to sever. In particular, appellant contends that because the counts stemmed from "separate incidents involving separate individuals at separate times and places," he was prejudiced by the consolidation. He also suggests that the jury cumulatively considered the evidence and made its decision believing the offenses corroborated one another.

{¶7} In response to appellant's pretrial motion to sever, the state argued that the cases all involved the same "modus operandi." When asked by the court to elaborate on the matter, the state claimed the testimony of the three victims would be admissible in separate trials under Evid.R. 404(B) because the charges involved the same method of operation, scheme, design or plan.[2] Specifically, the state asserted the following:

{¶8} "MR. MILES [Prosecutor]: * * * first we're dealing with two separate indictments. The first indictment deals with all three young ladies. The second indictment, the later one – the last indictment actually deals with additional allegations involving one of the same – same females. So there's not – the new indictment, Case 08CR255 doesn't deal with anything – any new victims I should say. So we're talking about the same victims involved.

{¶9} "As to – we believe that the witnesses will be able to corroborate certain facts if – upon if the cases were all tried together – the allegations – even though they did occur –

2. In a supplemental brief requested by this court, the state argued that under Evid.R. 404(B), other acts evidence would have been admissible in separate trials to show opportunity. However, we are cognizant that "[a] plea of not guilty does not automatically place *at issue* any of the factors necessary to allow for the admissibility of other-acts evidence (If such were the case, there would be no reason for the rule.) That determination must instead be made upon the theory of the case as presented by the prosecution and the defense." *State v. Griffin* (2001), 142 Ohio App.3d 65, 72. (Emphasis added.) In the case at bar, opportunity was never truly at issue. No one denied that the victims were guests at appellant's home, and evidence was presented that J.M. and M.M. were appellant's neighbors and had been in his home on more than one occasion. See *State v. Sinclair*, Greene App. No. 2002-CA-33, 2003-Ohio-3246 at ¶33. Arguably the only time opportunity may have been at issue was in regard to K.H., because one of appellant's witnesses testified to a partial "alibi." We note, however, that the state would not have known this when arguing against appellant's motion to sever.

some of them occurred on different dates we think that those *corroborating as far as who is present during those periods of time and things like that*.

{¶10} "As far as their – the State does believe if the Court was to separate these separate cases we believe that we would be able to – or we would ask the Court to allow testimony of these witnesses to testify under a theory that *it involves the same method of operation, scheme, design or plan under 404B* [sic.].

{¶11} "And in that, Judge, we believe the evidence would show as to the first victim, [K.H.], the allegations would be that the Defendant – she was at his residence – all three of these offenses took place at the Defendant's residence – two separate residences but always his residence. The one involving [K.H.] – there was a party basically and there were drugs and alcohol were involved, and when she was asleep the Defendant then awoke her committing a sexual act on her basically when she was passed out or asleep.

{¶12} "As to the second victim, [J.M.], similar – we believe the facts would be similar in that, again, at the Defendant's residence; Defendant has a party; substances are provided; when she's asleep – she's awoken in her sleep same as [K.H.] with the Defendant basically performing a sexual act on her when her inhibitions are lowered or she's asleep.

{¶13} "And lastly as to [M.M.] similar allegation the Defendant did provide alcohol, prescription drugs, marijuana and then – knowing these things and then when she's asleep or passed out took advantage of that situation and made sexual advances on her.

{¶14} "So we believe in those – in that respect all three cases are similar, and we would – we would ask that if they were severed to introduce under 404B [sic.] as *evidence of the Defendant's method of operation, his scheme, his design or his plan to perform these sexual acts upon these women while they slept or in a state of passed out from drug or alcohol use.*

{¶15} "THE COURT: The time frames in each of these do they overlap?

{¶16} "MR. MILES: They do to some degree, Judge. The – I believe it starts in, like, July of '05. I believe [K.H.] maybe – or * * * [J.M.] I believe was the first and then – they overlapped to answer the Court's question, yes." (Emphasis added.)

{¶17} In response to defense counsel's claims that no particular act would be corroborated by any of the other witnesses, that none of the state's arguments regarding a method of operation would relate to corroboration of any of the charged offenses, and that a joint trial would be highly prejudicial to appellant, the trial court denied appellant's motion, making the following observations:

{¶18} "THE COURT: Well, what I'm hearing is the State has a good faith basis to put forth the idea that there is certainly some corroboration between these three alleged victims and that is at least by way of *opportunity to commit the offenses*. Secondly, in the – *the scheme, plan, or design in all three of these instances is similar – same and similar methods used – modus operandi, if you will – to commit the offenses*.

