

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

SCOTT J. LENNOX
Reed & Earhart Attorneys at Law, P.C.
Warsaw, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DOUGLAS P. JOHNSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 92A03-1004-CR-222

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0904-FA-39

January 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

This case addresses the issue of when certain sex offense charges may be tried together in a single trial. Here, the perpetrator molested two different child victims, both relatives of his wife, in his home. The offenses took place at different times and involved different sex acts. In both incidents, the perpetrator warned his victim not to tell anyone. When one victim reported the molestation to her school counselor, the investigation led to the other victim coming forward to report that she too had been molested by the same perpetrator. The State charged the perpetrator with two counts of child molesting regarding one victim and two counts of sexual misconduct with a minor regarding the other victim. Before trial, the defense filed a motion to sever the charges into two separate trials. The trial court denied his motion and held a jury trial on all charges. The jury found the perpetrator guilty on three of the charges and not guilty on one charge.

Douglas P. Johnson now appeals, claiming that the trial court erred in denying his motion to sever the charges. Finding no error, we affirm.

Facts and Procedural History

H.C. and J.J. are extended relatives of Johnson's wife. Between February 2007 and August 2008, H.C., then age fourteen to sixteen, stayed overnight at Johnson's home. One night, she woke up and found that she was naked below the waist and that Johnson was touching her inappropriately. After that, Johnson allegedly had intercourse with her and told her not to tell anyone.

At Christmastime 2008, Johnson and his wife were babysitting eight-year-old J.J.

When J.J. asked Johnson for a drink, he took her into a bedroom, pulled down her pants, fondled her, and placed his finger inside her vagina. He threatened to hurt her if she told anyone.

On March 12, 2009, H.C. told her school counselor that Johnson had molested her, and the police began an investigation. On March 14, 2009, J.J.'s parents learned of H.C.'s allegations, and J.J.'s father asked J.J. if anything "odd" or "weird" had ever occurred at Johnson's home. Tr. at 59. J.J. began to cry hysterically, stating that Johnson had inserted his finger into her vagina when he was babysitting her. That day, J.J.'s parents notified the police. J.J. later indicated to Department of Child Services caseworker Jodie Hively that it was H.C.'s disclosures about Johnson that had prompted her to disclose her own molestation. *Id.* at 133. She testified that she was "scared" to tell anyone but that she was "happy that [she] could get it out of [her] system." *Id.* at 73.

On April 23, 2009, the State filed a four-count information against Johnson. Counts I and II, for class A and class C felony child molesting, pertained to acts Johnson allegedly perpetrated against J.J. Counts III and IV, for class B and class C felony sexual misconduct with a minor, pertained to acts Johnson allegedly perpetrated against H.C.¹ On February 22, 2010, Johnson filed a motion to sever counts I and II from counts III and IV for separate trials. The trial court denied the motion on February 24, 2010. A three-day jury trial began on March 2, 2010. The jury found Johnson guilty on counts I, II, and IV and not guilty on count III. At sentencing, the trial court merged the count II conviction into the count I

¹ The information identified J.J. as "Jane Doe" and H.C. as "Mary Doe."

conviction. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

Johnson contends that the trial court erred in denying his motion to sever the charges. When reviewing a trial court's decision to deny a motion for severance, our standard depends upon whether the defendant was statutorily entitled to a severance as a matter of right. If so, then we apply a de novo standard of review. *Booker v. State*, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003), *trans. denied*. In cases where the defendant is not statutorily entitled to severance as a matter of right, we review the trial court's refusal to sever for an abuse of discretion. *Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000). "To show that the trial court abused its discretion, the defendant must demonstrate in light of what actually occurred at trial that the denial of a separate trial subjected him to prejudice." *Waldon v. State*, 829 N.E.2d 168, 174 (Ind. Ct. App. 2005), *trans. denied*.

Indiana Code Section 35-34-1-9(a) states that two or more offenses may be joined in a single charging information when the offenses "(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." A single scheme or plan exists when the charges are connected by a distinctive nature, a common modus operandi, and a common motive. *Wilkerson v. State*, 728 N.E.2d 239, 246 (Ind. Ct. App. 2000). "Modus operandi" is a distinctive pattern rendering separate crimes recognizable as the handiwork of a single wrongdoer. *Craig*, 730 N.E.2d at 1265 n.1.

Indiana Code Section 35-34-1-11 distinguishes between severance as a matter of right

and severance as a matter of trial court discretion:

(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information *solely on the ground that they are of the same or similar character*, the defendant shall have a right to a severance of the offenses. *In all other cases* the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(Emphases added.)

Johnson contends that his case involves offenses joined solely on the ground that they are similar in character and that, as such, he was entitled to severance as a matter of right. Of the four counts against Johnson, two involve his alleged acts against J.J., and two involve his alleged acts against H.C. They are similar in character in that they all relate to sexual contact with minor children. If the similarities ended there, Johnson indeed would have been entitled to severance. *See Wilkerson v. State*, 728 N.E.2d at 247 (stating that defendant would have been entitled to severance as a matter of right where charges involved the same sex acts perpetrated against two totally unrelated victims in their respective homes, in the same city, with access gained through a window, three weeks apart, where one was robbed and one was not). However, Johnson's offenses against J.J. and H.C. were not only of the same character, but also were otherwise sufficiently connected to render severance a matter within the trial court's discretion.

First, the victims were similarly situated in that they are both relatives who were in

Johnson's care in his home at the time they were molested.² Although the acts against each victim were not identical to the extent of clearly constituting a *modus operandi*, they were similar to the extent that Johnson, who was in a position of trust, approached each victim in a secluded setting, performed similar acts on each, and warned each one not to tell anyone.³

Moreover, the investigation of H.C.'s allegations against Johnson was the catalyst that prompted the disclosure of J.J.'s allegations. When J.J.'s parents learned of H.C.'s allegations against Johnson, J.J.'s father asked J.J. whether anything "odd" or "weird" had ever occurred when J.J. was at the Johnsons' house. Tr. at 59. When J.J. answered affirmatively, emotionally recounting the incident to her father, her parents then reported the molestation to authorities. Thus, the evidence was intertwined, as one victim's disclosure led to discovery of Johnson's crimes against another victim. As such, the decision regarding severance was a matter for the trial court's discretion. *See Philson v. State*, 899 N.E.2d 14, 17 (Ind. Ct. App. 2008) (where allegations regarding defendant's acts against second sibling surfaced during investigation of his acts against first sibling, crimes were sufficiently linked together such that severance was not mandated as a matter of right), *trans. denied* (2009).

To determine whether the trial court abused its discretion in refusing to sever the offenses, we now address the number and complexity of the offenses as well as the jury's ability to distinguish the evidence and apply the law intelligently to each charge pursuant to

² To the extent Johnson relies on his change of residences in between the alleged molestations, we note that it is not the address of the residence that matters, but rather, the similarity of the setting, i.e., Johnson's home.

³ *Cf. Craig*, 730 N.E.2d at 1265 (finding *modus operandi* where defendant played "taste test" game with separate victims to manipulate them into performing oral sex on him).

Indiana Code Section 35-34-1-11(a). Although there were four charges against Johnson, there were only two victims and two incidents. Each victim testified as to Johnson's crime perpetrated specifically against her. The evidence, including testimony from H.C.'s physician, lacked complexity. Finally, the jury demonstrated its ability to compartmentalize the evidence regarding each victim, as is evidenced by its not guilty verdict on one of the four charges. Thus, we cannot say that the trial court abused its discretion in denying Johnson's motion for severance. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.