RENDERED: January 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-000726-MR

RALPH CORTEZ BUTLER APPELLANT

V. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
CIVIL ACTION NO. 95-XX-000002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON and MILLER, Judges.

HUDDLESTON, JUDGE. Ralph Cortez Butler, a teacher at Metcalfe County Middle School, stands charged in an indictment with nineteen counts of Sexual Abuse in the Third Degree.[1] The acts allegedly occurred during the 1994-95 school year. Butler is accused of having fondled, touched or grabbed the leg, breasts or buttocks of a number of his students during the school day.

Butler moved to sever and separately try the several counts of the indictment. Metcalfe District Court sustained the motion in part ordering the Commonwealth and Butler to identify two

[1] Sexual Abuse in the Third Degree is a Class B misdemeanor. Ky. Rev. Stat. (KRS) 510.130.

counts each to be tried first. The district court ordered severance of the remaining counts because: (1) a trial involving nineteen counts would be too lengthy; (2) jury selection would be difficult because Butler is a member of a "well-known and well respected" Metcalfe County family; (3) judicial economy dictates that only four counts should be initially tried, after which the parties are to "reassess their positions;" and (4) a trial of all nineteen counts would be "extremely prejudicial" to Butler.

Ky. R. Crim. Proc. (RCr) 6.18, entitled "**Joinder of offenses**," provides that two or more offenses may be charged in the same complaint or indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Additionally, RCr 9.12 permits two or more complaints or indictments to be consolidated for trial if the offenses charged therein could have been joined in a single indictment. On the other hand, RCr 9.16 mandates separate trials of counts if it appears that either a defendant or the Commonwealth will be prejudiced by joinder. Ordinarily, the decision of the trial court as to severance will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. See Epperson v. Commonwealth, Ky., 809 S.W.2d 835, 838 (1990).

To prevail in this action seeking a writ of prohibition,[2] the Commonwealth is required to establish that Metcalfe District Court is "about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result." Tipton v. Commonwealth, Ky.App., 770 S.W.2d 239, 241 (1989).

Butler contended below, and the district court agreed, that the cumulative effect of having all nineteen alleged victims testify against him in one trial would unduly prejudice him. Citing Ky. R. Evid. (KRE) 404(b), the Commonwealth responds that even if Butler were on trial for but one charge, some, and perhaps all, of the other eighteen victims would be able to testify against him. KRE 404(b) allows the introduction of evidence of other crimes, wrongs, or acts, not to prove a defendant's character, but to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Metcalfe Circuit Court, in a well-reasoned opinion, has addressed the issues raised in this proceeding. As the circuit court's opinion expresses our views, we adopt the greater part of it:

> A Trial Court may not usurp the discretion of the Commonwealth to put on the strongest case it has before

[2] Ky. R. Civ. Proc. (CR) 81 provides that relief heretofore available by the remedy of prohibition may be obtained by original action in the appropriate court. Sup. Ct. R. (SCR) 1.040(6) provides that proceedings for relief in the nature of prohibition against a district judge shall originate in the circuit court. KRS 23A.080(2) authorizes circuit courts to issue writs in aid of their appellate jurisdiction.

a jury and it most certainly may not delegate that authority to the defendant. This constitutes a clear abuse of discretion. If the defendant is allowed any discretion to [choose] what counts will be tried, the Commonwealth is denied that discretion. RCr 9.14. The defendant would undoubtedly require the Commonwealth to present evidence on what it considered to be the two weakest counts of the indictment. Severance by these terms would prejudice the Commonwealth. Allowing the defendant to make that choice is an abuse of discretion and is not dictated by the demands (or requirements) of justice.

A lengthy trial with many witnesses unquestionably places a burden on a court's docket. The trial of a case where the defendant is from a "well-known and well-respected family" certainly makes jury selection a much more difficult proposition. But nowhere in RCr 9.16 is discretion given to a trial court to sever multiple counts on these grounds. The Commonwealth may not be denied the production of competent and relevant evidence simply because the trial might be longer or jury selection might be tougher. Purporting to exercise discretion under RCr 9.16 on these grounds is an abuse of discretion, is not dictated by the demands of justice, and is prejudicial to the Commonwealth.

The heart of the matter, and the only relevant issue pertaining to RCr 9.16, is whether the district court may exercise its discretion to sever a nineteen (19) count indictment because a single trial would be "extremely prejudicial" to the defendant. The district court obviously believed that the prejudice would be generated by the Commonwealth "flooding" the jury with allegations of wrongdoing.

Multiple offenses may be charged in the same indictment in separate counts, "if the offenses are of the same or similar character . . . or constituting parts of a common scheme or plan." RCr 6.18. Offenses closely related in character, circumstance and time need not be severed. Cardin v. Commonwealth, Ky., 623 S.W.2d 895 (1981). Joinder is proper where multiple crimes are related in character, circumstance and time even if a large number of crimes is charged. Seay v. Commonwealth, Ky., 609 S.W.2d 128 (1980).