{¶19} "These three victims all were overnight guests at his residence, friends of his daughter, alcohol and drugs provided, and then while they are asleep or passed out or somehow otherwise unable to protect themselves the offenses are committed. And I think under those circumstances that the information would be admissible in – *even if the Court were to sever these three individual victim's* [sic] *cases they would be admissible for purpose of showing scheme, plan, design, motive, opportunity*, and, therefore, I'm going to overrule the motion to – to sever these various counts of the indictments.

{¶20} "As is pointed out by the State, the record should reflect the '08 case – the newest case – is merely – I shouldn't say merely – but is not a new victim it's a victim which is in the -07CR290 case, who upon – I gather from our previous discussions – preparations for previous trials, related additional offenses that were committed against her by this particular Defendant and the State went back and indicted on those additional charges.

{¶21} "But it's the same time frames, same victim as is already concluded in the Case 07CR290, so it's not actually a new – new event or new case. Certainly exceptions need not be taken by the Defendant but they're preserved." (Emphasis added.)

{¶22} The state then produced each of the three victims who testified regarding the events which gave rise to the different offenses for which appellant was charged.

{¶23} K.H., a 14-year-old victim and friend of appellant's daughter, spent the night at appellant's house as a guest of his daughter. K.H. testified that she felt a "scratching" inside her vagina, and awoke to find appellant fondling her in the early morning hours of June 17, 2006. While K.H. testified that she smoked marijuana earlier in the day with appellant's daughter, she did not receive it from appellant and she refused appellant's offer to smoke marijuana after the incident.

{¶24} J.M., a 15-year-old victim, testified to three specific incidents and other miscellaneous incidents of a sexual nature. J.M. was also a friend of appellant's daughter, but was also a neighbor and the daughter of appellant's "best" friends. In July 2005, J.M. was invited to appellant's house to watch a movie and subsequently fell asleep in the living room. Appellant came upstairs from a basement bedroom, woke her, and suggested she sleep downstairs. J.M. went downstairs and fell asleep on appellant's bed and later awoke to find him rubbing his erect, exposed penis against her buttocks, and his hand down her pants on top of her underwear. J.M. testified that appellant's arms were wrapped around her in such a way that she felt she could not get away. Appellant also tried to pull her shirt up to lick her breasts and he attempted to kiss her.

{¶25} A second incident involving J.M. also occurred in July 2005. At the behest of her mother, J.M. went to appellant's house to retrieve a "pop." Seeking his permission to get a soda for her mother, J.M. found appellant in his downstairs bedroom. Appellant pushed J.M. onto the bed and asked to "lick her kitty cat." She refused his advances. Appellant

gave her the soda, but said she couldn't leave without giving him a hug. As appellant hugged J.M., he cupped her buttocks to pull her closer, rubbed his clothed erect penis against her, and tried to kiss her. Although J.M. felt restrained, she was able to move away from him.

{¶26} J.M. also testified that between 2005 and 2006, appellant made sexual advances towards her. She stated that appellant attempted to touch her in a sexual manner approximately 20 times; he asked her for oral sex "all the time;" and "[h]e'd always told me when you're 18 I know you're going to let me hit it."

{¶27} Finally, J.M. testified that in the summer of 2006 when she was 16, appellant picked her up in a car to take her to her boyfriend's house. Appellant pulled into a park and asked her to give him "head." J.M. refused. He then asked if he could do "stuff" to her, which she also refused. Appellant exposed himself to J.M. to try and get her to look at him, but she again refused. He also attempted to pull her head down. Although appellant was "persistent," he eventually relented and drove out of the park. As they were leaving, appellant told J.M. he had ejaculated.

{¶28} When asked about appellant offering her drugs and/or alcohol, J.M. stated that while he had provided her with drugs and alcohol during the summer of 2006, she did not consume any at the time of any of the three specific incidents.