Any allegation of wrongdoing is prejudicial to a defendant. Ware v. Commonwealth, Ky., 537 S.W.2d 174 (1976). The proper way to approach the issues is to make a judgment that failing to sever would be **unfairly** or **unreasonably** prejudicial. Brown v. Commonwealth, Ky., 458 S.W.2d 444 (1970) and Romans v. Commonwealth, Ky., 547 S.W.2d 128 (1977). Severance is proper only where multiple counts "cannot be properly joined." RCr 9.14.

The converse of proper joinder is improper severance. The trial court must look at the issue from the point of view of both the defendant and the Commonwealth. RCr 6.18, 9.12, 9.14, and 9.16. The issue of severance or joinder must be fair to both. Neither the defendant nor the Commonwealth should be unfairly prejudiced and neither should be thwarted in putting on its best case with relevant and competent evidence.

Many jurisdictions, including Kentucky, have attempted to resolve the issue by holding that severance is improper (or really that joinder is proper) if the evidence concerning one count would be admissible in the trial of another count. If the evidence on one count is admissible in the trial of the other count, then joinder is proper. Rearick v. Commonwealth, Ky., 858 S.W.2d 185 (1993) (citing Spencer v. Commonwealth, Ky., 554 S.W.2d 355 (1977)) . . . .

* * * * *

"[E]vidence of independent sexual acts between the accused and persons other than the victim, **if similar to** the act charged, and not too remote in time, are admissible to show intent, motive or a common plan." Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988) **(emphasis added)**, citing Pendleton v. Commonwealth, Ky., 685 S.W.2d

549 (1985), which used the phrase "common and continuing pattern of conduct."

[The similarities in the nineteen counts are as follows]:

(1) All of the alleged victims are middle school students and attend the same school.

(2) All of the alleged victims are students of the defendant.

(3) All of the alleged incidents were very close in time.

(4) All of the alleged incidents involved improper touching of the buttocks, breasts or legs (thighs) of the students.

(5) All of the alleged incidents occurred at the middle school during regular school hours.

All of the alleged improper touching, if believed, demonstrates a pattern of conduct much more uniform than the proof of similarities in previous cases condoned by the [Kentucky] Supreme Court. See Anastasi and Pendleton, supra. Evidence of any of the incidences would unquestionably be admissible in a trial of any of the other incidences.

The district court ruling admits as much by implication by its ruling that four counts could be randomly selected by the parties from the total of nineteen counts and tried together. In other words, there is nothing in

the pattern of the whole which could preclude testimony about any alleged incident from being admitted by the court in trial of any other. That being the case, the only reasons left for severing the counts would be to shorten the trial and/or avoid the problems of jury selection -- neither of which is a permissible reason for exercising discretion to sever. Beyond that, even if such considerations were permissible reasons for exercising discretion to sever, it would not obtain the desired result. If evidence of any one would be admissible in the trial of any other, neither the trial nor jury selection would be shortened but would in fact have to be repeated many times. The exercise of discretion must stand up to rational critique or the exercise of discretion is clearly abused.

Finally, . . . [e]very element of every count must be proved by the Commonwealth beyond a reasonable doubt. The Commonwealth must put on the testimony of multiple victims to prove multiple crimes charged or have those charges dismissed. Whether the remaining 32 witnesses listed by the Commonwealth and referred to by the district court have relevant, competent and non-cumulative evidence to offer can only be made by the trial judge during the course of the trial. These alleged teenage victims have a right to fair trial also. [Their] testimony might [lose] some credibility if isolated from

the other testimony. Their testimony, if believed, will undoubtedly be prejudicial to the defendant. But it will not be **unfairly** prejudicial if it demonstrates intent, motive, common plan or pattern of conduct. Anastasi, supra.

The evidence of any one or all of the alleged incidences would be admissible in the trial of any single incidence. They are closely related in character, circumstance and time. Admission of all of the Commonwealth's evidence in a single trial would not be **unfairly** prejudicial to the defendant. Sherley [v. Commonwealth, Ky., 889 S.W.2d 794 (1994)]. However, exclusion of admissible evidence would be prejudicial to the Commonwealth. Further, there is no justification under the rules for severance merely to shorten a trial or make jury selection easier -- results which would not be obtained in any event.

IT IS THEREFORE ORDERED THAT THE DISTRICT COURT BE PROHIBITED from severing the counts of the indictment herein or allowing the defendant to exercise any discretion over the Commonwealth's selection of proof to carry its burden of proof.

The order from which this appeal is prosecuted is affirmed and this case is remanded to Metcalfe District Court for further proceedings consistent herewith.

JOHNSON, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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