{¶29} M.M., a 13-year-old friend of appellant's daughter and sister to J.M., testified to two specific incidents involving appellant. M.M. also testified that appellant would ask her for sex, but she thought he was joking because he asked all of his daughter's friends that question. Both incidents involving M.M. occurred in November/December 2006 and late at night, when she was visiting appellant's daughter. Appellant provided M.M. with alcohol. He also supplied marijuana, Percocet and Annex to his daughter, who then shared them with M.M. Later, M.M. became drowsy, and as she was getting ready to fall asleep on the couch, appellant sat down on the couch to talk to her. M.M. testified that she sat up and appellant

pulled a blanket off of her. Appellant then held her down, pulled her pants down, pushed her underwear aside, penetrated her with his penis, ejaculated inside of her and then left her.

{¶30} A few weeks later, M.M. and appellant's daughter were going to a party. M.M. testified that before she and appellant's daughter left, appellant gave them Percocet, pills and two "joints." M.M. also testified that she consumed alcohol and smoked marijuana at the party. After the party, M.M. went to appellant's daughter's bedroom and was lying on the bed when appellant came into the room and sat on the bed to talk. After some conversation, she testified that appellant held her down, pulled her pants down, penetrated her with his penis, and ejaculated. He continued to penetrate M.M. and then got up and left her.

{¶31} After the third victim's direct examination, appellant once again raised the issue of severance. Appellant argued he was prejudiced by the joinder of victims and indictments because the evidence proffered by the state failed to show that appellant's actions constituted a modus operandi, course of conduct, or method of operation.

{¶32} In response, the state maintained the following:

{¶33} "MR. MILES: * * *. As to the issue of the same and similar 404(B) argument, Judge, we believe there has been evidence – sufficient evidence that *there is a common design, scheme, or plan set forth by these three witnesses*.

{¶34} "Again, Judge, all three of these girls have testified that they were victimized overnight – as overnight guests at the Defendant's home That's the same and similar. They're sleeping over with the Defendant's daughter * * *. That's obviously similar in nature. As to [K.H.] she testified she's awoken – she was asleep and awoken by the Defendant's finger inside of her. So she's in a state of sleep of in a state of getting ready to go to sleep when the Defendant attacks her.

{¶35} "As to [J.M.], same conduct. She's asleep actually two separate occasions. He wakes her. The second occasion he awakes her, she's in her bed. He is on top of her

performing sexual acts. Certainly, that's same and similar motive [sic] operandi of the Defendant demonstrated there. As to [M.M.], she testified on two occasions. She had basically used drugs, and she was in bed when the Defendant attacked her basically either ready to go to sleep or on the brink of going to sleep.

{¶36} "So I think in those instances that testimony is clear that there *is a common design or scheme of the Defendant to perpetrate these offenses upon these girls when either they're asleep, or near sleep at the Defendant's residence as overnight guests. The – also, there's been some evidence of the Defendant's scheme or plan to gain the trust and confidence of these young girls by providing an area that they can consume alcohol, consume drugs, and in an environment that they're free to do that. So I think in those in those two respects, the State has shown sufficient evidence of common design scheme or plan*." (Emphasis added.)

{¶37} In response, the trial court stated:

{¶38} "Well, here's my view on the join[d]er issue. The Court has to rule on a motion for severance of the counts prior to the introduction of evidence. I did so based on information I was provided. If the trial doesn't bear that out, certainly an appellate court may find that there was prejudicial join[d]er as a result of the way the evidence actually plays out. We haven't finished this trial yet, you know, * * * so I'm not going to grant a mistrial or a dismissal of this action based on your motion that the join[d]er which the Court allowed to proceed with is in fact prejudicial. That's an appellate issue at this point in time as far as I'm concerned. * * *"

{¶39} "The 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, 342-43. "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." Crim.R. 8(A).

{¶40} Under Crim.R. 13, a "trial court may order two or more indictments or information or both to be tried together, if the offenses * * * could have been joined in a single indictment or information." However, upon an affirmative demonstration of prejudice, an accused may move to sever pursuant to Crim.R. 14. *State v. Wiles* (1991), 59 Ohio St.3d 71, 76-77, citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175. The decision granting or denying a motion to sever is a matter in the trial court's discretion. *Torres* at 343. Thus, we review the trial court's decision on severance under an abuse of discretion standard. *Lott* at 163.

{¶41} "To prevail on his claim that the trial court erred in denying his motion to sever, the [appellant] has the burden of demonstrating three facts." *State v. Schaim,* 65 Ohio St.3d 51, 59, 1992-Ohio-31. "He must affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." Id., citing *Torres* at the syllabus.

{¶42} The analysis begins with a determination as to whether appellant's rights were prejudiced. Id. A reviewing court is tasked with deciding "(1) whether evidence of the 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." Id., citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, 158-159; *Drew v. United States* (C.A.D.C.1964), 331 F.2d 85, 91. "If the 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." Id., quoting *Drew* at 90.

{¶43} "The admissibility of other acts 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." Id., citing *State v. Curry* (1975), 43 Ohio St.2d 66, 68. "This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature * * *." Id. "The legislature has [particularly] recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible." Id.

{¶44} "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted * * * unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D) and 2907.05(D).

{¶45} R.C. 2945.59 states "[i]n 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." See, also, Evid.R. 404(B) (evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). "Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 281-82.

{¶46} There were some commonalities between the victims in that all were young teenage girls and friends of appellant's daughter. The initial alleged sexual contact/conduct with the victims happened at appellant's home while the victims were overnight guests. Two of those incidents occurred while the victims were sleeping in appellant's home, while two of the incidents occurred as the victim prepared to fall asleep in his home. Two of the victims testified that appellant made requests of a sexual nature on several occasions. Two victims testified that they received drugs and/or alcohol from appellant in his home, although only one victim testified that this occurred on the same day as the alleged incidents. Two of the victims testified that they thought of appellant as a father figure. All of the incidents occurred within a two-year period between 2005 and 2006. Furthermore, M.M. was not a victim in the first indictment. In fact, M.M. initially told the police, and testified before the first grand jury, that nothing had happened. M.M. first approached the prosecutor's office in March 2008, almost a year after the first indictment, with her allegations of rape, which then resulted in the second indictment.

{¶47} These similarities do not rise to the level of showing a specific modus operandi, scheme, design, or plan, such that each victim's testimony would have been admissible in separate trials under Evid.R. 404(B) had the trials been severed.[3] See, also, *State v.*

3. "The joinder of offenses solely because they are of a same or similar character creates a greater risk of prejudice to the defendant, while the benefits from consolidation are reduced because 'unrelated offenses

Quinones, Lake App. No. 2003-L-015, 2005-Ohio-6576, ¶47 (finding the trial court erred in failing to sever the cases of two victims of sexual abuse where there was no pattern of abuse or "overlapping of the evidence" which would make their testimonies admissible at each other's trials under Evid.R. 404[B]); *State v. Frazier*, Cuyahoga App. No. 83024, 2004-Ohio-1121, ¶16-20 (finding the trial court abused its discretion in joining the two victims' cases for trial because if separated neither victim's testimony would be admissible in the other victim's trial).

{¶48} Moreover, when arguing against the motion to sever, the state initially represented that all of the incidents occurred at appellant's house, as the victims were sleeping or preparing for sleep, and they all involved drugs or alcohol provided to the victims. While most of the incidents did occur in appellant's home, at least one incident involving J.M. occurred in an automobile at a park. Although four of the incidents occurred when the victims were asleep or preparing for sleep, two of the incidents involving J.M. were perpetrated when she was awake. K.H. and M.M. testified to using drugs or drinking alcohol, although only M.M. testified to receiving anything from appellant. J.M. did not consume alcohol or drugs prior to the incidents, although she testified appellant provided her with drugs on other occasions.

{¶49} Nor was the evidence so direct and uncomplicated that it could reasonably be separated as to each underlying offense. *State v. Torres*, 66 Ohio St.2d at 344. The "joinder" test permits the joint trial of multiple offenses when evidence of each offense is "simple and direct." See *Lott*, 51 Ohio St.3d at 163. 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

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normally involve different times, separate locations, and distinct sets of witnesses and victims.'" *Schaim*, 65 Ohio St.3d at fn.6, quoting 2 ABA Standards for Criminal Justice (2 Ed.1980) 13.13, Section 13-2.1, Commentary.

reduced." *Drew*, 331 F.2d at 91. Because there is always that danger that the jury may cumulate evidence of offenses that are jointly tried, 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. Joinder is permissible 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. *Torres* at 344.

{¶50} During deliberations, the jury sent the following question to the trial court: "[s]hould the jury consider the incident in the car with respect to any of the charges?" The trial court responded "[n]o, the *allegation of misconduct in the motor vehicle* related to a Count of the indictment which the court removed from your consideration and *may not be used in determining any other count*." (Emphasis added.) The trial court had already granted a directed verdict of acquittal as to a charge of sexual imposition that occurred in appellant's automobile. The incident in the vehicle, however, was not limited to that one count in the indictment. Instead, it also related to a still-pending importuning charge. The jury then proceeded to convict appellant on that importuning charge despite having been instructed that it could not consider any of the evidence offered in support thereof.

{¶51} We must presume that the jury followed the court's instructions. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195. However, since the jury had been instructed to disregard the events that transpired in the automobile, yet still returned a guilty verdict on a charge based upon those events, the jurors must have either become confused and not followed instructions, or used evidence of the other offenses to support their verdict. Thus, the evidence as to each offense may not have been so separate, uncomplicated and sufficient to support a conviction without necessitating the use of evidence relating to other offenses. This is the very danger that a joint trial involving multiple charges and victims presents. Given the confusing result, we find that the evidence was not so simple and direct so as to

allow a joinder of the indictments.

{¶52} Appellant renewed his motion to sever. He was required to do so under Crim.R. 14 in order to preserve the issue for appellate review. See *State v. Cobb*, Butler App. No. CA2007-06-153, 2008-Ohio-5210, fn. 6 (if the defendant files a motion to sever, but ultimately fails to renew the motion, he waives the joinder issue on appeal). See, also, *State v. Wilkins*, Clinton App. No. CA2007-03-007, 2008-Ohio-2739, ¶18 (failure to renew motion to sever constitutes a waiver of the issue on appeal).

{¶53} The trial court declined to rule on the merits of appellant's renewed motion, indicating the issue had already been decided and was now a matter best left for appellate review. When deciding the pretrial motion, the trial court had only the state's representation as to what the evidence would show and made its decision accordingly. However, once the trial court had the benefit of hearing the state's evidence, it was in a better position to effectively determine if a severance of charges was warranted. Rather than address the merits of appellant's renewed motion, the court sidestepped the issue. Clearly, if Crim.R. 14 requires the accused to renew a motion to sever in order to preserve the matter for appeal, the trial court is under no less an obligation, once the motion is made, to rule on its merits.

{¶54} Because the facts in this case did not comport with Evid.R. 404(B) and were so numerous and intertwined as to create the distinct possibility that the jury would consider the volume or cumulative effect of the evidence rather than basing its decision on whether the state met its burden of proof on every element of each crime, and because the jury returned a guilty verdict on one count after being instructed by the court to disregard all evidence associated with that charge, and because the trial court failed to rule upon appellant's renewed motion to sever the charges, we cannot say, under the particularly unique factual and procedural basis of this case, that appellant was not prejudiced by the trial court's failure to sever the charges and denied his right to a fair trial. Accordingly, we find the trial court

abused its discretion by not granting appellant's renewed motion to sever. The court should have granted the motion and declared a mistrial.

{¶55} Appellant's first assignment of error is sustained.

{¶56} Assignment of Error No. 2:

{¶57} "THE JUR[Y] ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF [ ] GROSS SEXUAL IMPOSITION AND IMPORTUNING [ ], AS THE FINDINGS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶58} In his second assignment of error, appellant argues there was insufficient evidence to support his convictions.

{¶59} Sufficiency of evidence is governed by Crim.R. 29. *State v. Terry*, Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9, citing *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91; *State v. Miley* (1996), 114 Ohio App.3d 738, 742. A trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). "[A] [trial] court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, paragraph one of the syllabus. "The legal sufficiency of evidence necessary to sustain a verdict is a question of law." *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶43, citing *State v. Thompkins,* 78 Ohio St.3d 380, at 386, 1997-Ohio-52.

{¶60} Gross sexual imposition is defined as: "No person shall have sexual contact with another * * * when * * * the following applies: The offender purposely compels the other person * * * to submit by force or threat of force." R.C. 2907.05(A)(1). Sexual contact, as defined by R.C. 2907.01(B), includes, "any touching of an erogenous zone of another,

including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast for the purpose of sexually arousing or gratifying either person." Pursuant to R.C. 2901.01(A)(1), "'[f]orce' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In analyzing "force or threat of force" in a rape case, the Supreme Court stated that the amount of force necessary to commit the offense "depends upon the age, size and strength of the parties and their relation to each other." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph one of the syllabus.

{¶61} In this case, there was sufficient evidence, if believed, to support convictions for gross sexual imposition. In the first incident there was sexual contact when J.M. awoke to find appellant rubbing his erect, exposed penis against her buttocks and his hand was down her pants on top of her underwear. Appellant also tried to pull J.M.'s shirt up to lick her breasts and he attempted to kiss her. In addition, there was force involved because J.M. testified that appellant's arms were wrapped around her and she felt she could not get away. In the second incident involving J.M., there was also sexual contact when appellant hugged her, cupped her buttocks to pull her closer, rubbed his clothed, erect penis against her, and tried to kiss her. There was also force involved because J.M. felt restrained in appellant's unwanted embrace.

{¶62} Importuning, as defined in R.C. 2907.07(B), provides that: "No person shall solicit another * * * to engage in sexual conduct with the offender, when the offender is eighteen years of age or older and four or more years older than the other person, and the other person is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of the other person." "'Solicit' is defined as 'to entice, urge, lure or ask.'" *State v. Swann* (2001), 142 Ohio App.3d 88, 89, citing 4 Ohio Jury Instructions (1997) 199, Section 507.24. R.C. 2907.01(A) states in pertinent part, "'[s]exual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and

cunnilingus between persons * * *."

{¶63} In this case, there was sufficient evidence, if believed, to support a conviction for importuning with respect to Count 8 in Case No. 2007-CR-00290. Appellant solicited oral sex from the then 15-year-old J.M. when he asked if he could "lick her kitty cat." However, with respect to Count 9 in Case No. 2007-CR-00290, the court instructed the jury that it was to disregard the allegations of misconduct that occurred in appellant's motor vehicle and not to consider that evidence in deciding any of the charges. Nevertheless, appellant was convicted on Count 9 even though it involved conduct that occurred in appellant's motor vehicle.

{¶64} Because the evidence on which Count 9 was based had been withdrawn from the jury's consideration, there was insufficient evidence to convict appellant on this count. Therefore, appellant's conviction on Count 9 is reversed and appellant is discharged as to Count 9 in Case No. 2007-CR-00290. Appellant's second assignment of error is sustained with respect to Count 9 in Case No. 2007-CR-00290 and overruled in all other respects.

{¶65} Assignment of Error No. 3:

{¶66} "THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF [ ] GROSS SEXUAL IMPOSITION AND IMPORTUNING [ ], AS THOSE FINDINGS WERE CONTRARY TO LAW."

{¶67} Assignment of Error No. 4:

{¶68} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY OVERRULING HIS MOTIONS FOR ACQUITTAL UNDER OHIO CRIMINAL PROCEDURE RULE 29."

{¶69} Given our disposition of appellant's first and second assignments of error, the third and fourth assignments of error are rendered moot.

{¶70} Judgment reversed and cause remanded for a new trial on Counts 3, 4 and 8 in

Case No. 2007-CR-00290. Appellant's conviction for importuning pursuant to Count 9 in Case No. 2007-CR-00290 is reversed and appellant is discharged with respect to that particular count.

HENDRICKSON, J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶70} I concur with the judgment and the majority's decision that when analyzing a motion to sever, the court must determine whether evidence of any other acts would be admissible if the counts containing the other acts were severed. I realize that there is no bright line test or formula to determine whether evidence of other acts is appropriate in these cases. A review of Ohio law indicates that such decisions are made on a case by case determination. Unfortunately, this case cannot provide much guidance in assisting future parties in this area because it is so fact specific. However, I believe this case stands for the proposition or principal that trial courts should be circumspect in allowing other act evidence to be presented to the jury. "Arguably no other item of evidence, except perhaps testimony based on personal perception of the operative facts, possesses such enormous potential to affect the outcome of a criminal case. It is self-evident that extrinsic acts are potent yet volatile when considered by the jury." Weissenberger, Making Sense of Extrinsic Act Evidence (1985), 70 Iowa L.Rev. 579. In this case, unsubstantiated allegations of different acts were presented by the testimony of two separate victims who the jury apparently found less than credible. The state argues that the jury was able to sort through the allegations by acquitting appellant of the charges by these two witnesses. This is an assumption by the state. Conversely, it can be argued that the cumulative nature of these other acts, credible or

not, caused a compromised verdict on the charges for which he was convicted. Therefore, based upon the particular events which occurred in this trial, I would find that the failure to sever was prejudicial to appellant and remand for new trial.

[Cite as *State v. Garrett*, 2009-Ohio-5442.]